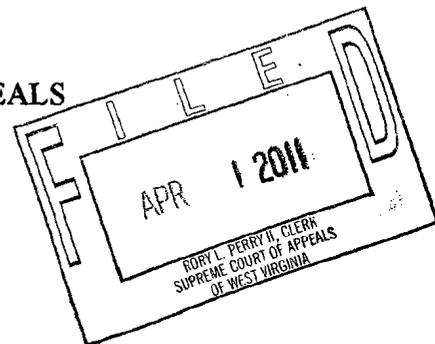


IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



VIVIAN P. CROWE, ET AL
PETITIONER,

VS.

CIRCUIT COURT OF SUMMERS COUNTY
CASE NO. 08-C-34

THE UNKNOWN HEIRS OF
THOMAS NEIGHBORS,
GEORGE T. CROWE, ET AL
RESPONDENTS,

RECEIVED
2011 MAR 17 AM 11:29
CIRCUIT COURT OF SUMMERS COUNTY WV

**PETITION FOR APPEAL FILED BY GEORGE T. CROWE
FROM AN ORDER ENTERED GRANTING PARTIAL SUMMARY JUDGEMENT
AND A VERDICT**

TO THE HONORABLE JUDGES OF THE SAID COURT:

Your petitioner and appellant herein, George T. Crowe, by his counsel, respectfully files this Petition for Appeal under the former appellant rules, to overturn a ruling rendered by the Robert A. Irons, Judge of the Circuit Court of Summers County, West Virginia, dated November 17, 2010.

L

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

This is a petition appealing the Order dated November 17, 2010, entered by the Honorable Robert A. Irons, Judge of the Circuit Court of Summers County, in a civil proceeding styled Vivian P. Crowe et al, petitioner, Civil Action No. 08-C-34 v. The Unknown Heirs of Thomas Neighbors and George T. Crowe et als. The Order of November 17, 2010, rendered a verdict and granted a Motion for Partial Summary Judgment in favor of the plaintiffs.

2

This matter arose when the petitioners, Vivian P. Crowe, Norma Crowe and Betty Lou Crowe Thompson filed a multi-count suit in the Circuit Court of Summers County, W.Va., titled "Petition and Suit to Quiet Title." The purpose of the petition was: Count 1 to interpret the Last Will and Testament of a Thomas G. Neighbors and to obtain a petition for declaratory judgment to construe the Will of Thomas Neighbors; Count Two was to set aside a quit claim deed of June 28, 2007; Count Three was an action to recover damages for an alleged timber trespass for sale of timber upon certain lands in question; and Count Four involved the alleged waste by a co-tenant and an action for accounting and rents and profits from the land.

An answer was filed by the defendant, George T. Crowe, in his behalf, and various other potential heirs to deny the claim of the plaintiff and to assert a claim of adverse possession in behalf of George Crowe.

In the course of the proceedings, the petitioner filed a Motion for Declaratory Judgement regarding the Will of Thomas Neighbors and a petition for partial summary judgment as to the defendant's adverse possession claim filed by the defendant. On October 26, 2009, and November 20, 2009, the petitioners appeared by their counsel, Anna R. Ziegler, and the respondent, George T. Crowe, appeared in person and by his counsel, Paul S. Detch, for the purposes of holding a hearing on the Motion for Declaratory Judgment involving the Will of Thomas Neighbors, various testimony was heard at the two hearings. Depositions had been previously taken and filed for the purpose of deciding whether a jury trial should be held to determine the factual matters at issue.

On or about November 17, 2010, (prior to the beginning date of the new rules of appellant procedure), the Honorable Judge Robert Irons entered a ruling granting the Motion for Partial

Summary Judgment and further rendered a verdict in favor of the plaintiffs, interpreting the Last Will and Testament of Thomas Neighbors. The lower court's ruling in effect prevents the defendant from having a jury trial on the factual matters in dispute. From this ruling of November 17, 2010, your appellant herein, George T. Crowe, by his counsel appeals.

II.

STATEMENT OF FACTS

This case involves a dispute over the ownership of two tracts of land, a fifty-one acre and a one acre parcel located in Talcott District, Summers County, West Virginia. Both tracts of land were originally purchased by Thomas Neighbors in 1921 and 1952 respectfully. This tract of land is referred to by the various parties as "the old home place." In the 1930's, Thomas Neighbors began a relationship with Maude Crowe. Maude Crowe and Thomas Neighbors never married; however, they are believed to have had several children together: John Crowe, Stella Crowe Pickeral, Keith Earl Crowe, Vivian P. Scott Crowe, Donald Crowe and Betty Lou Crowe Thompson. Donald Crowe died in infancy.

Prior to Maude Crowe's relationship with Thomas Neighbors, she was married to Early Crowe. Based upon the testimony and information and belief of the family, Maude Crowe and Early Crowe married in 1924 and had several children including; (the defendant) George Crowe, Denton Gordon Crowe, Charles Crowe, William Crowe, Elmer Crowe and Helen Crowe. In approximately 1934 or 35, Early Crowe divorced Maude Crowe. Both Neighbors and Early Crowe lived in a duplex type of house with Maude Crowe and who was the father (Neighbors or

Crowe) of the various children is uncertain.¹

Thomas Neighbors died testate as a resident of Summers County, West Virginia, on or about July 13, 1956. His last Will and Testament signed and dated April 12, 1952 provides in pertinent part “Second: All of my real estate wherever situated, I give, devise and bequeath unto Maude Crowe during her lifetime. Upon the death of the said Maude Crowe, I give, devise and bequeath my real estate to the child of the said Maude Crowe who supported me until my death, which child is to use, rent or sell my real estate as said child shall choose.” (Underlining added for emphasis).

George Crowe, the petitioner, was the oldest of the Crowe family. He was born in 1924 and by being the oldest in the family (Testimony of George Crowe, October 26, 2009, P. 3), due to the custom of times and circumstances in the family, was expected to be a major help and support to the family. After Maude Crowe and her husband, Early Crowe, divorced, Neighbors became like a father to George Crowe.

When World War II broke out, George Crowe enlisted. As part of his wartime career he was in the second wave of D Day. (Testimony of George Crowe, October 26, 2009, P.4) and fought as a combat soldier during the European campaign.

During his wartime service, George Crowe sent his mother a check every month, plus gave her his war bonds. He testified (Testimony of George Crowe, October 26, 2009, P.5) “I sent my mom a check every month. Plus, I gave her war bonds. As I could accumulate the money, I would send her bonds over that.” No one else in the family made such contributions.

¹The paternity of the various parties is uncertain, and is one of the few things all the litigants can smile about. The one thing all can agree on is that Maude Crowe is their mother.

(Testimony of George Crowe, October 26, 2009, P.5). (Q) "Did any of your other brothers or sisters make such a contribution to your knowledge? (A) Not to my knowledge." The money sent went to support the whole family, including Mr. Neighbors. (Testimony of George Crowe, October 26, 2009, P. 8) (Q) "And I take it then ---- did that money ---- was it used to assist or help Mr. Neighbors at any time?" (A) "Yes. Everything--- they were living together then, yeah." (Testimony of George Crowe, October 26, 2009, P.8). (Q) "To your knowledge, did anyone else contribute to their income?" (A) "Not money."

According to George Crowe, there was no one else other than himself to whom the Will could have referred to as he was the one who helped support Thomas Neighbors and Maude Crowe.

Thomas Neighbors died in 1956.

At the time of his death, he had owned two tracts of property, one consisting of roughly fifty acres and the other one acre, the title of which is in dispute. This fifty one acre property had access by a right of way over a ridge that along ago has been abandoned. The only access to the fifty-one acre property is owned exclusively by George Crowe. George Crowe having purchased the adjoining property from Charles Crowe, a brother. In order to gain access onto the fifty one acres in dispute, one has to traverse the adjoining twenty five acres owned exclusively by George Crowe. George Crowe opened the present road and right of way into the property. He thus controlled all access onto this fifty one acres. George Crowe rented the old home place to tenants of his choosing and all decisions made on the property were made by George Crowe.

In 1979, the property was inadvertently sold for taxes. George Crowe took the necessary steps to have the property redeemed and checked to determine if anyone was interested in the

property and at that point, believed that the property was exclusively his. No one used the fifty one acres without either the explicit permission or tacit permission of George Crowe. The petitioners claim is based on the ambiguity of the Will of Neighbors.

Occasionally family reunions were held, which were attended by various members of the families who wanted to go up to the "old home place." Mr. Crowe freely permitted the other family members to do so. Access was freely given. However, all of the taxes and maintenance on the property were performed by George Crowe. He maintained the old house, such as it was. He permitted it to be occupied by two of his relatives.

In 2003, George Crowe sold the timber on the fifty one acre and the adjoining twenty-five acre tract. After some of the members of the family realized that there was money from the timber contract, they began attempting to make a claim on the property. George Crowe decided he should take better steps to perfect his claim on the property and had a quit claim deed prepared to himself. The filing of the quit claim deed and the sale of the timber triggered the civil proceeding.²

The lower court ruled that the intent of Thomas Neighbor was to devise his property to the children of Maude Crowe. "Since there is evidence that each of the children provided some support, there is no standard which would allow this Court to award it to one or more children over the others and his express intent was to leave it to the children of Maude Crowe, per stripes."

The lower court also concluded that George Crowe could not establish his claim by adverse possession. The defendant, Crowe, appeals the ruling of the lower court.

²Settling the status of this quit claim was Count 2 of the complaint.

III.

ASSIGNMENTS OF ERROR RELIED UP ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

1. Did the lower court error in ruling that the intent of the heir of Thomas Neighbor's Will was to convey the property to all of the children to Maude Crowe's children per stripes?
2. Did the lower court error in ruling that in the event of a trial that George Crowe could not establish his claim by adverse possession?

IV.

POINTS AND AUTHORITIES RELIED UPON

ISSUE A:

Did the lower court properly interpret the Will of Thomas Neighbors? Thomas Neighbors died testate as a resident of Summers County, West Virginia, on July 13, 1956. His Last Will and Testament signed and dated April 12, 1952, provides in pertinent part "Second: All my real estate, wherever situated, I give, devise and bequeath unto Maude Crowe during her lifetime. Upon the death of the said Maude Crowe, I give, devise and bequeath my said real estate to the child of the said Maude Crowe who supported me until my death; which child is to use, rent or sell my real estate as said child may choose." (Underlining added for emphasis). A second provision seems to mislead the lower court which read: "If said child who supported me until my death is deceased at the time of Maude Crowe's death, then I give, devise and bequeath my said real estate to the child of the said Maude Crowe that supported the said Maude Crowe until her death." (Underlining added for emphasis).

There is no question that Maude Crowe looked after Thomas Neighbors in his declining years. The lower court said "that Maude Crowe died in testate in 1959. At the time of her death,

all of the children with the exception of Donald Crowe (who died in infancy) were alive and all of the children with the exception of Betty Lou Crowe Thompson had left the home. The evidence is inconclusive on which of the children cared for Maude Crowe prior to her death.” (Underlining added for emphasis). However, the issue involving who took care of Maude Crowe is a totally moot and irrelevant to the issue. By the clear terms of his Will, Thomas Neighbors left Maude Crowe a life estate in his property, but then the Will specifically says “upon the death of the said Maude Crowe, I give, devise and bequeath my said real estate to the child of the said Maude Crowe who supported me until my death.” The issue the lower court needs to be concerned with is who supported Neighbors until his death, not Maude Crowe.

The Court found that all of the children of Maude Crowe were still living at the time of Thomas Neighbor’s death.³ Therefore, the remainder interest, by the terms of the Will, was to go to the “child” who supported him. Petitioner contends he was the one who supported Neighbors and the Court makes no finding that indicates there is any evidence to support the claim of any other child, other than to say they all did, even infants. The lower court in its Order makes no findings that disputes George Crowe’s claim.

A Will speaks from the death of the testator, and not from its date, unless its language, by fair construction, indicates the contrary intention. (20 M.J. Wills § 76, P.369). [Virginia and West Virginia cases cited]. Therefore, the lower court can not construe Neighbor’s Will by the light of subsequent events.

The Court must place itself as nearly as possible in the situation of the testator at the time of the execution of the Will (1952), but interpret it as of 1956 when Neighbors died. In 1952,

³Except for Donald Crowe who died in infancy.

George Crowe was one of the few adults of the Crowe family. The list of children, who was the child of Maude Crowe, who had provided support in 1952 to Neighbors was a short one. George Crowe's testimony appears to be un-contradictable, because he was the only one providing financial support. (Testimony of George Crowe, October 26, 2009, P. 5).

The lower court spends no time discussing any of the evidence to contradict George Crowe, that was the only one who supported Neighbors, because there really is none. The lower court is totally misguided where the lower court says "the evidence is inconclusive on which of the children cared for Maude Crowe, prior to her death." Who cared for Maude Crowe is a non-issue, because George Crowe was alive at the time of Neighbor's death. Who supported Maude is irrelevant, as the Will provided for her care was of concern only if the child who supported Neighbor's was deceased.

The Court concludes that "Neighbors intention was to devise his property to the children of Maude Crowe who supported the two of them" is simply a statement that is in total conflict with the expressed language of the Will. The Will refers to one "child."

The lower court should have been looking at the situation in 1952, when the Will was executed, to determine who provided aid, George Crowe, as the only one supporting Neighbors at the time, was the oldest child to provide support. In any event, George Crowe was entitled to have this issue submitted to a jury. The defendant clearly established there was a dispute of facts and that summary judgment was not appropriate.

The second issue before this Court is the ruling that the adverse possession by George Crowe could not be proven at a trial as a matter of law. Any discussion of adverse possession must begin with a discussion as to who the rightful owner is. At no place in the Will does it imply

that it is to go to all of the children of Maude Crowe, otherwise he would have left it to Maude Crowe, or said so to all her children. The Court is absolutely incorrect in treating all of the children, even those who were infants in 1952 as being covered and being beneficiaries of the Will. This is pure speculation on the part of the lower court.⁴ This begins the question of against whom did George Crowe have to hold the property in adverse possession of the lower court correctly sets out six grounds for adverse possession. The lower court says in order to prove the first element of “adverse or hostile” possession the person claiming under adverse possession must prove that his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner.” Somon v. Murphy Fabrication & Erection, Co. 160 W.Va. at 90, 232 S.E. 2d 524 (1977). Counsel for George Crowe recognizes that one can not hold adversely against a co-tenant. The problem with the lower court’s argument on this issue is that the Last Will and Testament left the remainder interest of the property to one child of Maude Crowe, subject to her life estate. The one child, who looked after Neighbors, is the one apparently designated as the true owner. The property was not given to all the children of Maude Crowe nor was it given to the heirs of Maude Crowe. There’s not a single word or phrase in the Will that suggested that it was to be given to all of the children per stirpes, as was found by the lower court. When was George Crowe supposed to come to the conclusion he was not Neighbor’s heir and which child did he have to treat as adversarial?

As cited above, the lower court is to interpret the Will as of the time of the death of the

⁴Counsel for the defendant, George Crowe, believing the lower court was attempting to resolve the issue, not on the law or facts, but just dumping it back on the family to side up with whomever the family wanted. This probably was so George Crowe as only three members ever joined the plaintiff. It may be noble but misguided effort.

testator, not measure it by subsequent events. Looking at the situation in 1956 when Neighbor's died, then the only person who has stepped forward and has offered any explanation or claim that he was the sole beneficiary and heir of Neighbors was George Crowe. The other children talk about helping Maude Crowe, but that argument is irrelevant.

The Court has to be cognizant of the situation from 1956. George Crowe took over and managed the entire property following the death of Neighbors. He owned the adjoining property and cut and maintained the only road that is used today into the property. Crowe had the exclusive control over the road because the only access at this time that remains crosses the property that is exclusively George Crowe's, the original right of way having been abandoned. Crowe, by controlling the adjoining 25 acres controls the only right of way into the 51 acres exercised complete dominion or control over the property.

The plaintiff's only claim that was established was that a number of the members of the family were able to go back and to have family gatherings on the old "home place." The dates were set and permission given by the use of George Crowe. George Crowe always said that they were "welcome." But if the one child referred to by Neighbor's Will is not George Crowe, then who is it?

Offering a welcome does not necessarily mean that he was in any way giving up dominion or control over the land. George Crowe brought his bulldozer in to maintain his road, he controlled the residence on the property, harvested all of the crops on it, looked after the entire upkeep and exercised dominion over the land and paid the taxes on it.

George Crowe meets all the requirements of holding by adverse possession.

There is no question that his possession of the fifty-one acres has been "actual," that it has

been open and notorious, renting the homestead, harvesting the timber, maintaining the road to it are obviously acts of being notorious, that the possession has been exclusive. Other than allowing people to come back and have family gatherings at the old homestead by which he had acknowledged that his relatives was "welcome" is hardly saying that he is anything but exclusive. No one questions that it was continuous since 1956 and that it was done under the claim of title either from the tax sale or Will of Neighbors. George Crowe testified that he had claimed the title initially because he had redeemed the taxes and though he had not placed it into his name but continued to keep it under the estate of Neighbor does not mean that it was not his property and that he was only a co-tenant. He also indicated that he was the only one who could claim under the Will of Neighbors.

But for the convoluted interpretation of the Will by the lower court, there is no one who could read the Will and come to the conclusions that all of the children born of Maude Crowe, even the infants, are included as the actual owner against who adverse possession applies. George Crowe is certainly entitled to a jury trial on the issue.

V.

CONCLUSION

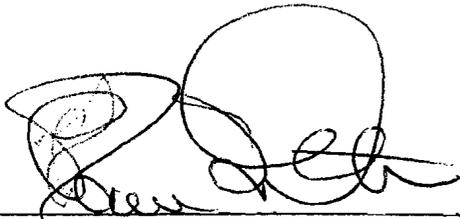
The lower court is simply in error in saying that it can interpret a Will that is very specific that property is to be left to one individual and interpret that it is to be left to all the heirs of Maude Crowe in the face of the exact language within the Will.

The lower court is in error in assuming that it can make a determination without the benefit of a jury trial that George Crowe is not the individual who has been designated under the Will.

The purpose of holding the hearing before the Honorable Judge Robert Irons was to establish whether there was a controversy involved and that this was sufficient evidence to argue either way. There is indeed a controversy, one of which if it proceeded to trial, would show that there is no question but that George Crowe would prevail. As it is, the Court takes a convoluted view of the interpretation of a Will and then because of the interpretation of the Will excludes all of the testimony involving adverse possession on the basis that one can not hold adverse to a co-tenant.

The lower court is simply in error in determining that it can substitute its judgment for that of a jury on factual disputes. Summary judgment in this matter should be set aside and a jury trial awarded so that the proof can be more better developed. At the lower court's proceedings it was believed, at least, that the lower court would follow the established law that is set out in the order saying that the Court can only rule in the event there is no dispute of facts. In the case before this Court, there is an absolute hotly contested issue of facts and if all the facts were interpreted as it should be, the Court should rule in favor of George Crowe.

This case should be remanded to the lower court for a trial by jury to determine who is the true heir of Thomas Neighbors and a jury determination on the claim of adverse possession, if it is not George Crowe.

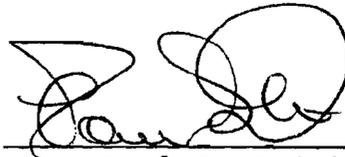
A handwritten signature in black ink, appearing to read "Paul S. Detch", written over a horizontal line.

PAUL S. DETCH
201 N. COURT STREET
LEWISBURG, W.VA. 24901
W.VA. BAR NO. 1002

GEORGE CROWE
By Counsel

CERTIFICATE OF SERVICE

I, Paul S. Detch, hereby certify that a true and exact copy of the foregoing PETITION FOR APPEAL was served upon Anna Ziegler, Ziegler & Ziegler, 110 James Street, Hinton, W.Va. 25951 by mailing a true and exact copy by regular United States mail, postage paid on this 16 day of March, 2011.



Paul S. Detch