

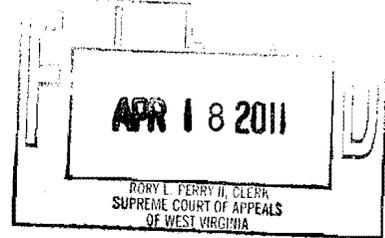
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VIVIAN P. CROWE, *et al.*,
Petitioners,

Circuit Court of Summers County,
Civil Action No.:
08-C-34

v.

THE UNKNOWN HEIRS OF
THOMAS NEIGHBORS,
GEORGE T. CROWE, *et al.*,
Respondents.



APPELLEES' RESPONSE TO THE PETITION FOR APPEAL

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TABLE OF AUTHORITIES

1. West Virginia Code § 55-13-1 (2010).
2. *Carvey v. West Virginia State Board of Education*, 527 S.E.2d 831, 206 W.Va. 720, (1999).
3. *Dantzie v. Dantzie*, 222 W.Va. 535, 668 S.E.2d 164, (2008).
4. Black's Law Dictionary, Seventh Edition, 1999, page 1453.
5. *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770, (1963).
6. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, (1994).
7. *Clark v. Beard*, 59 W.Va 669, 53 S.E. 597, (1906).
8. *Selman v. Roberts*, 185 W.Va. 80, 404 S.E.2d 771 (1991).
9. *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977).

Comes now your Appellees, by counsel, Anna R. Ziegler, and respectfully requests that this Honorable Court affirm the lower Court's ruling in this action and for their response to the Petition for Appeal Filed by George T. Crowe, state as follows:

PROCEEDINGS AND NATURE OF RULING IN THE LOWER TRIBUNAL

In an effort to determine the ownership of real property in their father's Estate and the disbursements of proceeds earned by selling the timber on the real property, Petitioners below and Appellees herein brought claims for Declaratory Judgment, Action to Set Aside Deed, Timber Trespass, Waste by Co-Tenant and Accounting for Rents and Profits. Respondent below and Appellant herein, George Crowe, filed counter-claims alleging adverse possession, action to offset expenses incurred improving real estate and the value of said improvements. No other party to this suit has filed an answer, though some have filed statements that they wish to be included as Petitioner/Appellees.

Petitioners/Appellees filed a Motion for Declaratory Judgment Regarding the Will of Thomas Neighbors and Partial Summary Judgment on Defendant's Adverse Possession Counter-Claim and an evidentiary hearing on said Motion was held on October 26th and November 20th, 2009. Upon hearing all the evidence, the lower Court granted Petitioner/Appellees' Motion for Partial Summary Judgment on George Crowe's Claim for Adverse Possession and properly interpreted the Will of Thomas Neighbors on Petitioners/Appellees' Motion for Declaratory Judgment by finding that the only way to give effect to Neighbors' intention is to allow the property to pass to Maude Crowe's children, *per stirpes*.

Though the Appellant's statement of the underlying proceedings is largely accurate, Appellee notes that Appellant would have this Court believe that George T. Crowe represents "various other potential heirs"¹ to the subject property. This statement by Appellant is simply not true. Appellant George T. Crowe was the only heir to file a formal response to the petition filed in the lower Court. However, several other potential heirs filed statements with the Court that they wished to join the Petitioners/Appellees and some indicated that they are not interested in the property nor in the outcome of this law suit.

STATEMENT OF FACTS

At the very crux of this case is the ownership of two tracts of land, a fifty-one acre parcel and a one acre parcel, located near Pence Springs, West Virginia. Both tracts were originally purchased by Thomas Neighbors in 1921 and 1954 respectively. This property is referred to throughout as the Homeplace.

In 1924, Maude Dunbar married Early Crowe. The two resided in Roanoke, Virginia and had several children, George T. Crowe² (Respondent below-Appellant herein), Denton "Gordan" Crowe, and Charles Crowe. Based upon information and belief, Early Crowe was also the father of William Crowe, Elmer Crowe and Helen Crowe.

Sometime in the 1930s, Maude Crowe left Roanoke and moved to Pence Springs, West Virginia and began a relationship with Thomas Neighbors. Though Early Crowe filed for and received a divorce from Maude in approximately 1934, Maude never married Thomas Neighbors. Maude and Neighbors begot John Crowe, Stella Crowe Pickeral, Kenneth Earl Crowe, Vivian P. "Scott" Crowe (Petitioner below-Appellee herein), Donald

¹ *Petition for Appeal Filed by George T. Crowe from an Order Entered Granting Partial Summary Judgment and a Verdict*. Page 2, Paragraph 2.

² Though there is some confusion between the parties about the exact birth order and specific paternity of each of the children, George Crowe refers to Early Crowe as his father throughout.

Crowe (deceased in infancy), and Betty Lou Crowe Thompson (Petitioner below-Appellee herein). Ultimately, Maude mothered twelve children born between 1924 and 1945, raising eleven children into adulthood. Appellees Vivian P. “Scott” Crowe and Betty Lou Crowe Thompson are the youngest two children surviving to adulthood. Petitioner below and Appellee herein, Norma Crowe is the wife of Scott Crowe and knew Maude well.

Only four of Maude’s children are still living and all four living children testified at the hearing on Appellees’ Motion for Declaratory Judgment and Motion for Partial Summary Judgment. In addition to the testimony of the surviving children, the Court heard the testimony of several of Maude’s grandchildren and Carolyn June Crowe, the widow of William Crowe, the second of Maude’s children³.

The evidence is largely undisputed. Thomas Neighbors died testate in 1956. His Last Will and Testament signed and dated April 12, 1952, states in pertinent part:

“SECOND: All my real estate, wheresoever 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 Maude Crowe who supported me until my death; which child is to use, rent or sell my real estate as said child shall choose. 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.”

Neighbors’ Will did not contain a residuary clause. While Thomas Neighbors’ Will was recorded for probate, the estate was never settled.

Maude Crowe died suddenly of a stroke, intestate, in 1959, and her estate was never probated. At the time of her death, all of her children were grown and had left home, except Betty Lou, who was thirteen years old. It is undisputed that Maude was self-sufficient and

³ Because most of the people involved in this action have the same last name, “Crowe”, the undersigned often refers to each individual by his or her first name.

worked until her death. She provided for her children and many of her grandchildren, including the children of George Crowe, as they lived with her in the 1940s and 1950s.⁴

All four of Maude's children testified unequivocally that Maude was Neighbors only caretaker in the months prior to his death. They further testified that Neighbors and Maude did not reside together consistently until the last few months of Neighbors life and that Neighbors frequently lived away from Maude and the children to work. Though the four living children each testified that Maude was Neighbors only caretaker, each testified that he or she also contributed to Maude's household. None could state with certainty whether the other children likewise assisted their mother, though they each believed that Maude and Neighbors were largely self-sufficient and that Maude received some form of social services check.

Perhaps the most convincing testimony in support of Appellees' Motions was the testimony of Appellant George Crowe. George unequivocally acknowledged that Maude was the primary caregiver of Thomas Neighbors in the months and years preceding his death. When asked during testimony, "Who took care of Mr. Neighbors right before he passed away?" Appellant George Crowe responded, "My mom."⁵ By that time, mid-1950s, most of Maude's children had moved away and were raising families of their own, including George.

Though George testified that he sent Maude war-bonds or money during his time in the service, 1943-1946⁶, he never testified that he was supporting Neighbors, rather he

⁴ Testimony of George Crowe on Cross Examination, Page 12, lines 19-24. Note, the cross-examination testimony of George Crowe was not designated for the record but a Motion to Supplement the Record has been filed to include the Cross Examination.

⁵ Testimony of George Crowe on Cross Examination, Page 13, lines 4-6.

⁶ Testimony of George Crowe on Direct Examination, Page 5, lines 1-10.

assumed that any assistance he gave to Maude was for the benefit of Neighbors, as well⁷. Furthermore, George could not testify with any certainty whether any of the Maude's other children likewise contributed financially to Maude or Neighbors or to the family.⁸ In fact, the testimony of the other living children was that they, too, provided various forms of support to Maude and Neighbors. George, like the other children who testified, acknowledged that Maude was on public assistance and worked for a neighbor, doing laundry and other household chores and that Neighbors was employed.

Perhaps most relevant to this inquiry was George's testimony that he did not know which child of Maude's Neighbors intended to leave his property to. On direct examination, George's counsel asked, "When you talked about Mr. Neighbors, saying he was leaving this property to someone who assisted him or helped him, do you have any idea as to who he was talking about?" A: "No. The old man was always good to me..."⁹

Much of George's testimony, as well as the testimony of the other witnesses, involved events relevant to the property since Maude's death in 1959. There was testimony about who maintained the property and who paid the taxes over the years. George testified that while he assisted in the maintenance of the Homeplace and its access road, other family members also worked on, visited and even lived on the property¹⁰. George acknowledged in cross-examination¹¹ that many other family members have actually resided on the Homeplace, but that he had not lived in the house on the Homeplace since he was a small

⁷ Testimony of George Crowe on Direct Examination, Page 6, lines 5-9.

⁸ Testimony of George Crowe on Direct Examination, Page 5, lines 6-8.

⁹ Testimony of George Crowe on Direct Examination, Page 16, lines 10-14.

¹⁰ Testimony of George Crowe on Direct Examination, Page 13, lines 18-22 and Testimony of George Crowe on Cross Examination, Page 22, lines 1- Page 23, line 7 .

¹¹ Note, the cross-examination testimony of George Crowe was not designated for the record but a Motion to Supplement the Record is filed herewith.

child. He also acknowledged that there had been several times when family members went to the property, usually for family gatherings, to hunt, or for vacation.

The payment of the taxes over the years seems to be a particular point of contention.¹² The tax records show that the property was taxed in the name of “Maude Crowe” or “Maude Crowe Estate” from 1956 until 2008. George testified that his sister, Helen, and brother-in-law, Uyles (improperly identified as “Hugh” in the transcript), from Ohio paid the property taxes from the time of Maude’s death in 1959 until the mid- 1960s.¹³ According to George, Uyles contacted him in the 1960s and told him that he could no longer pay the taxes on the Homeplace. Per George’s testimony, George instructed Uyles to contact the other siblings and inquire whether anyone else might be able to take over the payment of the real estate taxes. When Uyles called him back several days later, George agreed to take over payment of the property taxes, though he never inquired as to whether Uyles solicited the other family members.¹⁴ George testified that his brother John financially assisted with the taxes on at least one occasion, a fact that John corroborated during his testimony.

At one point in the mid-1970s, George failed to pay the taxes and the tax lien was sold. George testified that in the process of redeeming the tax lien, he was given the option of putting the property in his name and he elected not to do so.¹⁵ When questioned about this, George stated that he hadn’t put the property in his name so the property would remain “tied-up” and “nobody could sell it.”¹⁶ Notably, the property continued to be taxed in the name of “Maude Crowe Estate” for another 30 years, until 2008.

¹² The taxes since 1959 have collectively been less than \$5,000.

¹³ Testimony of George Crowe on Direct Examination, Page 9, line 18-20.

¹⁴ Testimony of George Crowe on Direct Examination, Page 9, line 18-Page 10, line 3.

¹⁵ Testimony of George Crowe on Direct Examination, Page 11, line 22-Page 12, line 1.

¹⁶ Testimony of George Crowe on Direct Examination, Page 11, line 22-24.

George specifically testified on cross-examination that he did not believe any family member could affect the title to the property. Sometime in 2007, George heard that Appellee Betty Lou had sold her interest in the property to the other appellees.¹⁷ Until that event, George believed that the property was “tied-up” and could not be sold. He apparently based this belief largely on the fact that the taxes had remained in the name of Maude Crowe or the Maude Crowe Estate until 2008, though he had the opportunity to change this designation. And, until then, he “did not want to stop any of the kids from coming and visiting”.¹⁸ In 2007, George deeded, by quitclaim deed, the Homeplace from himself to himself.

In about 2005, George Crowe had the property timbered. He did so without the knowledge or permission of the heirs to the property. Until this act, George had not exercised any act of dominion over the property. And the act of timbering the property was done only for his own personal profit. Despite repeated requests for all of the logging information, Petitioners have only received one timber deed which indicates that George Crowe received \$42,000 for the family’s timber.

Appellee Vivian “Scott” Crowe testified that he resided with his mother until 1956 when he was seventeen, around the time of his father’s (Neighbors’) death. Scott, being the last boy to leave, chopped and hauled firewood, worked in the garden, helped his father (Neighbors) hauling logs and bringing vegetables to the road to sell. Scott occasionally worked with Neighbors on a nearby farm where Neighbors was employed as a farm hand. A year or two preceding Maude’s death, Scott moved out of his mother’s home and worked. He would visit with his mother on his days off and would give her what he could spare from

¹⁷ Testimony of George Crowe on Cross Examination, Page 34, line 8-line 22.

¹⁸ Testimony of George Crowe on Cross Examination, Page 35, line 17-line 18.

his wages. Appellee Norma Crowe, wife of Scott, recalls purchasing flour and other staples in Alderson for Maude.

Scott Crowe also testified that he has gone to the Homeplace several times since his mother's death. On some occasions, he went with other family members and sometimes by himself. Scott testified that he has attended many family reunions and gatherings at the Homeplace and that he has also been there to hunt on several occasions. Though no one had ever asked him, Scott testified that he would have willingly contributed to the payment of the real estate taxes. Scott believed that the property belonged to all of Maude's children.

Betty Lou testified that, as Maude's youngest child, she was the last to leave her mother's home and that she assisted her mother around the house with chores such as gardening and babysitting the young grandchildren who often stayed with Maude, including George's children. Though she was born in 1945 after George left their mother's house, she does not recall that any one of Maude's children contributed any more or less than any of the rest of the children. Since Maude's death, Betty Lou testified that the Homeplace had been considered and treated as if it belonged to the entire family and, until recently, there had been no evidence that any one person "claimed" it as their own.

John Crowe, the sixth of Maude's children, testified that all of Maude's children did chores around the Homeplace and that he has no knowledge which, if any, of Maude's children supported or contributed to the household any more or less than any of the other children. John recalled helping in the fields, picking and hauling berries, fetching water from the spring and cutting firewood. John testified that he believed Maude and Neighbors were poor, but primarily self-sufficient. He believed, though not certain, that Maude received some form of social security or welfare. John went on to state that he believed that George owned the property only because he had paid most of the taxes on it. However, John also

testified that his brother-in-law, Uyles had paid taxes on the property for many years after his mother died and that he also thought perhaps someone else paid taxes on the property. John testified that George had asked him to contribute to the property taxes and that he had, in fact, given George money for the taxes within the last decade or so.

Carolyn "June" Crowe, wife of the late William Crowe (deceased in the early 1980s), testified on behalf of the Petitioners that she and her husband and children actually spent most of their summers on the property for a number of years. She testified that, while there, she and her family did virtually all of the general upkeep and maintenance. June stated that she now lives in a mobile home near the Homeplace. She further testified that she did not believe that George had contributed any more or less than any of Maude's other children to Maude during her life and, since Maude's death, George had not contributed as much time and effort to the property as he indicated. June Crowe un-equivocally stated that it was her late husband and family who resided on and maintained the property, particularly in the three and a half decades following Maude Crowe's death and until her own husband's death.

Bobby Crowe, son of Carolyn June and William Crowe, also testified that he lived on the Homeplace as a child. He testified that he, his father, mother and siblings were the only ones to actually live on the property and that his family did a lot of maintenance to the property and the road leading up to the property. Bobby stated that he does not recall George Crowe spending any more time on the property than any of the other family members.

Melvin Crowe, also the son of Carolyn June and William Crowe, testified that he vacations at the Homeplace and has done so since 1982, but that he is not there all the time because he actually resides in North Carolina. Melvin testified that he does not pay rent to

anyone to live there nor has he every asked anyone for permission to live on the property. Nevertheless, Melvin is of the opinion that George Crowe owns the property.

Tommy Crowe, another son of Carolyn June and William Crowe, testified that he currently lives near the Homeplace, on the road leading to the property. Tommy testified that his father's family actually resided on the Homeplace when he was young and that he has lived there most of his life, except for a brief period while he was in prison. Tommy testified that many family members, including his father and brothers, invested time and energy toward the maintenance of the road and the house. Since Tommy resides on the road accessing the property, he takes it upon himself to restrict who accesses the property and testified that he "didn't let nobody up there but family." Tommy stated on one occasion he saw Appellee Scott Crowe going to the Homeplace and went out to greet him. He asked Scott if he could accompany him. Tommy testified that Scott went on alone and that he (Tommy) retreated to his house and Scott went on to the family's Homeplace. Finally, Tommy testified that George Crowe had offered him a piece of property only a week or two before testifying on George's behalf.

The evidence presented overwhelmingly indicated that, since Maude's death, various children and grand-children have lived on, contributed to, or worked at the Homeplace. Some family members worked on the property over the years, some have paid the taxes on the property, some have lived on the property and nearly all have visited, relaxed, and recreated on the property.

ISSUES RAISED ON APPEAL AND DISCUSSION OF AUTHORITY

ISSUE A RAISED BY APPELLANT: Did the lower Court properly interpret the Will of Thomas Neighbors?

Yes, the Court appropriately interpreted the Last Will of Thomas Neighbors on Appellees' Motion for Declaratory Judgment by concluding that Mr. Neighbors' intention was to devise his property to the children of Maude Crowe which supported him and Maude. There is evidence that each of Maude's children provided support and therefore the only ruling which would allow the Court to appropriately give effect to Neighbor's intention would be to award the property to Maude's children.

In interpreting a Will, "Courts of record...shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."¹⁹ "Generally, the aim of a declaratory judgment action is to avoid the expense and delay which might otherwise result, and to secure in advance a determination of legal questions which, if pursued, can be given the force and effect of a judgment or decree without the long and tedious delay which might accompany other types of litigation."²⁰

When interpreting the provisions of a will, the court should construe in favor of the testator's intent. "The paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy."²¹ "In construing a will the intention must be ascertained from

¹⁹ West Virginia Code § 55-13-1.

²⁰ *Carvey v. West Virginia State Board of Education*, 206 W.Va. 720, 726, 527 S.E.2d 831, 837 (1999).

²¹ *Dantzic v. Dantzic*, 222 W.Va. 535, 668 S.E.2d 164, Syl. Pt. 2 (2008) (citing, *Farmers & Merchants Bank v. Farmers & Merchants Bank*, 158 W.Va. 1012, 216 S.E.2d 769 (1975)).

the words used by the testator, considered in the light of the language of the entire will and the circumstances surrounding the testator when he made his will.”²²

It is clear from the language of Neighbor’s Will that he intended for his property be given to the child or children of Maude’s who cared for him (Neighbors). Neighbor’s Will has two conditions precedent, and no residuary clause. The first condition precedent states in pertinent part, “Upon the death of the said Maude Crowe, I give, devise, and bequeath my said real estate to the child of Maude Crowe who supported me until my death...”

The second condition pertaining to the disposition of the property in Thomas Neighbor’s Will is not met. When read carefully, the second condition precedent which reads, “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...” only takes effect if the child who supported Neighbors predeceases Maude. None of Maude’s children predeceased her (with the exception of the one who died in infancy). Therefore the second condition precedent is not satisfied.

One might assume that if the first condition had not been met, the next logical disposition of Neighbors’ property would be to the child or children who supported Maude, regardless of who supported Neighbors. Though this may not have been Neighbors exact or primary intent, this clause may shed some light on Neighbor’s overall intention. In the event that the first condition precedent fails, then it seems that Neighbor’s may have wanted his property to go to the child or children who supported Maude.

²²*Id.* Syl. Pt. 3 (2008) (citing, *Weiss v. Sato*, 142 W.Va. 783, 98 S.E.2d 727 (1957)).

Black's Law Dictionary defines "support" as "Sustenance or maintenance; esp. articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed."²³

Notably, Appellant specifically stated that he did not know which child Neighbors was referring to in his Will. Furthermore, Appellant testified that he sent war-bonds to Maude, though he never specifically testified that he was supporting Neighbors. Finally, Appellant was unaware of whether other children likewise contributed to Maude and/or Neighbors, financially or otherwise. To the extent that Maude received assistance or support from her children and that Neighbors directly or indirectly benefited from it, the evidence is clear that she received it from all members of the family, in their own ways. Some of Maude's children gave her money, others assisted her in the garden and around the farm, and some purchased staples and food.

The evidence is overwhelming and undisputed. All parties agree that Maude, and Maude alone, who took care of Neighbors in the final months of his life. Additionally, it seems that all of Maude's children contributed toward Maude's family. Many of Maude's children hunted or worked in the garden or gathered edible plants, providing food for the family. Appellee Scott Crowe worked with his father hauling vegetables to the road to sell for family income. Appellees Betty Lou and Scott helped their mother with the chores at the neighbor's where Maude worked and took care of their young nieces and nephews who frequently lived with Maude. When Scott left his mother's home sometime in the early 1950s, he gave his mother what he could spare from his wages. John Crowe testified that he helped in the fields and cut firewood.

²³ Black's Law Dictionary, Seventh Edition, 1999, page 1453.

It seems that George Crowe relies almost solely on his assertion that he supported Neighbors and Maude by sending them “war bonds” while he was in the military from 1943-1946. He claims that these war bonds amounted to \$50.00 per month.

The fallacy in George Crowe’s position is that Thomas Neighbors did not write his Will until 1952, after George claims to have “supported” Maude and Neighbors. This would certainly have been “circumstances surrounding the testator when he made his will.”²⁴ If Neighbors intended George’s war bonds to be the link between George and the property, then wouldn’t he have said as much in his Will? Or simply left the real estate to George directly?

Perhaps the most indicative evidence, however, is that when asked whether he knew who Neighbors was referring to in his Will, Appellant replied, “no”²⁵. Furthermore, George never exercised any action indicating ownership until 2007 when he heard that one sibling had sold her interest to another sibling. He did not begin paying the taxes on the property until more than a decade after Neighbor’s death. Even after he began paying the taxes on it, he received money from at least one sibling to assist in the payment of the taxes. When he had an opportunity to have the property “put in his name”, he elected not to on the premises that the property would be “tied-up” and “no one could sell it.”²⁶ If he believed that he owned the property to the exclusion of the other heirs, then why would he worry whether or not anyone else might sell it? George Crowe’s own actions indicate that he never believed the property belonged to him.

The lower Court appropriately determined that Neighbors’ intention was to devise his property based on which child supported him and that the clause referring to the child or

²⁴ *Dantzic*, Syl. Pt. 3 (2008) (citing, *Weiss v. Sato*, 142 W.Va. 783, 98 S.E.2d 727 (1957)).

²⁵ Testimony of George Crowe on Direct Examination, Page 16, lines 10-14.

²⁶ Testimony of George Crowe on Direct Examination, Page 11, lines 22-24.

children who supported Maude likewise indicates Neighbors intent to devise the property to Maude's children. Neighbors' intention can only be satisfied by a devise to all of Maude's children.

ISSUE B RAISED BY APPELLANT: Did the lower court err in granting Petitioner-Appellees' Motion for Summary Judgment dismissing George Crowe's claim for adverse possession?

Summary Judgment is appropriate to dismiss Appellant's claim for adverse possession because, even when viewed in the light most favorable to the non-moving party, George Crowe, no rational trier of fact could find that George Crowe acquired ownership of the property by adverse possession.

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law."²⁷ Moreover, "summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party."²⁸

At the out-set it should be noted that one co-tenant cannot claim property by adverse possession from another co-tenant. It is only by actual ouster which a co-tenant may be able to acquire title to property by adverse possession.²⁹ "The payment of taxes by one co-tenant on the land owned in common does not of itself constitute an ouster of another co-tenant."³⁰ In fact, "[i]t has frequently been held that a purchase by one co-tenant, at a sale for delinquent taxes, of the land owned in common, inures to the benefit of the

²⁷ *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770, Syl. Pt. 3 (1963).

²⁸ *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, Syl. Pt. 4 (1994).

²⁹ *Clark v. Beard*, 59 W.Va 669, 53 S.E. 597, 1906.

³⁰ *Id.* 53 S.E. 597 at 599.

other co-tenant.”³¹ Even if George had paid the taxes on it every single year, which he admits he did not do, that alone does not create a claim of adverse possession against the co-tenants.

George Crowe’s position that he acquired the property by adverse possession fails because his own testimony does not support a claim for adverse possession “One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the tract adversely or hostilely; (2) That the possession has been actual; (3) That it has been open and notorious (sometimes stated as visible and notorious); (4) That possession has been exclusive; (5) That possession has been continuous; (6) That possession has been under claim of title or color of title.”³² Based on George’s testimony alone, the Court appropriately dismissed this counter-claim.

“For the element of ‘hostile or ‘adverse’ possession, the person claiming adverse possession must show that his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner.”³³ Since the deaths of Maude and Neighbors some fifty years ago, the property has been used by all of the heirs as a respite. In fact, George Crowe’s “ownership” of the property has been consistent with all the other heirs. He, like many of the other heirs, vacationed on the property. He stated that the he had been given the opportunity to have the property put in his name and elected not to because he wanted to keep the property “tied up” so that no one could sell it. George acknowledged that other members of the family used the property consistently with his use.

³¹ *Id.* 53 S.E. 597 at 599, citing *Cecil v. Clark*, 44 W.Va. 659, 30 S.E. 216.

³² *Selman v. Roberts*, 185 W.Va. 80, 404 S.E.2d 771 (1991), Syl. Pt. 1., citing Syl. Pt. 3, *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977). *Selman* was reversed in part by *Brown v. Gobble*, 196 W.Va. 559, 474 S.E. 2d 489 (1996) on standard of proof grounds.

³³ *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84 at 90, 232 S.E.2d 524 at 528 (1977).

Any exercise of George's cannot be said to be 'hostile' or 'adverse' to the ownership of the other heirs.

"For 'actual' possession, there must be an exercising of dominion over the property and the quality of the acts of dominion are governed by the location, condition and reasonable uses which can be made of the property."³⁴ Until the recent timbering, Appellant has not exercised dominion over the property. Other family members have, and continue to, reside on the property, without George's permission and without paying rent to George. Though Appellant may have contributed to some of the basic property upkeep, so have many of the other property heirs. George Crowe did not pay the taxes on it for many years. He stated that his sister and brother-in-law paid them for several years after Maude's death and that he received money from sibling John to assist in the payment of the taxes. George has never attempted to exclude other family members from the property and acknowledges their use of the property. George has definitely not had actual possession of the property.

"For possession to be open and notorious, it is generally meant that the acts asserting dominion over the property must be of such a quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own."³⁵ Again, until George recently timbered the property and even more recently deeded the property to himself, his actions have hardly been open or notorious. George, along with the rest of the family, has treated the Homeplace as if it belonged to all the children of Maude. Furthermore, he cannot claim that his "ownership" of the property was open, the property remained taxed in the name of Maude Crowe Estate, despite George's claim that he was given the opportunity to change the title to the property to his own name.

³⁴ *Id.* 160 W.Va. at 90, 232 S.E.2d at 528.

³⁵ *Id.* 160 W.Va. at 91, 232 S.E.2d at 528.

“The element of ‘exclusive’ possession related to the fact that the disseisor must show that others do not have possession, although this does not mean that sporadic use by others defeats this element since it only need be the type of possession which would characterize an owner’s use.”³⁶ Contrary to the allegations in George Crowe’s counter-claim, there was extensive testimony that he did not have exclusive possession of the property. In fact, one of his brother’s and his nephew lived on the property for many, many years. All of the siblings have utilized the property over the years. And though some of this use of the property was sporadic, so wasn’t George’s. He hasn’t lived on the property. He uses the property just like all the other co-tenants, he vacations there, hunts there and generally uses it as a get-away, just like the other heirs to the property. George did not have exclusive use of the property.

“Continuous is merely to state that it must last for the statutory period...”³⁷ Perhaps the only two acts which might support George’s position for adverse possession is that he had the property timbered within the last five years and that he deeded the property to himself in 2007. These are clearly within the ten-year statutory period for adverse possession.

George certainly can’t claim that he owns the property by color of title since it wasn’t until 2007 that George deeded the property to himself. Nor can he claim that he owns it by claim of title. His actions indicate that he didn’t believe he actually owned the property.

George Crowe’s own testimony provides sufficient evidence to deny any claim he may have for adverse possession. The lower Court properly granted Partial Summary Judgment in this case because the record, taken as a whole, could not lead a rational trier of fact to find for George Crowe.

³⁶ *Id* 160 W.Va. at 91, 232 S.E.2d at 529.

³⁷ *Id* 160 W.Va. at 91, 232 S.E.2d at 529.

CONCLUSION

These matters should have been addressed and resolved some 50 years ago when the key family members were still living. Unfortunately, no one saw the need to resolve this prior to George Crowe's timbering and quitclaim deed. The rest of the family seemed content to visit the property and reminisce about their mother and their younger years. George Crowe's recent actions completely disregarded the rights of his younger siblings and totally disrupted the family.

Wherefore, Your Appellees pray that this Honorable Court affirm the lower Court's ruling on the Motion for Declaratory Judgment of the Last Will and Testament of Thomas Neighbors and Appellees' Motion for Partial Summary Judgment on George Crowe's Adverse Possession Counter-Claim; and for such other and further relief as this Honorable Court deems just.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VIVIAN P. CROWE, *et al.*,
Petitioners,

Circuit Court of Summers County,
Civil Action No.:
08-C-34

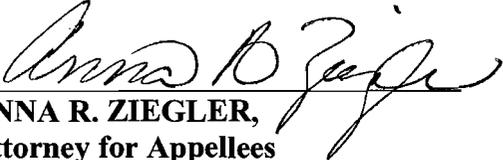
v.

THE UNKNOWN HEIRS OF
THOMAS NEIGHBORS,
GEORGE T. CROWE, *et al.*,
Respondents.

CERTIFICATE OF SERVICE

I, ANNA R. ZIEGLER, do hereby certify that I have served a true copy of the foregoing **Appellees' Response to the Petition for Appeal** upon Counsel named below by first class mail on this the 16th day of April, 2011.

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