15-0460 ATTORNEY'S COPY

IN THE CIRCUIT COURT OF PLEASANTS COUNTY, WEST VIRGINIA

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MILLIE FARNSWORTH
CIRCUIT COURT CLERK
PLEASANTS CO WV

HAROLD REX ANDERSON, JR. and
HAROLD REX ANDERSON, III,
Plaintiffs,

vs.

CIVIL ACTION NO. 11-C-39

CORDELIA A. JONES HEIRS, et al.,
Defendants.

PARTIAL SUMMARY JUDGMENT ORDER

This matter came before Larry V. Starcher as Special Judge for the Circuit Court of Pleasants County, West Virginia, following a long delay in locating several of the defendants, on the 27th day of June, 2014, for a hearing on the plaintiffs' motion for summary judgment. Defendants filed a "response" to plaintiff's motion, but did not file a "counter motion for summary judgment." Plaintiffs were represented by Matthew F. Graves, and the represented defendant heirs were represented by John R. McGhee, Jr. A single *pro se* defendant heir, Rowena F. Sellers, did not participate.

The Court reviewed all of the parties' pleadings and accepted into evidence certain exhibits to said pleadings for consideration of facts that were to be determined , and heard argument of counsel on plaintiffs' motion for summary judgment. The proceedings were taken by Ginny Armistead, Certified Court Reporter, Morgantown, West Virginia.

Subsequent to the June 27, 2014, the Court, in considering all of the above, did additional research and determined that not only should plaintiffs motion for summary judgment fail, but that in consideration of the factual allegations, arguments, and additional research, the defendants would likely be entitled to partial summary judgement. More specifically, defendants would likely prevail on a finding that by deed dated August 1, 1912, Cordelia A. Jones transferred the mineral interests in the subject property in this litigation to her seven children.

However, because the defendants had not filed a counter motion for summary judgement, the court convened a telephonic hearing on March 17, 2015, with counsel for both the plaintiffs and the representative heirs of Cordelia A. Jones. At the hearing the court entertained an oral motion for summary judgment from counsel for the defendants which was reduced to writing and filed by counsel for the representative heirs of Cordelia A. Jones on March 19, 2015. The Court now is considering both parties' motions for summary judgment. Further, at the March 17, 2015 hearing the court noted to counsel that there are insufficient factual allegations to determine with certainty how ownership of each of the Cordelia A. Jones heirs' interests has moved through the century plus from the time the August 1, 1912 deed was made.

The purpose of this action is to attempt to quiet title to the mineral interests in a seventy-five (75) acre tract of Pleasants County, West Virginia land. The results of this Order will, in part, quiet the title; however, considerably more title research is needed to state definitively the exact ownership of the subject mineral interests at the present time.

The basic issue the Court was presented in this litigation is whether a 1912 deed transferred mineral rights to all seven of a mother's (Cordelia A. Jones) children, or, to only one of the children. More specifically, the question is whether a grantee in a deed must be named in

the granting clause, or may title to an interest in property pass to a "grantee" if the person is named later in the deed in what is arguably either a "reservation or exception clause," or a "conveyance."

Findings of Facts

1. The property that is the subject of this litigation is two tracts of real estate (a 50 acre tract and a 25 acre tract) situated in Lafayette District, Pleasants County, West Virginia, hereafter referred to as "the subject property;"

2. By deed dated February 24, 1870, Leonard Shingleton and Lavina Shingleton transferred fifty (50) acres to Z. T. Jones and Cordelia A. Jones; by deed dated May 26, 1885, Mary Gorrell (widow of A. S. Gorrell) and A.C. Gorrell, Jr.[1] transferred twenty-five (25) acres to Zacharia T. Jones and Cordelia A. Jones, the two tracts combined being the subject property of this litigation;

3. By will dated October 29, 1904 and probated December 31, 1904, Z.T. Jones left all of his real and personal property[2] to his wife Cordelia A. Jones; the subject property was owned by Z.T. Jones and his wife Cordelia at the time of his death;

4. By deed dated August 1, 1912, Cordelia A. Jones transferred the subject property, in whole or in part, to her seven children; it is this 1912 deed that is in dispute in this litigation.

5. The granting clause of the subject August 1, 1912 deed provides that:

> THIS DEED, Made this the 1st day of August A.D. 1912, by and

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[1]In this 1885 deed the middle initials of grantor Mary Gorrell's deceased husband was "S," which is in conflict with the middle initial of the second grantor, A. C. Gorrell, Jr. Perhaps one of these initials was transcribed incorrectly in the deed, since it may be that these men were father and son.

[2]The real estate jointly held by Z.T. and Cordelia in 1904 did not provide for full ownership by "right of survivorship," as property is most commonly owned in modern times.

> between Cordelia A. Jones, in her own right, as widow of Z.T. Jones deceased and as devisee under the Last Will and Testament of Z.T. Jones, deceased, of Hebron, West Virginia, party of the first part and grantee [sic][grantor] and L. Oliver Jones, also of Hebron[,] West Virginia, party of the second part and grantee.

Further, following the legal description of the two tracts of real estate that constitute the subject property, the 1912 deed states as follows:

> It is expressly understood and agreed, that in case oil is found and produced in paying quantities from said land hereby conveyed that the following named children and heirs at law of Z.T. Jones, now deceased shall have own and possess the usual one-eight (1/8) thereof or what is commonly known as royalty, jointly and in common, and that said royalty shall be owned and held in common by said heirs, to-wit:
>
> Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, Vesta Nichols and L. Oliver Jones, grantee herein, share and share alike to them their heirs and assigns; But the said L. Oliver Jones shall have the exclusive right to make execute and deliver all such oil and gas leases upon said lands and to receive all rentals and bonuses on account of said leasing in his own right without having to account in any manner to his co-owners in said royalty.[3]

The paragraph in the 1912 deed following the above quotation reserves what is, in essence, a life estate for Cordelia A. Jones, but makes it clear that any part of the property she is not using for herself is for grantee L. Oliver Jones' exclusive use and entitlement to profits and proceeds from the farm "except [for] the oil production as hereinbefore provided;"

6. The Plaintiffs, Harold Rex Anderson, Jr. and Harold Rex Anderson, III, are now the owners of the surface of two tracks of real estate (one 50 acre tract and one 25 acre tract) located

[3]The words "oil" and "gas" are both used in this deed, and counsel for the Defendants argues that the use of both suggests that it should be concluded to mean that the "grantor" Cordelia A. Jones' intent was to pass title to her children *all* mineral rights. And, there is a logical basis for this position because historically the naming of the predominant mineral(s) of a given region in a deed by reservation or exception has been often considered to mean *all mineral interests.*

in Pleasants County, West Virginia, the same real estate that is the subject property in this litigation; this ownership is not contested;

7. All, or part, of the mineral or oil and gas interests in the subject property are contested in this litigation;

8. The Defendants in this case are the heirs of six of the seven Cordelia A. Jones children, excepting only L. Oliver Jones;

9. Several of the defendants identified in this case have been paying the property taxes on the "mineral interests" for the seventy-five (75) Pleasants County acres of the subject property "for the last several years," specifically, identified defendants (all Cordelia Jones heirs) Paul Jones, Sara J. Covell, Teresa Jean Jones Willard Minard, Margaret Ann Reed Dye, Wanda Ruth Reed Knowlton and Charles William Reed.[4] have all paid on the taxes;

10. Several of the Defendants identified in this case executed five (5) year leases with Chesapeake Appalachia, L.L.C. in 2009, although no royalties have yet been paid to any Cordelia Jones heirs; and,

11. Based on Defendants' brief and exhibits attached thereto and admitted into evidence, the court concludes that whatever rights the defendants were granted in the relevant 1912 deed were preserved in the chain of title which is composed of the following transfers of title to the subject property:

(a) August 1, 1912 Deed – Cordelia A. Jones to L. Oliver Jones, with "oil and gas interests" contested in this litigation;

(b) February 15, 1934 Deed of Trust (collateral for $1,100.00 loan) – L. Oliver Jones

[4]The Reeds – Charles William Reed, Wanda Ruth Reed Knowlton, and Margaret Ann Reed Dye were the children of Mary Virginia Jones Reed who was the daughter of William P. Jones, son of Z. T. and Cordelia A. Jones.

and wife to the Land Bank Commissioner City of Baltimore, Maryland;

(c) August 2, 1939 Deed – Trustee of the aforesaid Deed of Trust to the First National Bank of St. Marys and the Pleasants County Bank of St. Marys (through an apparent foreclosure), ". . . subject to any conveyances or reservation . . . of coal, oil and gas, and other mineral and mineral rights . . .;"

(d) April 17, 1940 Deed – Pleasants County Bank of St. Marys conveys its undivided one-half (½) interest in th subject property to the First National Bank of St. Marys;

(e) January 26, 1945 Deed – First National Bank of St. Marys to Charles W. McHenry with the deed specifically referencing a reservation of all interests in the oil and one-half of all gas formerly owned by L. Oliver Jones for one Phillip H. Jones, and the right for said Philip H. Jones ". . . to join in any lease for oil and gas or other minerals . . . and to collect one-half of any rentals or royalties paid on the same;"

(f) July 8, 1987 Will of Charles W. McHenry left his entire estate to his sister Lucille Higgins (McHenry died October 23, 2001; Will probated February 13, 2002); and,

(g) August 2, 2007 Deed – Lucille Higgins, by Marsha H. Dearth, as Attorney-In-Fact for Lucille Higgins to Harold Rex Anderson, Jr. and Harold Rex Anderson, III, with language that "this conveyance is made subject to all exceptions, reservations and conveyances as set forth in prior instruments hereto."

Issue

The issue presented to the Court is whether in order for title to a property interest (here mineral rights) to pass to a person, must the person be named as a grantee in the initial granting clause in the deed, or may title pass when a person is named in separate clause in the deed.

Discussion of Facts and the Law

Plaintiffs Harold Rex Anderson, Jr. and Harold Rex Anderson, III simply take the position that in the August 1, 1912 deed six of the seven children of Cordelia A. Jones are "strangers to the title," excepting L. Oliver Jones as the sole child who would take any interest by the deed. In support of plaintiffs' position counsel cites a series of cases (mostly dated) from West Virginia and other jurisdictions. Furthermore, counsel contends that whether the "strangers to the deed" are named in what may be characterized as either a "reservation clause" or an "exception clause," the result is the same. For example, plaintiffs cite, along with other cases, *Beckley Nat. Exchange Bank v Lilly*, 182 S.E. 767 (W.Va 1935), *Collins v. Stalnaker,* 48 S.E.2d 430 (W.Va. 1948), and *Erwin v. Bethlehem Steel Corporation*, 62 S.E.2d 337 (W.Va. 1950), all cases which defendants can distinguish from this case with the choice of words used in making the conveyance and the facts of the casees.

Plaintiffs entire argument hinges on the use of the words "reservation" and "exception" clauses in deeds – but neither of these words appear in the initiation of the clauses in the subject August 1, 1912 deed by which Cordelia A. Jones was attempting to give (convey) a property interest to each of her children.

Counsel for the plaintiffs wraps up his argument with the conclusion that plaintiffs are the current exclusive owners to not only the surface of the subject property, but also oil and gas interests as part of the property. The support for such ownership is based on a recitation of a partial chain title much like that which the court cited in its Findings of Facts – which are insufficient to support a motion for summary judgment.

Defendants, the Cordelia A. Jones Heirs, argue that the modern trend in property law is to seek to honor the intention of the grantor, as being the position adopted in the Restatement of Law on Property. Counsel for the defendants points out that our West Virginia Supreme Court, in discussing the distinction between a reservation and an exception in a deed, used language that was cautious to construe language in order to carry out the intent of the grantors. Citing *Beckley Nat. Exchange Bank v Lilly*, 182 S.E. 767 (W.Va 1935), as did counsel for the plaintiffs, defendants. Defense counsel contends that this case is distinguished in language used to create to conveyance and the facts of the instant case. *Beckley Nat. Exchange* states clearly that ". . . A reservation to a stranger to the instrument is void for all purposes;" however, our West Virginia Court goes on to say ". . . [t]he fact that this is so has inclined the courts, in order to save the substance, to construe provisions intended for the benefit of strangers to the instrument as exceptions rather than reservations." *Beckley, at 773.* While the Court did express some interest in the intent of the maker of an instrument, the Court concluded that neither a reservation or an exception may ". . . operate to vest rights in a third person not a party to the instrument." *Id.* In *Beckley,* the Court looked to the words that the person who might take outside a reservation could not take because the instrument used the language ". . . expressly reserve from the *operation* of this conveyance all rights . . .." And the right being reserved in the *Beckley* case related to use of land for purposes of ingress and egress, clearly with no conveyance of an interest in the property intended.

But in the August 1, 1912 deed, Cordelia A. Jones intended to transfer, give and convey the subject property, in whole or in part, to her seven children, using a term the term conveyance that the children "shall have and own and possess." The 1912 deed that is in dispute in this

litigation used neither the word "reservation" nor "exception" in introducing the clause by which the grantor (Cordelia A. Jones) intended to pass title to the mineral interests all seven of her children. Rather, the grantor (Cordelia A. Jones) used words of conveyance: "shall have own and possess," "shall be owned and held in common," "co-owners." All are words that express intent of conveyance with certainty of ownership.

Another West Virginia case cited by the plaintiff is *Collins v. Stalnaker,* 48 S.E.2d 430 (W.Va. 1948). The Court used the same historical language as in *Beckley Nat. Bank* noting that a stranger to a deed cannot take title based on a reservation or exception in their favor. However, again, *Collins* can be distinguished from the instant case. In *Collins* the Court spoke to the need for words of "conveyance," of which the instrument in question was devoid. Again, in the instant case the grantor does not introduce the clauses with either "reservation" or "exception," but rather uses language that clearly suggests grantor Cordelia A. Jones' intent to convey the mineral interests to all seven of her children.

Plaintiffs also rely on the case of *Erwin v. Bethlehem Steel Corporation*, 62 S.E.2d 337 (W.Va. 1950). In *Erwin,* a case dealing with mineral rights, our Court again discussed reservations and exceptions and the need for words of conveyance, or "operative words." The Court held that "[I]t is essential, however, in order to pass title to an estate by deed, that there be operative words which manifest intent to transfer the property described in the instrument, and the intent must be disclosed by the language of the deed . . .." *Erwin, at 345.* Defendants in the case now before us can pass the test *Erwin* establishes: first, *Erwin* does not say the grantees need to be named in the granting clause found at the start of a typical deed; second, in our 1912 deed the clauses that introduce the grantor's intent to convey the mineral interests are neither

"reservation" or "exception;" and third, the grantor did use clear words of conveyance, or "operative words" as discussed in *Erwin*.

For many years West Virginia University College of Law Professor Robert Tucker Donley was considered the leading expert on mineral interests in our state. Professor Donley's The Law of Coal, Oil and Gas in West Virginia, The Michie Company (1951) was considered the authoritative source on the subject. His 1951 work was updated in Robert T. Donley, The Development of the Law of Coal, Oil and Gas from 1971 to 1972, 74 W. Va. L. Rev. 260 (1972), and further updated in Paul N. Bowles et al., An Update of Donley's The Law of Coal, Oil and Gas in WV and Virginia: 1971-1986, 89 W. Va. L. Rev. 757 (1987).

In Professor Donley's 1951 authoritative source on the law of mineral interests in West Virginia, one finds **§ 29. Creation of Mineral Interests by Grant or Reservation in Deed.**, p. 30, etc. In this section Donley discusses both the *Erwin* and *Collins* cases, *supra.*, and with each he speaks of "reservations" and "exceptions," and to the grantor's intent, and words sufficient to pass title. In addressing *Erwin, at 39*, Donley states:

> To revert again to the *Erwin* case and the lack of the *grantor's intention* there to transfer the thing withheld to a third person, *the question arises as to what words are sufficient to manifest an intention to pass* the reserved rights . . .. (emphasis provided).

Of *Collins, at 40,* Donley cautions that:

> . . . the *Collins* case should be carefully limited to its peculiar facts and does not mean that an exception of oil and gas, in place, cannot, under any circumstances vest title in one who is not a party to the deed. *If the deed clearly evinces an intention* that the exception shall so operate, then if necessary in order to effectuate that intention, *the court should,* it is submitted, apply the Oklahoma doctrine. (emphasis provided).

In *Burns v Bastien,* 174 Okla. 40 P.2d. 377 (1935), Oklahoma enabled title to pass in a reservation clause, after looking carefully to the intent of the grantor, by declaring that a trust was created, through which legal title could pass to the beneficiary of the trust. This is not to suggest that West Virginia should use the unnecessary step of creating a trust, but to indicate how important the intentions of the grantor was to Professor Donley and should be to modern courts.

Donley further discusses a matter related to the instant case. In **§ 162. Transfer of Royalty Interests as Transfer of Title to Oil in Place.** and **§ 162a. ----- In General.** Donley states at page 228:

> While "royalties" is a term used to designate the lessor's share of the oil produced under a lease, it has long been employed as a descriptive term in connection with grant, or exception, of title to the oil in place, prior to the creation of any leasehold estate.

Donley further discusses in section 162a. the case of *Toothman v. Courtney,* 62 W.Va. 167, 58 S.E. 915 (1907). About *Toothman,* Donley says that our Court has

> . . . held, or recognized, that a grant, or an exception and reservation, of all the oil rental, or all of the royalties to be derived from the land, unlimited in time, is, in legal effect a grant, or an exception and reservation, of title to the mineral, in place.

Donley, § 162a., at p. 230. In the same discussion Donley further discusses that if the reservation is for "1/8 of all the oil and gas . . . that may be produced . . . it is distinguished from 1/8 of the oil in place." This should not adversely affect the defendants' claim in ths instant case. First, we are not addressing a reservation clause in the instant case, and second, there is clear language of conveyance in the August 1, 1912 deed that is the subject of this litigation.

Finally, the recent West Virginia Supreme Court 2013 case of *Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity United Methodist Church of*

Terra Alta, West Virginia v. Marvin D. Morgan, January 2013 Term, No. 12-0080 (filed June 13, 2013) involved a case in which the Court had to wrestle with the meaning of the word "surface" as it appeared in a 1907 deed. The Court recognized that *its role was to attempt to reach a result which the parties intended,* and to do so by confining themselves to the four corners of the document. And, that is what this court has attempted to do in this case.

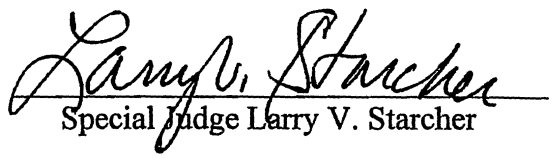
The COURT THEREFORE ORDERS the following:

1. The court DENIES Plaintiffs' Motion for Summary Judgment;
2. The court GRANTS Defendants' Motion for Summary Judgment, in part, and holds:
   a. The August 1, 1912 deed executed by Cordelia A. Jones, widow, transferred a fifty (50) acres tract and a twenty-five (25) acres tract to L. Oliver Jones of land located in LaFayette District, Pleasants County, West Virginia, and all oil and gas interests which may lie thereunder to her seven children, to be held in common, to-wit: Flora B. Lamp, A. Fulton Jones, Emma C. McCullough, Mary D. Jones, William P. Jones, Vesta Nichols and L. Oliver Jones, share and share alike to them their heirs and assigns;
   b. More specifically, heirs of Cordelia A. Jones now hold equal shares in the mineral interests referenced in said 1912 deed;
   c. No determination, other than "the heirs of Cornelia A. Jones,"was made by the court as to specific persons who may own those interests today; and,
3. The court further ORDERS the Clerk of this court to provide a certified copy of this

Order to the Clerk of the County Commission of Pleasants County, West Virginia for recordation.

The Clerk of this court is also directed to forward copies of this ORDER to all counsel of record and *pro se* defendants who filed pleadings in this case.

ENTER: April 20, 2015



Special Judge Larry V. Starcher

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Millie Farnsworth, Circuit Clerk
Pleasants County of West Virginia

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