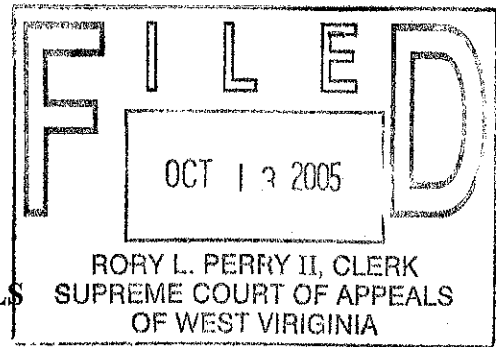


Appeal No. 32726



**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**CHRISTINE McCONAHA, Individually
And In Her Capacity As Administratrix
Of The Estates of JAMES VINTON SLATER
and MABEL FLORENCE SLATER,**

Plaintiff/Appellant,

vs.

**ETHEL ISABELLE RUST, JANET EVENE
BURDETTE, MARVIN DARRELL SLATER,
JESSE EDWARD SLATER, JESSE EDWARD
SLATER, JR., ROBERTA I. KINTZ, SAMUEL
WEBSTER HARRISON, JR. and GEORGE HARRISON,**

Defendants/Appellees.

**ON APPEAL FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 99-C-2207)**

BRIEF OF APPELLANT

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I. PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This is an appeal from the Circuit Court of Kanawha County, which entered a final order on the disposition of three parcels of property located on the Sigmon Fork of Tupper Creek, Poca District, Kanawha County, West Virginia.

On September 29, 1999, Christine McConaha, individually and in her capacity as Administratrix of the estates of James Vinton Slater and Mabel Florence Slater, filed a complaint in Kanawha County Circuit Court against defendants Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jesse Edward Slater, Jesse Edward Slater, Jr., Roberta I. Kintz, Samuel Webster Harrison, Jr. and George Harrison. Thereafter, an amended complaint was filed on October 18, 1999. (Amended Complaint, Original Record ("OR") at 1) The amended complaint alleged three counts. First, Count I sought the partition of real estate transferred from the estate of James Vinton Slater and Mabel Florence Slater to their heirs by intestate succession. Count II sought an accounting for the fair rental value and the value of any property removed from the property by Jesse Edward Slater and Samuel Harrison, Jr., who were using the whole of the property for their own benefit. Count III of the complaint sought an accounting for the compensation of lost rental value due to the use of the subject property by Jesse Edward Slater, Jr. and George Harrison.

On October 22, 1999, George Harrison and Samuel Harrison, Jr. filed answers to the Amended Complaint. (Answer of George Harrison, OR at 4; Answer of Samuel Harrison, Jr., OR at 7) On November 12, 1999, Jessie Slater and Jessie Slater, Jr., filed answers to the Amended Complaint. (Answer of Def. Jessie Slater & Jessie Slater, Jr., OR at 14)

On October 28, 2003, the circuit court entered an order referring the matter to a special commissioner. (Order of Reference to Special Commissioner, OR at 29)

On December 17, 2003, the special commissioner, John N. Charnock, Jr., conducted a hearing where testimony was taken to determine, as a matter of law, the extent of each party's ownership in the real property at issue. (Transcript of Hearing held on 12/19 before Special Commissioner, OR at 43) On March 3, 2004, the special commissioner filed his report concerning the results of his investigation and determinations concerning the ownership interests in effect with regard to the subject real estate. (Report of John N. Charnock, Jr. Special Commissioner, OR at 36) The Commissioner found that the bills of sale were ineffective to transfer ownership, that the quitclaim deed of Samuel Harrison was void and of no effect as it attempts to reserve a portion of property subject to an undivided interest, and the ownership at the time the complaint was filed, October 18, 1999, has not changed, meaning seven undivided interests remain among the seven children. Thereafter, Ethel Isabelle Rust filed an objection to the Special Commissioner's recommendation. (Objections of Ethel Isabelle Rust to Recommendations of Special Commissioner, OR at 45)

On May 12, 2004, the circuit court held a hearing on the objections to the special commissioner's report. (Transcript of Hearing held 5/12/04 before Judge Stuckey, OR at 54). On May 19, 2004, the hearing begun on May 12th was completed. At the conclusion of the hearing, the circuit court ruled on the disposition of the subject real estate. (Transcript of Hearing held 5/19/04 before Judge Stucky, OR at 55). On November 16, 2004, the circuit court entered its Final Order, partitioning the property among the interest holders previously identified by the court. (Final Order, OR at 56)

On November 26, 2004, Plaintiff Christine McConaha filed a timely notice of appeal. (Notice of Appeal, OR at 70)

On March 14, 2005, Plaintiff Christine McConaha filed a petition for appeal to this Court, which was granted by this Court's Order on September 12, 2005.

Plaintiff is now appealing the Final Order entered on November 16, 2004, as the circuit court's ruling was plainly erroneous and must be overturned.

II. STATEMENT OF FACTS

James Vinton Slater died intestate on January 30, 1962, owning three parcels of real estate located on Sigmon Fork of Tappers Creek, Poca District, Kanawha County. His wife, Mabel Florence Slater, and seven children survived him. Those parcels of real estate are described as: (1) one acre surface, more or less, and ½ interest in minerals; (2) 17.18 acres surface, more or less, and ½ interest in minerals; and (3) 37 acres, more or less, and ½ interest in minerals. Mabel Florence Slater died October 6, 1992. Accordingly, James Vinton Slater had left seven children as his heirs at law, those being Christine McConaha, Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jesse Edward Slater, Roberta I. Kintz, and Elvin D. Slater, deceased. Samuel Webster Harrison contends that he is the sole heir at law of Elvin D. Slater, as his adopted son.¹

Christine McConaha, both individually and as administratrix of the estates of James Vinton Slater and Mabel Florence Slater, brought suit to partition the property in kind or by sale, and to recover rents for the use of the property by some of the individual interest holders for the benefit of the other interest holders. (Amended Complaint, OR at 1)

¹ Ethel Rust disputed the contention that Samuel Harrison was adopted by Elvin Slater in her filed objection. *See* May 12, 2004 Objection of Ethel Isabelle Rust to Recommendations of Special Commissioner (OR at 45); No proof of adoption was presented in the court below.

With respect to the use of the property, Christine McConaha testified that Jesse Edward Slater had not permitted her onto the property on several occasions when she was attempting to fulfill her duties as administratrix of her parents estates, that Jesse Edward Slater had placed "No trespassing" signs on the property, had fenced in a majority of the property, had cut and used the hay from the land, and that he was using the property to maintain his horses. (Transcript of Hearing held on 12/19 before Special Commissioner, pgs. 44-45, (OR at 54); Transcript of Hearing held 5/19/04 before Judge Stuckey, pgs. 91-92 (OR at 55)). She also testified that the areas around the houses that Jesse Edward Slater and Samuel Harrison lived in were the most valuable pieces of the property and were being used by them exclusively. (5/19/04 Hearing, at 85-86, 107-108, 117 (OR at 55)).

Jesse Edward Slater filed his Answer, claiming that three of the heirs had transferred their interests to Elvin Slater. (Answer of Jesse Edward Slater and Jesse Edward Slater, Jr., (OR at 14)) Jesse Edward Slater produced several "Bills of Sale," claiming that they represented transfers of property interests from his siblings Marvin Darrel Slater, Ethel Isabelle Slater Rust, and Janet Evans Slater Burdette to Elvin D. Slater. (Bills of Sale, Plaintiff's Exhibit 1, Transcript of Hearing Held on 12/19 Before Special Commissioner with Exhibits, OR at 43) These "Bills of Sale" were dated February 1982, October 1982, and October 1989, respectively. Moreover, Jesse Edward Slater claimed that he had a "contract" with Elvin Slater. The alleged contract required Jesse Edward Slater to build a house and workshop on the property, for which he would receive all of Elvin's interest, including the interests alleged to have been transferred to Elvin, in the land, excepting the house and two acres surrounding the house. Id. and see

Transcript of Hearing held on 05/12/04, pgs. 100-102, 148-151, OR at 54. The Answer prayed that those interests be conveyed to him upon completion of his work, pursuant to this contract with Elvin Slater, at the direction of Elvin's heir, Samuel Harrison. *Id.* No written "contract" between Elvin Slater and Jesse Edward Slater was ever produced. Samuel Harrison testified that he had no knowledge of such an agreement. (Transcript of Hearing held on 05/19/04, pg. 11 (OR at 55)).

With regard to the "Bills of Sale" and the "contract," significant testimony and evidence was presented.

None of the alleged "Bills of Sale" were recorded until after the institution of this action, i.e. after September 29, 1999. It is uncontested that Elvin Slater never recorded these "Bills of Sale" during his lifetime. The three interests represented in the "Bills of Sale" did not appear on the appraisal of Elvin's estate², which stated that Elvin died with the possession of an undivided one-seventh (1/7th) interest in the subject property. (Appraisement of Estate of Elvin D. Slater, Harrison Exhibit 1, Transcript of Hearing Held on 12/19 before Special Commissioner with Exhibits, OR at 36; Plaintiff's exhibit 1, Transcript of Hearing held on 5/12/05, OR at 54) In 1986, Elvin wrote a letter to Christine McConaha explaining that his payments of money to his siblings were not intended to take their property interests. (Transcript of Hearing held on 12/19 before Special Commissioner with Exhibits, Plaintiff's Exhibit 2, OR at 43; Transcript of Hearing held on 05/19/04, pg. 55, OR at 55)

With respect to the heirs whose interests were implicated by the "Bills of Sale," two of the heirs discussed the arrangement by which they believed that they were exchanging their forbearance from use of the property for money from Elvin and were

² Jesse Edward Slater was the fiduciary of Elvin Slater's estate.

not divesting themselves of title to their interests. Marvin Slater testified that his understanding of the "Bill of Sale" was that Elvin would give him \$7,000 to not build a house on the land as long as Elvin was alive and that his interest in the property would return to him when Elvin died. (Transcript of Hearing held 5/12/04 before Judge Stuckey, at 68-69, 73-74, 77, 79 (OR at 54)). Ethel Rust testified that Elvin gave her \$8,000 when she signed the "Bill of Sale," which she understood to mean that she could only use the land if she returned the money prior to his death, or, if he died, her interest would once again become available for her or her children's use. (Id. at 81-82, 87-88 (OR at 54)). Specifically, she testified that Elvin did not want a deed for her property interest. (Id. at 89-90 (OR at 54)). Janet Burdette testified that she received \$4000 from Elvin when she signed the "Bill of Sale," and that Elvin did not want a deed for that transaction. (Id. at 12, 14 (OR at 54)).

In addition, both Jesse Edward Slater and Samuel Harrison provided evidence concerning the disposition of these interests. As fiduciary of the estate of Elvin Slater, Jesse Edward Slater signed the probate papers of Elvin's estate prepared by attorney Page Hamrick III, which claimed that Elvin owned a one seventh (1/7th) interest in the subject property. (Appraisalment of Estate of Elvin D. Slater, Harrison Exhibit 1, Transcript of Hearing Held on 12/19 before Special Commissioner with Exhibits, OR at 36; Plaintiff's Exhibit 1, Transcript of Hearing held on 5/12/05, OR at 54). Jesse Edward Slater testified that he signed the oath of the fiduciary on that appraisalment on March 12, 1998. (Transcript of Hearing held on 5/12/04 at 123-125, (OR at 54)). Samuel Harrison also executed a Short Form Settlement Waiver, signed and notarized on April 30, 1999, waiving his rights to object to the settlement of Elvin's estate, by which he received a

1/7th interest in the subject property. (Short Form Settlement Waiver, Harrison Exhibit 1, Transcript of Hearing Held on 12/19 before Special Commissioner with Exhibits, OR at 36) Samuel Harrison also testified that he would have no basis to dispute the Appraiser's finding that Elvin Slater owned a one seventh (1/7th) interest in the property. (Transcript of Hearing held 5/19/05 at 26 (OR at 55)).

Also of interest regarding the "contract" referenced in Jesse Edward Slater's Answer was his testimony that the agreement for the construction of a house on the property with Elvin was to be paid for with all of Elvin's interest and the three interests referenced in the "Bills of Sale," excepting the house and the 2 surrounding acres (Transcript of Hearing held 5/12/05 at 101 (OR at 54)). Jesse Edward Slater testified that work on the house was completed in 1974 or 1975. (Transcript of Hearing held 5/12/05 at 101 (OR at 54)) However, the three "Bills of Sale" were not in existence until 1982, in two instances, and 1989, in one instance.

As an additional matter, a quitclaim deed from Samuel Harrison was produced which purported to transfer his interest to Jesse Edward Slater, while making a reservation of two acres of property unto Samuel Harrison around the house and workshop, in consideration for the services performed by Jesse Edward Slater. (Quitclaim deed, Plaintiff's Exhibit 1, Transcript of Hearing Held on 12/19 Before Special Commissioner with Exhibits, OR at 43). Although Samuel Harrison testified that Elvin never discussed such a contract with him during his lifetime, he executed the quitclaim deed on February 21, 2002, based on the claims of Jesse Edward Slater. (Transcript of Hearing held 5/19/04 before Judge Stuckey at 11, 27 (OR at 55)).

Interestingly, the quitclaim deed was executed some two and one-half years after the partition suit had been filed.

As stated above, on October 28, 2003, Judge Stucky entered an order referring the matter to Special Commissioner John Charnock. Mr. Charnock issued his report on March 3, 2004, finding that:

- No bill of sale was recorded until after the institution of this action.
- The bill of sale for Janet Burdette was not notarized and was therefore improperly recorded.
- The bills of sale were ineffective to transfer ownership. However, should the property be sold, those who received money should reimburse the estate of Elvin Slater.
- The quitclaim deed of Samuel Harrison is void and of no effect, as it attempts to reserve a portion of property subject to an undivided interest.
- The ownership at the time the complaint was filed has not changed, meaning seven undivided interests remain among the seven children.

(Report of John N. Charnock, Jr., Special Commissioner, OR at 29).

The circuit court held hearings on objections filed to the Special Commissioner's Report on May 12, 2004. As Christine McConaha testified, she instituted the action to protect the interests of the other heirs of the estate of James Slater. (Transcript of Hearing held 5/19/04 before Judge Stuckey at 83, 92, 106-107 (OR at 55)). During the hearings, the circuit court entertained arguments from defendants' counsel that the "Bills of Sale," despite being unrecorded and, in one case, not notarized, qualified as deeds, pursuant to WV Code § 36-3-4. (Transcript of Hearing Held 5/12/04 at 47-51, (OR at

54)). The circuit court erroneously held that the "Bills of Sale" were effective to transfer the property interests at issue, stating that two of the subject instruments had the attributes of a deed and could have been recorded, and the other instrument, while it could not be recorded, still had the attributes of a deed. The circuit court failed to make any finding that the "Bills of Sale" were delivered, an essential element to a valid transfer. Having made that mistake, the circuit court went on to err in various other ways. The court held that Jesse Edward Slater would receive the interests, pursuant to his "contract" with Elvin Slater. The court held that Jesse Edward Slater would receive a five-sevenths (5/7ths) interest in the property, excepting the reservation of Samuel Harrison in the two acres surrounding the house and workshop and that Samuel Harrison would receive a five-sevenths (5/7ths) interest in the two acres surrounding the house and workshop. (Transcript of Hearing Held 5/19/04 at 121-124, (OR at 55)). The court sought to partition the remaining interests while questioning Christine McConaha during the hearing.

The court offered to partition a ten-acre segment, which Mrs. McConaha felt may not have been of equal value to the other portions of the land, to satisfy her interest. (Id. at 114, 117 (OR at 55)). The court also suggested that, should McConaha request further surveys or appraisals to determine the value of the divided parcels, she would be required to pay those expenses if the ten acre portion was a fair distribution. (Id. at 124 (OR at 55)). Faced with those potential expenses and the rulings of the court concerning the "Bills of Sale" which extinguished interests of three of the heirs of James Vinton Slater, the "contract" between Jesse Edward Slater and Elvin Slater, and the effective reservation and transfer of five sevenths (5/7ths) interest of what she testified was one of the "most

valuable” pieces of the property to Samuel Harrison, she reluctantly agreed to take the ten acre portion as her share of the property. (Id. at 101-124, OR at 55)). The circuit court entered its Final Order on November 16, 2004.

III. ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH IT WAS DECIDED BY THE LOWER TRIBUNAL

- A. The Circuit Court erred in recognizing the transfer of property interests where no deed was delivered, recognizing the transfer of a specific piece of the property when other parties held an undivided interest in the same, and failing to account between the co-tenants for the use by one of the whole, or more than his share, of the common property.**

If permitted to stand, the circuit court’s resolution of this partition suit would upset the very foundations of West Virginia property law.

As is more fully set forth below, the circuit court’s ruling was plain error. The circuit court’s errors included recognizing the transfer of property interests where no deed was delivered; recognizing the transfer of a specific piece of the property when other parties held an undivided interest in the same; and failing to account between the co-tenants for the use by one of the whole, or more than his share, of the common property. After making these rulings, the court determined that the property could be partitioned to the parties who had interests remaining after the court’s erroneous rulings.

Under West Virginia property law, real property can be conveyed only by deed or will. Delivery is an essential element to a deed’s validity. The circuit court failed to make a finding that the “Bills of Sale” were delivered. A preponderance of the evidence showed that, even if the “Bills of Sale” were considered deeds, despite their lack of formalities, there was no delivery as required by law. Further, no co-tenant has the right, as against his fellow co-tenants, to convey to a third person any specific or distinct

portion of the common estate. The quitclaim deed clearly reserved specific portions of the common estate and should have been found to be void and of no effect. Furthermore, the alleged contractual arrangement, or any other arrangement, that would convey a specific portion of the common estate without the approval of the other common tenants should have been void and of no effect. Additionally, when a co-tenant occupies and uses the whole, or more than his share, of the property for himself, he is liable to his co-tenants for a reasonable rent for it, considering the condition of the property when he took possession of it. For the reasons outlined herein, these rulings were plain errors that affected the Appellant's substantial rights and seriously affect the fairness, integrity, and public reputation of the judicial proceedings.

IV. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

The doctrine of plain error is applicable in civil cases where the case was tried before a judge without a jury and the parties, without objection, allowed the court to try the case on a totally erroneous legal theory that was dispositive of the outcome of the case to the substantial prejudice of the appealing party. Lowther v. Riggleman, 189 W. Va. 68, 489 S.E.2d 49 (1993). To trigger the application of the plain error doctrine, there must be: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Maples v. West Virginia Dept. of Commerce, 197 W. Va. 318, 475 S.E.2d 410 (1996), *citing* Syllabus Pt. 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

A. The circuit court erred by recognizing the “Bills of Sale” as effective transfers of real estate, where there was no delivery or acceptance.

Under West Virginia law, real property can be conveyed only by deed or will. W. Va. Code § 36-1-1. The circuit court’s determination that the “Bills of Sale” presented in this case were effective transfers was plain error. This determination affected the substantial rights of all of the parties to the case by denying them their rightful claims to portions of the common estate. Finally, to allow this error to stand would seriously affect the fairness, integrity and public reputation of judicial proceedings, as this would represent a drastic departure from well-settled property law.

1. Acceptance and delivery, which are premised on the intent of the grantor and grantee, are essential elements of a valid deed transfer and may be proved or disproved by the circumstances.

During the hearings, counsel for the defendant Jesse Edward Slater argued that W. Va. Code § 36-3-4 had abolished the necessity for deeds to conform with deed formalities, where the deed’s manifest intent was evident. Such an argument fails in this case, since the clear language of the statute requires that, in order for the instrument to be given effect, it must be “properly executed and **delivered.**” W. Va. Code § 36-3-4 (emphasis added). This Court held in Walls v. Click, 209 W.Va. 627, 634, 550 S.E.2d 605, 612 (2001), that “effective delivery must include (1) transfer of possession of a valid deed satisfying all required formalities, and (2) intent of the grantor to divest himself of title.

With regard to situations wherein a deed has been manually delivered to a grantee, this Court has held that:

To constitute legal delivery of a deed, the grantor must intend that it presently vest in the grantee the estate purportedly conveyed. **The handing of a deed to a**

grantee without that intent is not delivery. “The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention whether the deed was then intended by the parties to take effect according to its terms.” The intent of the grantor may be shown by circumstances. Among the circumstances admissible are “the subsequent possession of the premises” and **“the subsequent conduct of the parties.”**

(emphasis added; internal citations omitted) French v. Dillon, 120 W.Va. 268, 197 S.E. 725 (1938). In French, this Court considered evidence that three years had passed after the date of the alleged delivery without the deed being recorded as circumstantial evidence in its determination that, even if the deed was handed to the grantee, it was not intended as an immediate conveyance of title. *Id.* The ability to rebut a presumption of a delivery may be premised either on evidence showing nondelivery by the grantor or nonacceptance by the grantee. Downs v. Downs, 89 W.Va. 155, 108 S.E. 875 (1921).

2. **The Court either relied on the form of the “Bills of Sale” and did not find an effective delivery and acceptance or found such delivery and acceptance against the clear weight of the evidence when ruling that a transfer of property occurred.**

The Circuit Court ruled that the “Bills of Sale” had the attributes of deeds and in two of the three cases could have been recorded. Based on that determination, the court found that the three heirs had “conveyed” their interests. It is unclear from the Final Order and the court’s statements at the hearing whether this determination was based wholly on the form of the “Bills of Sale” or whether the court was finding an effective delivery and acceptance by making a finding of fact that the instrument “conveyed” their interests. If the former, the court erred by failing to consider clear evidence that delivery and acceptance did not occur. In that case, plain error applies. If the latter, the court erred by making such findings in light of the clear preponderance of the evidence against

such a finding. In such an event, this Court has held that it shall make such findings and render such judgments on the evidence as the trial court should have made and rendered. Walls, at 639, *quoting* Bluefield Supply Co. v. Frankel's Appliances, Inc., 149 W.Va. 622, 142 S.E.2d 898 (1965). A discussion of the evidence concerning the intent of the parties follows in section iii.

As administratrix of the estate of James Vinton Slater, Christine McConaha had a duty to confirm that the heirs received their proper share of the estate's assets. As such, she instituted this action to partition the land and to recover rents from the two co-tenants, Jesse Edward Slater and Samuel Harrison, who were using the whole property for their own benefit. Once the court had ruled that Jesse Edward Slater and Samuel Harrison owned five sevenths (5/7ths) of the undivided property interests, further disputes related to the property were of extremely limited value. As such, and under considerable pressure from the judge and without advice from counsel that the court was proceeding under an erroneous legal theory, she accepted the circuit court's offered resolution under the misapprehension that the other heirs interests had been extinguished and that those heirs were not entitled to significant rents from the two co-tenants using the entire property and its resources for their own benefit.

3. The evidence showed that no delivery or acceptance occurred.

Based upon the evidence presented, the clear preponderance of evidence showed that neither the grantors intended to divest themselves of title, nor did the grantee intend to accept title.

Looking first at the grantee, Elvin Slater, the evidence showed that from the date these "Bills of Sale" were handed to him in 1982 and 1989 to the date of his death in

1997, he never recorded these documents. As in French, such failure to record can be weighed as circumstantial evidence that Elvin never intended to accept delivery of the other heirs' interests. In fact, those documents were not recorded until twenty years, in two cases, and eleven years, in one case, after they were signed, and years after his death and his estate was closed. Furthermore, as Elvin already lived on the property with the permission of the other heirs, his continued presence on the land should not heavily weigh against a finding of non-delivery. Finally, Elvin's own correspondence to Christine McConaha evidenced that it was not his intent to take his siblings interests in the property.

Looking to the grantors, two of the grantors testified that they did not intend to divest themselves of their title to the property. Instead, they believed that their property interests would return to them either upon returning the money given to them by Elvin or upon Elvin's death.

Furthermore, the evidence showed that the only parties claiming that Elvin held the three heirs' interests referenced in the "Bills of Sale" contradicted their sworn and notarized statements with respect to the Estate of Elvin Slater. Jesse Edward, as fiduciary of the estate, and Samuel Harrison, as beneficiary of the estate, each represented, or accepted through waiver of the rights to object to the settlement of the estate, that Elvin Slater owned a one seventh (1/7th) interest in the subject property, which is consistent with the evidence that no transfer of additional interests to Elvin Slater occurred during his lifetime. Further, the claim of Jesse Edward Slater that he had a written agreement, drafted in 1974, with Elvin that would operate to deliver property interests that were allegedly acquired in 1982 and 1989 is simply not credible. No such agreement was ever

produced. Finally, the quitclaim deed from Samuel Harrison could not operate to transfer additional interests to Jesse Edward Slater, as Samuel Harrison had only a one seventh (1/7th) interest, pursuant to the settlement of the estate of Elvin Slater.

Based on the preponderance of the evidence, the circuit court should have found that no delivery or acceptance of these "Bills of Sale" occurred, as the parties never intended to divest themselves of their title to the property. To find otherwise was error.

B. The circuit court erred by recognizing either the quitclaim deed, which improperly conveys a distinct portion of the property, or any other agreement that would achieve the same result.

This Court has held that one co-tenant has no right, as against his associates, to convey to a third person any specific or distinct portion of the common estate. Mauzy v. Nelson, 147 W.Va. 764, 131 S.E.2d 389 (1963). In Mauzy, this Court stated:

...it is a general rule that one cotenant has no right, as against his associates, to convey to a third person any specific or distinct portion of the common estate...The reason is obvious. The grantor's title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner as to compel his cotenants to take their shares in several distinct parcels such as he may please; and since a grantor himself has no right, on a partition, to select any particular portion of the land and to insist that his moiety, or any part of it, be set off in that specific portion, so he cannot convey such a right to his grantee. If this were not admitted be the established law, the cotenants not assenting to such a sale might, without any fault of their own, be deprived of their right to enter and occupy every portion of the common estate, and to have any portion of it, thus conveyed, assigned to them on a partition of the common estate."

Mauzy, at 768, quoting, 14 Am. Jur. § 86, Cotenancy.

The quitclaim deed, which purported to transfer all of Samuel Harrison's interest to Jesse Edward Slater with the exception of the two acres upon which the house and

workshop sit, should, therefore, be void and of no effect. During the hearing before the circuit court, the attorneys for Samuel Harrison and Jesse Edward Slater suggested that the intent of the quitclaim deed was to transfer Samuel's undivided interest in the rest of the land to Jesse and Jesse's interest in the two acres surrounding the house to Samuel. As a result, the court awarded Samuel a 5/7th's interest in the house's two acres, with the end result being the court partitioning the house, workshop, and two acres to Samuel. However, the quitclaim deed does not even mention this arrangement and, instead, seeks to reserve a specific portion of the common estate for Samuel Harrison. Christine McConaha testified that she believed this portion of the property was one of the most valuable pieces, due to the "lay of the land." The end result of either arrangement would be prejudicial to the other common tenants with respect to this most valuable piece of the common property.

For the same reason, any alleged agreement between Elvin Slater and Jesse Edward Slater to convey specific pieces of property without the approval of the other interest holders would be impermissible. Namely, it would result in the conveyance of a distinct portion of the common property by one of the co-tenants and resulted in the prejudice of the other cotenants with regard to their rights by partition to those portions of the common estate.

Based on the Final Order of the circuit court and the transcript of the proceedings, it is unclear whether the court determined that the transfer of these undivided interests was pursuant to the quitclaim deed or some other agreement. Regardless of the mechanism by which the court felt such a transfer occurred, the ruling was error and prejudiced the other interest holders.

C. The circuit court erred by failing to account for rents owed to the co-tenants by co-tenants who were using the whole, or more than their fair share, of the common property.

This Court has held that, in a suit for the partition of real estate, an accounting between co-tenants for the use by one of the whole, or more than his share, of the common property, but without ouster, may be had as incidental relief therein. Morrison v. Holcomb, 123 W.Va. 153, 14 S.E.2d 262 (1941). This is based on a well-settled principle that when a co-tenant occupies and uses the whole property himself, he is liable to his co-tenants for a reasonable rent for it in the condition it was when he took possession. Rust v. Rust, 17 W.Va. 901 (1881). Despite the allegations of the complaint seeking such an accounting, the circuit court gave such an accounting no notice or credence. Jesse Edward Slater and Samuel Harrison had use of the whole property during the subject period of time. Christine McConaha testified that Jesse Edward Slater “ran her off the property.” She also testified that Jesse Edward Slater had fenced in a majority of the property and was using said property for his horses. The court’s failure to account for such rents and reimbursements for use of the property’s resources was plain error. Believing that such rents were significantly reduced due to the holding of the circuit court granting Jesse Edward Slater a five-sevenths (5/7ths) interest in the property, Christine McConaha did not fully pursue these rents for the benefit of the other heirs of James Vinton Slater’s estate and was, therefore, prejudiced. It affected the substantial rights of the various interest holders by denying them the compensation that they deserved by law. To let that error stand would seriously affect the fairness, integrity, and public reputation of the judicial proceedings, where this is a well-settled matter of law.

D. In light of the disputed partition in kind, partition by sale would be appropriate.


Christine McConaha instituted this action to assure that every heir, including herself, received his or her fair share of the common property. The disputes arising out of this action have been costly. Further attempts to partition the property in kind are likely to result in further disputes among the parties, as the property is not conveniently dividable. As such, petitioner suggests that partition by sale would be the appropriate remedy for resolving the final disposition of this property.

CONCLUSION

WHEREFORE, the Appellant requests that the Court overturn the ruling of the circuit court and hold that each of the heirs maintain a one-seventh interest in the subject property, remand this action with an Order for the circuit court to oversee the sale of the property and division of proceeds among the proper property interest holders and the accounting of reasonable rent owed to the co-tenants from those co-tenants who have used all, or more than their share, of the common property upon the grounds set forth in this Brief for the Appellant, and such other, general and further grounds as may be apparent to the Court.

CHRISTINE McCONAHA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTINE MCCONAHA, Individually
and In Her Capacity As Administratrix
Of the Estates of JAMES VINTON SLATER
and MABEL FLORENCE SLATER,

Plaintiff/Appellant,

v.

Appeal No. 32726
(From the Circuit of Kanawha
County, Civil Action No. 99-C-2207)

ETHEL ISABELLE RUST, JANET EVENE
BURDETTE, MARVIN DARRELL SLATER,
JESSE EDWARD SLATER, JESSE EDWARD
SLATER, JR., ROBERTA I. KINTZ, SAMUEL
WEBSTER HARRISON, JR. and GEORGE HARRISON,

Defendants/Appellees.

CERTIFICATE OF SERVICE

I, John H. Tinney, counsel for Plaintiff/Appellant, hereby certify that on the 13th day of October, 2005, the foregoing "**Brief of Appellant**" was served upon the parties by depositing a true copy thereof in United States first-class mail, postage prepaid, and addressed as follows:

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