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STATE OF NORTH DAKOTA

NORTH DAKOTA SUPREME COURT

Stanley R. Nevin,

Plaintiff/Appellant,

and

Northern Oil and Gas, Inc.,

Plaintiff-Intervenor/
Appellant,

v.

Helen L. H. Kennedy; Gena Baker f/k/a Gena Kennedy; Nona Kennedy; Jason Craig Newburn, as personal representative of Maura Kay Newburn, deceased: Keira Kennedy Adams; Jess Anne Knutson; Charles Herbert Jacobson; Miles G. Johnsrud and Marlene Kay Johnsrud as Co-Trustees of the Miles G. Johnsrud and Marlene Kay Johnsrud Family Mineral Trust under Agreement dated July 13, 2011; JoAnn Kennedy; Scott Cameron as Trustee of the Scott Cameron Trust dated June 13, 2013; Shannon Kristine Dusek and David Alan Dusek, as Trustees of the Shannon and David Dusek Family Revocable Trust; Tiffany Papagno, as Personal Representative of the Estate of Thomas W. Kennedy, deceased; Robert W. Kennedy; Michael Kennedy; Lisa Marie Kennedy; Lisa Marie Kennedy; James M. Kennedy; Jodie Thompson Woroniecki, as Personal Representative of the Estate of Barbra Kennedy Johnson a/k/a Barbara Kennedy Johnson, deceased; Michelle Grass; Colleen Zychowicz, f/k/a Colleen Kennedy; Debra Kennedy Griffie; Donald James Kennedy, Jr.; Steven Shannon Kennedy; Benjamin J. Larson; Rainbow Energy Marketing Corporation; Northern Energy Corporation; Landmark Oil and Gas, LLC, Missouri River Royalty Corporation; Spartan Minerals & Royalty LLC; Sven Resources, LLC; Continental Resources, Inc.; Burlington Resources Oil & Gas Company LP; XTO Holdings, LLC; PetroShale (US), Inc.; Bole Resources LLC;

Supreme Court No. 20220136

McKenzie County Civil No.
Civil No. 27-2018-CV-00097

Brooks Energy Inc.; CJC Energy Inc.; KT Energy Inc., Mel Energy Inc.; Noble Royalty Access Fund 12 LP; Noble Access Royalty Fund 13 LP; North Fork AD3, LLC; Outdoor Entourage Inc.; G. William Hurley Revocable Trust; Hurley Oil Properties Inc.; Wind River Resources Inc.; WHC Exploration LLC; Dakota West, LLC; Marvin J. Masset; Avalon North, LLC; Peter Masset; Newport Minerals, Ltd.; Deep Rock Resources, LLC; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representative of any of the above-named persons who may be deceased or under any other title or interest,

Defendants/Appellees.

BRIEF OF APPELLANT NORTHERN OIL AND GAS, INC.

Appeal from the District Court
Northwest Judicial District
McKenzie County, North Dakota
The Honorable Robin A. Schmidt

ORAL ARGUMENT REQUESTED

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I. REQUEST FOR ORAL ARGUMENT

[1] Northern respectfully requests oral argument. This case is important because the district court did not follow this Court's precedent established in *Malloy v. Boettcher*, 334 N.W.2d 8 (N.D. 1983), thereby creating title uncertainty concerning the effect of numerous similar deeds in North Dakota.

II. STATEMENT OF THE ISSUES

[2] Whether the trial court erred when it ruled that two March 10, 1960 Warranty Deeds ("1960 Deeds") did not vest Lois Kennedy with 1/2 of Angus Kennedy's mineral interest in the lands covered therein despite the plain and unambiguous reservation in the 1960 Deeds and the rule stated in *Malloy v. Boettcher*, 334 N.W.2d 8 (N.D. 1983).

[3] Whether the trial court erred in reforming the 1960 Deeds when no Defendant pled reformation and whether it also erred by admitting and relying upon incompetent and otherwise inadmissible evidence to reform the 1960 Deeds.

[4] Whether the trial court erred in applying res judicata and collateral estoppel based on the probate of Angus Kennedy's estate.

III. INTRODUCTION

[5] This case involves disputed minerals once owned by Angus Kennedy, Sr. ("Angus") in several townships located in McKenzie County (the "Property"). The dispute hinges on Angus' intent behind identical reservation clauses in the 1960 Deeds.

[6] Angus's wife, Lois Kennedy ("Lois"), joined as a grantor in each of the 1960 Deeds. The 1960 Deeds defined Angus and Lois as the "parties of the first part"

and, thereafter, reserved unto "THE PARTIES OF THE FIRST PART" all oil gas, and other minerals. The plain language of the 1960 Deeds sets forth Angus's intent that Lois own 50% of his preexisting mineral interest following the conveyance. When considering a functionally identical deed, this Court held that such a reservation vests in the non-owning spouse 50% of the owning spouse's mineral interest. *Malloy v. Boettcher*, 334 N.W.2d 8 (N.D. 1983). Notably, *Malloy* was decided on the four corners of the deed. Despite this precedent, the trial court found the 1960 Deeds to be ambiguous and admitted at trial all extrinsic evidence offered by the Kennedy Heirs.[1]

[7] The trial court admitted extrinsic evidence without regard to whether the pertinent document or testimony related to Angus's intent. Nevertheless, none of the proffered documents or testimony demonstrate an intent contrary to the unambiguous language in the 1960 Deeds. In fact, the only evidence holding any probative value was a May 14, 1963 Mineral Deed from Angus Kennedy to Kennedy Cattle Co., Inc. (the "1963 Mineral Deed"). The 1963 Mineral Deed confirmed explicitly Angus's own understanding that the 1960 Deeds previously transferred 1/2 of his mineral interest to Lois.

[8] By finding that Angus intended "PARTIES OF THE FIRST PART" to mean "Angus Kennedy" individually, the trial court effectively allowed the Kennedy Heirs to reform the 1960 Deeds. The lower court erred in this regard for various reasons explained below. Finally, the trial court erred in determining that a probate inventory

[1] The "Kennedy Heirs" is a named that certain Defendants designated for themselves. They are defined in the Third Amended Judgment Quieting Title, Awarding Costs, and Dismissing Remaining Claims. (R898:2:¶4).

precludes Lois and her successors-in-interest from claiming that she held any interest under the 1960 Deeds.

IV. STATEMENT OF THE CASE

[9] On February 9, 2018, Stanley R. Nevin ("Mr. Nevin"), as successor to Lois, filed the initial Complaint in this action seeking to quiet title to his mineral interest in and to the Property. (R2). On May 17, 2018, Northern Oil and Gas, Inc. ("Northern") filed its Complaint in Intervention. (R42). On September 10, 2019, the Kennedy Heirs moved for summary judgment (R197) and, on September 16, 2019, Mr. Nevin also moved for summary judgment (R296).

[10] Following briefing, the Court held a hearing on the parties' competing motions for summary judgment on December 9, 2019. On February 6, 2020, the court entered an Order on Cross Motions for Summary Judgment ("Summary Judgment Order"). (R418). In the Summary Judgment Order, the district court ruled that summary judgment was not appropriate and denied both motions. (R418:12:¶21). Shortly thereafter, on February 13, 2020, the court entered an Order Granting Joint Motion to Bifurcate Case and Submit Proposed Scheduling Order ("Bifurcation Order"). (R425). The Bifurcation Order severed the quiet title claims from the accounting claims. (R425:2:¶1).

[11] On March 25, 2021, the court held a bench trial on the quiet title claims. (R920). On September 9, 2021, it entered a Memorandum Decision and Order for Judgment ("Order for Judgment"). (R827). On April 12, 2022, the district court entered a Third Amended Judgment Quieting Title, Awarding Costs, and Dismissing

Remaining Claims (the "Final Judgment"). (R898). Northern timely appealed from the Final Judgment.

V. STATEMENT OF FACTS

[12] Prior to March 10, 1960, Angus Kennedy owned 100% of the minerals in the following lands located in McKenzie County, North Dakota:

Township 149 North, Range 97 West, 5th P.M.
Section 25: S/2SW/4, NW/4SW/4, SW/4NW/4

("Section 25 Lands")

Township 150 North, Range 96 West, 5th P.M.
Section 32: SE/4SE/4

("Section 32 Lands"),

Township 151 North, Range 96 West, 5th P.M.
Section 19: Lot 4, SE/4SW/4

("Section 19 Lands")

Township 151 North, Range 97 West, 5th P.M.
Section 24: E/2SE/4, NW/4SE/4, N/2SW/4, SW/4NW/4, N/2NW/4

("Section 24 Lands")

(All of the foregoing lands were previously defined, collectively, as the "Property").

[13] On March 10, 1960, Angus and Lois, as husband and wife, executed the 1960 Deeds. (R586; R587; R588; R589). One of the 1960 Deeds conveyed the Section 19 Lands and the Section 24 Lands to Douglas R. Kennedy. (R586:1). The other 1960 Deed conveyed the Section 25 Lands and Section 32 lands to Angus Kennedy, III. (R587:1).

[14] Both Angus and Lois were the grantors in the 1960 Deeds and were defined in the first clause as the "parties on the first part." (R586:1; R587:1). Immediately after the grant, both the 1960 Deeds contain the following typewritten mineral reservation:

> EXCEPTING AND RESERVING UNTO THE PARTIES OF THE FIRST PART, their heirs, successors and assigns, all right, title and interest in and to any and all oil, gas, uranium, and other minerals in or under the foregoing described lands, with such easement for ingress, egress and use of the surface as may be incidental or necessary for the use of said rights.

(*Id*.). When referencing the "parties of the first part," the 1960 Deeds consistently use the plural pronouns "they, "them," and "their." (*Id*.). When referencing the "party of the second part" (*i.e.*, the grantee), the 1960 Deeds use the singular pronoun "his." (*Id*.). Finally, in both of the 1960 Deeds, Angus and Lois convey by general warranty. (*Id*.). A local Watford City attorney named James Taylor prepared the 1960 Deeds. (R645:22:4-9, 72:9-12, 77:8-14, 97:22-24).

[15] On May 14, 1963, Angus Kennedy executed a 1963 Mineral Deed conveying "an undivided one-half interest" in the minerals covered by the 1960 Warranty Deed to Douglas R. Kennedy (the Section 19 Lands and the Section 24 Lands).[2] (R590; R586; R587). The phrase "one-half" is typewritten, as was the following intent clause: "It is the intention of the grantor herein to convey all of the mineral interest owned by him." (R590:1). There were no intervening mineral conveyances of any portion of the Property by Angus between the 1960 Deeds and the 1963 Mineral Deed. (R920:28:24-29:4, 134:10-17). The 1963 Mineral Deed was

[2] The 1963 Mineral Deed also covered other lands not at issue here.

prepared by Angus's long-time attorney and friend, John ("Jack") Davidson. (R920:169:24-170:6; R645:112:20-25, 46:11-47:1). Mr. Davidson was very familiar with Angus's affairs. (R920:84:2-10; 171:1-7).

[16] Beyond the 1960 Deeds and the 1963 Mineral Deed, there is no evidence regarding Angus Kennedy's intent concerning the disputed mineral reservations. Although Angus executed a Last Will and Testament about six (6) months prior to the 1963 Mineral Deed, unlike that deed, the Last Will and Testament does not speak to the effect of the 1960 Deeds on Angus's mineral ownership or the property that comprised his estate. (R590; R610). The Last Will and testament devises and bequeaths specific property to Lois, and devises and bequeaths the residue of his estate to a testamentary trust called the "Kennedy Trust." (R610:1-2).

[17] Angus passed away in April of 1965. (R920:81:23-24). A Final Decree of Distribution dated August 7, 1968 attempts to set forth the residue of Angus Kennedy's estate. (R637). Inventoried among the residual assets, according to the Final Decree, were "[a]ll" of the minerals in the Section 25 Lands and the Section 32 Lands. (R637:3). However, the inventory identified no mineral interests in Section 19 Lands and the Section 24 Lands. (*Id*.)

[18] Mr. Nevin is the successor to the interest held by Lois after the 1960 Deeds (R592; R593), and the Kennedy Heirs are the successors to the interest held by Angus after the 1960 Deeds. Defendant Burlington Resources Oil & Gas Company, LP ("Burlington") was the first to identify Mr. Nevin's interest in 2009 and, on September 15, 2010, Burlington obtained a Paid Up Oil, Gas & Mineral Lease from Mr. Nevin covering the Section 19 Lands. (R604). Northern obtained an Oil and Gas Lease

covering the Section 24 Lands on November 9, 2016. (R594). Northern then leased the Section 25 Lands and the 32 Lands by Oil and Gas Lease dated June 9, 2017. (R595).

[19] On May 2, 2017, Northern sent Defendant Continental Resources, Inc. ("Continental") a letter requesting it to honor Northern's working interest under the Oil and Gas Leases from Mr. Nevin. (R596). Although Continental initially agreed with Northern's letter, on August 18, 2017, Continental informed Northern that the Kennedy Heirs intended to file a quiet title action and that Continental would be suspending production revenues pending a court determination. (R597). The Kennedy Heirs did not file a quiet title action, so Mr. Nevin did.

VI. STANDARDS OF REVIEW

[20] This Court reviews the trial court's interpretation of the 1960 Mineral Deeds and the adequacy of the Defendant's pleadings *de novo*. *See Gerrity Bakken, LLC v. Oasis Petro. N. Am., LLC*, 2018 ND 180, ¶ 9, 915 N.W.2d 677; *City of Fargo v. Rakowski*, 2016 ND 79, ¶ 17, 877 N.W.2d 814. It also reviews the court's legal determinations relating to res judicata and collateral estoppel *de novo*. *Chapman v. Wells*, 557 N.W.2d 725, 728 (N.D. 1996). Factual findings, on the other hand, are reviewed under the clear error standard. *Sproule v. Johnson*, 2022 ND 51, ¶ 1, 971 N.W.2d 854. A finding of fact induced by a mistaken view of the law is clearly erroneous. *Manz v. Bohara*, 367 N.W.2d 743, 746 (N.D. 1985). Also, a finding of fact is clearly erroneous if there is no evidence to support it or if, after reviewing all of the evidence, this Court is convinced that the trial court erred. *Sproule*, 2022 ND 51, ¶ 1, 971 N.W.2d 854.

VII. ARGUMENT

1. The trial court erred when it found that the 1960 Deeds are ambiguous and did not apply the rule in *Malloy*.

[21] Deeds conveying mineral interests are subject to the general rules governing contract interpretation and are construed to give effect to the grantor's intent. N.D.C.C. § 47-09-11; *Nichols v. Goughnour*, 2012 ND 178, ¶ 12, 820 N.W.2d 740. The language of the deed, if clear and explicit, will be conclusive. N.D.C.C. §§ 9-07-02, 9-07-04; *Royse v. Easter Seal Soc'y for Crippled Children & Adults*, 256 N.W.2d 542, 544 (N.D. 1977). Whether a deed is ambiguous is a question of law. *Johnson v. Shield*, 2015 ND 200, ¶ 7, 868 N.W.2d 368.

[22] The 1960 Deeds raise the "stranger to title" issue,[3] where a spouse with no apparent pre-existing interest joins in a deed with a reservation of minerals to both spouses. In *Malloy v. Boettcher*, the North Dakota Supreme Court concluded that such a reservation results in the non-owning spouse acquiring 50% of the interest owned by the spouse who held a pre-existing interest in the deeded lands. 334 N.W.2d 8, 10 (N.D. 1983).

[23] The 1960 Deeds are substantially identical to the deed in *Malloy*. In *Malloy*, Clyde Boettcher and his wife Dorothy executed a deed in 1978 conveying an undivided 1/3 interest in certain property to their daughter Loretta. *Id.* at 8. The deed reserved a life estate unto Dorothy and Clyde as the "parties of the first part." *Id*. Before they executed the deed, Clyde was the sole owner of the 1/3 interest. *Id*. When Clyde

[3] Although a misnomer, as discussed below, the term is a short-hand way of referring to a very common title scenario in North Dakota and elsewhere.

died, Loretta claimed that she was the sole owner of the undivided 1/3 interest in the property. *Id.* The North Dakota Supreme Court disagreed and held that Dorothy held a life estate under the reservation in the deed. *Id.* at 10. In other words, by including his wife Dorothy in the reservation, Clyde conveyed 1/2 of the reserved interest to his spouse and she also held a life estate measured by her life.

[24] In concluding "that a reservation or exception can be effective to convey a property interest to a third party," the *Malloy* court explained:

> [I]f Clyde had intended to deduct from the property interest being conveyed to his daughter Loretta only a life estate for the duration of his own life, he could have easily expressed that intent in the reservation clause. Instead, however, he reserved a life estate to both himself and his wife Dorothy as 'parties of the first part.' *We believe that the language of the reservation clause expresses Clyde's intent that upon his death Dorothy would possess a life estate interest in the property.*

Malloy, 334 N.W.2d at 10 (emphasis added).

[25] This Court has not overruled or otherwise restricted *Malloy*. In fact, the Court confirmed the applicability of the rule in *Hallin v. Lyngstad*. 2013 ND 168, 837 N.W.2d 888 (N.D. 2013). In *Hallin*, the grantors in a single deed were two married couples: Emma and John Lyngstad, and Walter and Esther Brandt.[4] *Id*. at ¶ 3. Before the grant, Emma Lyngstad owned 1/3 of the mineral interest and Walter Brandt owned 2/3 of the mineral interest in the property. *Id.* Their respective spouses owned no interests in the property prior to the conveyance. *Id.* The parties to the case agreed that the rule in *Malloy* governed as to their spouses. *Id.* at ¶ 10. Thus, the dispute related to the proportion of the reserved mineral interest among each set of spouses after the

[4] The Hallins were successors-in-interest to the Brandts.

conveyance. The Lyngstad parties argued that, following the execution of the deed, Emma and John Lyngstad owned 1/2 of the reserved mineral interest (despite being greater than John Lyngstad's original 1/3), while the Hallins argued that the original proportions (1/3 and 2/3) remained intact as between the two couples. *Id.* at ¶ 4.

[26] The North Dakota Supreme Court disagreed with the Lyngstads and held that the pre-existing proportionate ownership would remain intact as to the reserved interest. *Hallin*, ¶¶ 4, 14, 19. The Court determined that, while Walter Brandt effectively conveyed half of his reserved interest to his spouse Esther via the reservation (per *Malloy*), Walter's interest was not partially conveyed through the reservation to John and Emma Lyngstad. *Id.* at ¶ 19. Thus, *Hallin* confirmed the ongoing validity of *Malloy* as to spouses and left open the question concerning when a reservation may effectively convey an interest to a non-spouse.

[27] It is critical to understand that the *Malloy* court found the deed there to be unambiguous. If that were not the case, it would have remanded to the trial court to receive parol evidence to clarify the ambiguity. *See, e.g.*, *Webster v. Regan*, 2000 ND 18, ¶ 8, 605 N.W.2d 808. The Court did not do this. Instead, it ruled on the four corners of the deed. The Court specifically said that "the language of the reservation clause expresses Clyde's intent that upon his death Dorothy would possess a life estate interest in the property." *Malloy*, 334 N.W.2d at 10.

[28] This is where the trial court in this case erred initially. Although that court acknowledged that "[i]if the language used in the 1960 Deeds were unambiguous, the decision in *Malloy* would control," it concluded without discussion that the

reservation clauses in the 1960 Deeds were "ambiguous as to what Angus intended." (R827:10:¶16; R418:8:¶13).

[29] However, the reservation is not ambiguous. It specifically defines the "parties of the first part" as "Angus Kennedy and Lois Kennedy" and states thereafter in typewritten print that it reserved all oil, gas, and other minerals to "THE PARTIES OF THE FIRST PART." *See* N.D.C.C. § 9-07-16; *Olson v. Peterson*, 288 N.W.2d 294, 297, 298 (N.D. 1980). Every pronoun within the document harmonizes with the plural nature of the "parties of the first part" (*i.e.*, "they," "their"), including the covenants of general warranty that both Angus and Lois provided. Angus intended to reserve his minerals to both himself and his wife Lois Kennedy; we know this because it is what he clearly stated in the 1960 Deeds. He was not required to execute two instruments to accomplish what he could (and did) accomplish in one.[5]

[30] Because the 1960 Deeds unambiguously reserve Angus Kennedy's mineral interest unto both him and Lois Kennedy, this Court should reverse and remand with instructions to quiet title to 50% of the mineral and working interest in the Property in Northern and Mr. Nevin's name.[6] *See* N.D.C.C. § 47-02-08; *Black Stone Minerals Co., L.P. v. Brokaw*, 2017 ND 110, ¶ 9, 893 N.W.2d 498 (*citing* 7 Richard R. Powell, Powell on Real Property § 50.02[5] (Michael Allen Wolf ed., 2017)); *see also Myaer*

[5] *I.e.*, one deed conveying the surface to the grantee and a separate one conveying half the minerals to Lois.

[6] A natural result would also be that Burlington's Paid Up Oil and Gas Lease in Section 19 will also be validated.

v. Nodak Mut. Ins. Co., 2012 ND 21, ¶ 10, 812 N.W.2d 345 (stating that interpretation is a question of law where the document is unambiguous).

2. The trial court erred when it admitted extrinsic evidence and reformed the 1960 Deeds against Northern and Mr. Nevin.

a. *The district court's admission of extrinsic evidence violated the parol evidence rule.*

[31] Courts may not receive extrinsic evidence to alter, vary, or explain a deed where the grantor's intent is discernible from the deed itself. *Flaten v. Couture*, 2018 ND 136, ¶ 14, 912 N.W.2d 330. Therefore, when the district court received evidence outside of the 1960 Deeds, it violated the parol evidence rule. *See Gawryluk v. Poynter*, 2002 ND 205, ¶ 9, 654 N.W.2d 400 ("When the language of a deed is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed."). In effect, the district court ignored the parol evidence rule to reform the 1960 Deeds to replace the typewritten, capitalized text stating "PARTIES OF THE FIRST PART" with "Angus Kennedy," and to replace "*their* heirs, successors or assigns" with "*his* heirs, successors or assigns."

b. *The Defendants did not request reformation in their pleadings or plead a factual basis for reformation.*

[32] The only circumstances under which a court may receive extrinsic evidence to alter a clear deed is where the proponent of the evidence has pled reformation based on a substantive theory such as fraud or mutual mistake. *See Arndt v. Maki*, 2012 ND 55, ¶ 12, 813 N.W.2d 564; *see also* N.D.C.C. § 32-04-17. In such

instances, the party seeking reformation must allege fraud or mistake with particularity. N.D. R. Civ. P. 9(b).

[33] The lower court's reformation of the 1960 Deeds was improper at the outset because none of the Defendants pled the remedy of reformation or facts that would constitute a substantive basis for reformation. *See* N.D. R. Civ. P. 8(a) (setting forth notice pleading standard); N.D. R. Civ. P. 9(b) (requiring fraud and mistake to be pled with specificity); N.D.C.C. § 32-04-17; *Evangelical Lutheran Church v. Stanolind Oil & Gas Co*., 251 F.2d 412, 419-20 (8th Cir. 1958) ("It is the rule that facts establishing fraud or mistake . . . upon which reformation might be based must be specifically pleaded."). Northern repeatedly objected to the Defendants' pleading deficiency, which they never attempted to rectify (likely because of the heightened burden of proof associated with reformation). Because of these pleading deficiencies, the district court erred when it allowed the Defendants to reform the 1960 Deeds.

c. *No evidence supports reformation, and the only admissible extrinsic evidence supports Mr. Nevin and Northern.*

[34] In cases where the claimant has pled reformation and a substantive basis with particularity, the claimant must then present evidence which is "clear, satisfactory, specific, and convincing." *Freidig v. Weed*, 2015 ND 215, ¶12, 868 N.W.2d 546. Courts must "not grant reformation upon a mere preponderance of evidence, but only upon certainty of error." *Id.* Finally, "When considering whether to reform a written instrument, courts should exercise great caution and require a high degree of proof, *especially when death has sealed the lips of the original parties or a party*." *Arndt*, 2012 ND 55, ¶12, 813 N.W.2d 564 (internal quotation omitted) (emphasis in original).

[35] Even setting aside the pleading problems, the Defendants did not prove a right to reformation. When considering whether to reform based on mutual mistake, which is presumably the only basis upon which Defendants could theoretically proceed, the inquiry is whether there was a mutual mistake at the time the parties executed the instrument. *Freidig,* 2015 ND 215, ¶ 11, 868 N.W.2d 546. As indicated above, given the "mutual" nature of the mistake, the claimant seeking reformation must demonstrate with clear and convincing evidence that each party to the transaction operated under the same mistaken factual assumption. *See Johnson v. Hovland*, 2011 ND 64, ¶ 12, 795 N.W.2d 294; *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 15, 703 N.W.2d 330; *Mougey Farms v. Kaspari*, 1998 ND 118, ¶ 35, 579 N.W.2d 583.

[36] Here, the Kennedy Heirs did not present any evidence that Angus Kennedy, Lois Kennedy, Douglas Kennedy, and Angus Kennedy, III operated under a common mistaken belief concerning the effect of the reservation in the 1960 Deeds (nor did the lower court make such a finding). Indeed, the *only* extrinsic evidence having any bearing on intent is the 1963 Deed. (R590). That deed unquestionably supports Mr. Nevin and Northern. In that document, Angus Kennedy specifically granted a "one-half" mineral interest in typewritten print and later clarified that it was his "intention . . . to convey all of the mineral interest owned by him." (*Id*.). In other words, the 1963 Mineral Deed stated that Angus was intending to convey all his interest, and that he believed that his interest was limited to a 50% interest in the entire mineral estate.

[37] To the extent extrinsic evidence is permitted, these statements in the 1963 Mineral Deed are dispositive on intent because of two facts. First, the parties agree

that Angus Kennedy owned 100% of the mineral estate in the Property prior to the 1960 Mineral Deed. Second, the parties further agree that there were no intervening conveyances between the 1960 Deeds and the 1963 Mineral Deed. (R920:28:24-29:4, 134:10-17). Thus, in the 1963 Mineral Deed Angus said, for all intents and purposes, "I conveyed half of my mineral interest to Lois in the 1960 Deeds."

[38] In its Summary Judgment Order, the trial court initially agreed with Northern and Mr. Nevin that the 1963 Mineral Deed confirms Angus's intent to reserve half of the minerals unto Lois Kennedy in the 1960 Deeds. The court said, "Judging the [1963 Mineral Deed] by its four corners, the inference is that Angus only owns ½ the minerals, and that is what he is transferring." (R418:9:¶15). Further, it stated that "[t]he 1963 Mineral Deed appears to support the point that Angus only had ½ the minerals after the 1960 Deeds." (R418:11:¶20). However, in the Order for Judgment after trial, the district court reversed its earlier findings without any new evidence bearing on the 1963 Mineral Deed, stating: "The court finds the 1963 Mineral Deed is not probative as to Angus's intent to the 1960 Deeds." (R827:11:¶18). The lower court was correct in its initial analysis of the 1963 Mineral Deed.

[39] At trial, the court admitted every document offered by the Kennedy Heirs[7] over Northern's repeated objections. The Kennedy Heirs' evidence, however, holds no probative value because none of the documents or testimony related to Angus Kennedy's (or any other original party's) intent. Outside of Angus's Last Will and

[7] No other Defendants participated meaningfully at the trial other than Continental, whose evidence related to the original demand made to Northern, Continental's response, and the subsequent decision to place all revenues in suspense.

Testament, all the documents – including the probate documents – were prepared and executed by third parties. The admission and consideration of such evidence was contrary to the law.

[40] In North Dakota, assuming extrinsic evidence is proper in the first place, only the original parties' conduct subsequent to the disputed instrument is relevant on intent. *See Minex Res. v. Morland*, 518 N.W.2d 682, 686 (N.D. 1994); *Johnson Constr. v. Rugby Mun. Airport Auth.*, 492 N.W.2d 61, 66 (N.D. 1992); *Stracka v. Peterson*, 377 N.W.2d 580, 583 (N.D. 1985); *Beck v. Lind*, 235 N.W.2d 239, 248 (N.D. 1975). The actions of nonparties, including successors in interest, do not bear on the intent of the original grantor. *See Stracka*, 377 N.W.2d at 583 ("The [successors-in-interest] were not parties to the 1946 deed and so their conduct is immaterial."); *Hanson Indus. v. Cty. of Spokane*, 114 Wash. App. 523, 535, 58 P.3d 910, 917-18 (Wash. App. 2002); *Guido v. Baldwin*, 172 Ind. App. 445, 450, 360 N.E.2d 842, 847 (Ind. App. 1977); *see also Mehus v. Thompson*, 266 N.W.2d 920, 924 (N.D. 1978).

[41] Thus, the Defendants' evidence – consisting of numerous conveyances by the successors of Angus Kennedy years or decades later – is irrelevant. In *Stracka*, this Court found that even the original party's leasing activity after the disputed conveyance was irrelevant because it could "indicate [the lessor's] mistaken belief" concerning her ownership. *Stracka*, 377 N.W.2d at 583. Here, that principle applies with even greater force because the leases and other instruments were even not executed by Angus.

[42] Further, in this case, Northern is not aware of a single document of record in McKenzie County where a successor of Angus leased or conveyed anything other

all or a portion of "his," "her," or "its" interest. In other words, there is no indication that these heirs were leasing or transferring anything other than the interests they acquired through the Kennedy Trust (*i.e.*, the remaining 50% interest in Angus's estate after the conveyance to Lois) and/or the Kennedy Cattle Company.

[43] And while certainly Angus signed the Last Will and Testament, that document does not speak to the issues in this case. (R610). Like most wills, Angus's Last Will and Testament simply prescribes the disposition of the residue of his estate after the specific bequests and devises. Angus did not specifically devise any of the minerals to the Property, nor did he append any sort of schedule or inventory setting forth the property that he believed comprised the residue of his estate. Thus, the Last Will and Testament is not helpful.

[44] Despite this fact, the principal testimony of the Kennedy Heirs' representative at trial (James Kennedy) related to the reading of Angus's Last Will and Testament. James Kennedy testified that he remembered, as a fifteen-year-old in 1965, the absence of any sort of reaction from Lois when Jack Davidson read the document aloud. (R920:82:13-15; 89:7-9) The Kennedy Heirs argue that Lois's silence signifies some sort of acquiescence to the notion that she was not entitled to any real property interests in North Dakota. This argument is flawed for two major reasons.

[45] First, this argument assumes that Angus Kennedy's estate plan under his Last Will and Testament bears upon the issues here. As discussed above, it does not. Northern does not contest the fact that Angus willed his remaining North Dakota real property generally to the children of his first marriage. However, this fact does not speak to whether he conveyed half the minerals in the Property to Lois several years

earlier. Just like any inter vivos transfer to a third party during his lifetime, the minerals reserved unto Lois were not part of Angus's estate. *In re Estate of Barg*, 752 N.W.2d 52, 71 (Minn. 2008); *Gheen v. State ex rel. Dep't of Health*, 2014 WY 70, ¶ 14, 326 P.3d 918, 923 (Wyo. 2014). Furthermore, Angus knew they were not part of his estate because, about six (6) months after he signed his Last Will and Testament, he executed the 1963 Mineral Deed. (R590; R610). This document shows that Angus understood that the minerals reserved to Lois in the 1960 Deeds were not part of his estate. (R590).

[46] This is another issue upon which the district court changed courses. In the Summary Judgment Order, the trial court acknowledged that the "silence as to Lois's minerals in the will and final decree can be an inference . . . that [Angus] had already provided her minerals in the 1960 Deeds, and thus it was redundant to list her minerals." (R418:10:¶16). Following the bench trial, however, and again without any new evidence, the trial court held that "the silence as to Lois's minerals in the will and the final decree is a strong inference that Angus did not intend for Lois to get any minerals." (R827:11:¶19).

[47] Second, Lois's reaction to the reading – which took place only two or three days after her husband's passing (R920:81:23-24; 83:2-12) – is simply not relevant. A party who received real property from a decedent during his lifetime cannot convey that property back into the decedent's estate based on his or her reaction to the reading of the decedent's will. *See Harrison v. Manvel Oil Co.*, 180 S.W.2d 909, 918 (Tex. 1944) ("Title cannot be divested by mere acquiescence, nor does mere inaction raise an estoppel."); *Roberts v. Bookout*, 139 So. 175, 176 (Miss. 1932) (holding that "mere silence . . . is not sufficient to divest title . . . out of its true owner").

[48] Indeed, if anything, Lois's reaction indicates that she also believed that her mineral interests in the Property were not subject to the Last Will and Testament. If Lois had reacted with surprise or dismay, certainly the Kennedy Heirs would argue with even greater fervor that their position is correct. The bottom line is that any attempt to extrapolate significance from the actions or inaction of a widow in mourning, as discerned by a 15-year-old boy at the time, is completely speculative.

d. *Northern was a bona fide purchaser against whom the 1960 Deeds could not be reformed.*

[49] The reading of the Last Will and Testament illustrates why parties cannot reform deeds against a bona fide purchaser like Northern. *See* N.D.C.C. § 32-04-17; *Farmers Union Oil Co. v. Smetana*, 2009 ND 74, ¶¶ 18, 24, 764 N.W.2d 665, 671, 673-74 (N.D. 2009). When Northern purchased its Oil and Gas Leases from Mr. Nevin, the 1960 Deeds plainly reserved half of the minerals unto Lois and the 1963 Mineral Deed confirmed this fact. Northern was entitled to rely on the state of the record title, and the appliable rule of law governing the instruments, when it made its investment decisions. Northern is a bona fide purchaser against whom the 1960 Deeds may not be reformed. This is another reason for the Defendants' aversion to claiming such relief.

e. *Any reformation claim is time-barred*

[50] Finally, for similar reasons, any action to reform would be time-barred. North Dakota Century Code § 28-01-15(2) requires that a party seeking to reform an instrument based on mutual mistake must commence the action within ten years after the claim for relief accrues. *W. Energy Corp. v. Stauffer*, 2019 ND 26, ¶ 9, 921 N.W.2d 431. Further, the claim for relief accrues at the time the instrument in question is

recorded. *See id*. at ¶ 10. Applying these principles here, the Defendants or their predecessors should have pursued reformation of the 1960 Deeds no later than March 10, 1970. *See Tarnavsky v. McKenzie Cty. Grazing Ass'n*, 2003 ND 117, ¶ 10, 665 N.W.2d 18 (N.D. 2003) (noting a successor in interest "is not entitled to any greater rights under the statute of limitations than his predecessors in interest"). Further, even assuming that *Malloy* abrogated from the common law (which it did not),[8] the Defendants or their predecessors had until May 12, 1993 (ten years after *Malloy*) to file suit. Given that they did not do so, Northern may rely on the state of record title and the Defendants cannot reform the 1960 Deeds here.

[51] In summary, instead of accepting the construction that harmonizes the three deeds without alteration, the lower court adopted an interpretation that creates a conflict between 1960 Deeds and the 1963 Mineral Deed and then harmonizes them through revision. *See Century Fin. Servs. Grp. v. Bates*, 934 S.W.2d 619, 621 (Mo. Ct. App. 1996). The court first revised the 1960 Deeds to replace "PARTIES OF THE FIRST PART" in the reservation with "Angus Kennedy" (and changed all associated pronouns) and then effectively revised the 1963 Mineral Deed to say "100%" instead of "one-half" in order to render it consistent with the notion that Angus did not previously reserve 50% of the minerals unto Lois. This was improper procedurally and substantively and does not give proper credence to the competence of the attorneys who prepared the deeds. This Court should reverse the judgment of the trial court and direct the entry of a quiet title judgment into Mr. Nevin and Northern's names.

[8] An argument Northern intends to rebut on reply if made by the Defendants.

3. The trial court erred when it ruled that res judicata and collateral estoppel precluded Northern and Mr. Nevin.

a. *Applicable legal standards.*

[52] Res judicata and collateral estoppel are affirmative defenses that a defendant must assert when answering a complaint. *Great W. Cas. Co. v. Butler Mach. Co.*, 2019 ND 200, ¶ 8, 931 N.W.2d 504 (N.D. 2019); *see also* N.D.R.Civ.P. 8(c). Failure to raise an affirmative defense in an answer waives the defense. *In Interest of K. B.*, 490 N.W.2d 715, 717-718 (N.D. 1992); *see also Gustafson v. Poitra*, 2008 ND 159, ¶ 7, 755 N.W.2d 479 (N.D. 2008). If advanced as a basis for the claimant's own relief (*i.e.*, offensively), the claimant pursuing res judicata or collateral estoppel must set forth a statement of facts showing that he or she is entitled to the relief and must formally demand such relief. N.D. R. Civ. P. 8(a). Additionally, the claimant must identify the applicable judgment that purportedly precludes the adverse parties. *See* N.D. R. Civ. P. 9(e).

[53] Assuming it is properly pled, res judicata (or claim preclusion) applies only if the party advancing the theory establishes (1) that there has been a final decision on the merits in a prior action issued by a court of competent jurisdiction, (2) the second action involves the same parties, or their privies, as the prior action, (3) the current action raises an issue that was actually litigated or which should have been litigated in the first action, and (4) the two causes of action are identical. *Mo. Breaks, LLC v. Burns*, 2010 ND 221, ¶ 12, 791 N.W.2d 33. Regarding collateral estoppel, or issue preclusion:

> Four tests must be met before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the

> party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Hofsommer v. Hofsommer Excavating, 488 N.W.2d 380, 384 (N.D. 1992). Like res judicata, collateral estoppel requires that the prior determination be based on a judgment entered by a tribunal of competent jurisdiction. *Id*. at 383.

b. *The Defendants did not properly plead res judicata or collateral estoppel and the doctrines were not tried.*

[54] None of the counterclaiming Defendants pled res judicata or collateral estoppel either defensively or offensively. The only Defendants to plead either doctrine were Defendants Michelle Grass and Colleen Zychowicz, and they did so by simply stating "res judicata" among their affirmative defenses. These two Defendants did not counterclaim and therefore provided no factual basis concerning how the doctrines could apply. Nor did they identify the applicable judgment under N.D. R. Civ. P. 9(e).

[55] When the Kennedy Heirs filed their Motion for Summary Judgment, however, they sought to quiet title in their names based on the allegedly preclusive effect of the inventory in the Final Decree in Angus Kennedy's probate. Mr. Nevin and Northern objected based on the pleading deficiency and responded to the issues substantively. In its February 6, 2020 Summary Judgment Order, the trial court largely agreed with Mr. Nevin and Northern on both counts. Procedurally, the court said:

> Res judicata is an affirmative defense that requires pleading before a court can address it. In this case, only [Michelle Grass and Colleen Zychowicz] have plead res judicata; the other Kennedy Heirs only raised it in summary judgment briefing. The other Kennedy Heirs argue by reserving all other affirmative defenses in their answer until after discovery, they have preserved res judicata. However, Rule 8(c) is clear it must be affirmatively stated, and res judicata was not. Since N.D.R.Civ.P. 8(c) specifically requires the defense be affirmatively

> stated, res judicata can only be used by Michelle Grass and Colleen Zychowicz.

(R418:10:¶18). Substantively, the court said res judicata and collateral estoppel do not answer the question concerning Lois's ownership because her "ownership of those mineral interests would not be an issue raised in the probate, nor necessary and essential to the Final Decree."

[56] Following these rulings in the Summary Judgment Order, on March 15, 2020, the Kennedy Heirs moved to amend their answer to add the affirmative defense of res judicata. (R427). On May 1, 2020, the district court denied leave to amend due to undue delay and the futility of the defense. (R468). The court said that it "has already ruled that res judicata does not apply" and that "it would be futile to allow the Kennedy Heirs to amend their pleadings to add an affirmative defense that the court has already deemed irrelevant to the issues at hand." (R468:4:¶4). Based on these rulings, and the bifurcation of the title and accounting issues, the court said in a September 29, 2020 "Order after Status Conference Regarding Trial Issues" that the "scope of the trial will be limited to the interpretation of the [1960 Deeds]." (R501:2:¶1).

[57] Thus, the district court erred procedurally when it ruled after trial that res judicata and collateral estoppel precluded Mr. Nevin and Northern's claims. No Defendant pled collateral estoppel in any form, so they all waived that defense. N.D. R. Civ. P. 8(c); *Skogen v. Hemen Twp. Bd. of Twp. Supervisors*, 2010 ND 92, ¶18, 782 N.W.2d 638; *Gustafson v. Poitra*, 2008 ND 159, ¶ 7, 755 N.W.2d 479; *In Interest of K. B.*, 490 N.W.2d 715, 717-718 (N.D. 1992). Although Michelle Grass and Colleen Zychowicz raised res judicata in their Answer, they did not appear for trial to prosecute

it, and the other Defendants cannot avail themselves of a defense that they did not plead. *Sande v. Sande (In re Estate of Sande)*, 2020 ND 125, ¶ 10, 943 N.W.2d 826; *Palmisano v. Townsend*, 392 A.2d 393, 395 (Vt. 1978).

[58] Even more fundamentally, none of the Defendants pled res judicata or collateral estoppel offensively to support a claim to quiet title. As this Court knows, a properly pled affirmative defense can defeat a plaintiff's claim but cannot supply a basis for relief in favor of the defendant. *Morris Cerullo World Evangelism v. Newport Harbor Offices & Marina, LLC*, 67 Cal. App. 5th 1149, 1157-58 (Cal. App. 2021). If a defendant has a competing claim to quiet title, as stated above, that defendant must set forth a short and concise statement of facts to support the relief. N.D. R. Civ. P. 8(a)(1). The facts must give notice of the nature of the claim so that the adverse parties can prepare their defense:

> The primary function of a bill of complaint is to apprise the court and the defendant of the grounds or basis of the plaintiff's claim. To do this, the plaintiff must allege all of the necessary facts upon which he bases his cause of action. Failure to state those facts, or others from which they might reasonably be inferred, is failure to state a cause of action.

In re Estate of Hill, 492 N.W.2d 288, 296 (N.D. 1992); *see also* N.D.C.C. § 32-17-08 (requiring counterclaiming defendant in quiet title action to allege "fully and particularly the origin, nature, and extent of the defendant's own claim to the property.")

[59] Here, none of the Defendants pled facts that could support applying res judicata or collateral estoppel as affirmative relief to quiet title in their own names. The only facts any Defendants pled in support of their quiet title claims related to the alleged practice of having non-owning spouses join as grantors in deeds in order to waive

homestead rights. It would have been very simple for any of the Defendants to similarly plead basic facts surrounding the inventory in the Final Decree entered in Angus Kennedy's probate to quiet title in their own names under the preclusive doctrines. The Defendants' failure to do so bars them from using those doctrines offensively, and the lower court erred when it allowed the Kennedy Heirs to do so – especially after its prior rulings and the stated scope of trial. The Court should reverse the district court's application of res judicata and collateral estoppel on procedural grounds.

c. *The Defendants are the first to be estopped.*

[60] The district court's rationale concerning collateral estoppel and res judicata is flawed because, setting aside the merits, the Defendants are the parties who this Court should estop. *See Mau v. Schwan*, 460 N.W.2d 131, 133 (N.D. 1990). The Kennedy Heirs' argument on the subject arises from a property inventory incorporated into a Final Decree of Distribution entered by a county court more than three (3) years after Angus's passing. (R637). The theory is that Northern and Mr. Nevin, as privies to Lois, cannot argue ownership contrary to the Final Decree.

[61] One of the main problems with this contention, however, is that it ignores the declarations made by Angus Kennedy himself. More than five years before the Final Decree, Angus declared in the 1963 Mineral Deed that he had previously conveyed half his mineral interest to Lois. Typewritten in the grant language was a "one-half" mineral interest, followed by a typewritten intent clause stating that the interest conveyed was his entire interest. This is significant because of the doctrine of estoppel by deed.

[62] "Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting as against the other and his privies any right or title in derogation

of the deed, or from denying the truth of any material fact asserted in it." *Kadrmas v. Sauvageau*, 188 N.W.2d 753, 756 (N.D. 1971) (*quoting* 31 C.J.S. Estoppel § 10, 295); *see also McLaughlin v. Lambourn*, 359 N.W.2d 370, 372 (N.D. 1985).

> [T]he doctrine of estoppel by deed provides that equity will not permit a grantor, or one in privity with him or her, to assert anything in derogation of an instrument concerning an interest in real or personal property as against the grantee or his or her successors. . . . The principle is that when a person has entered into a solemn engagement by deed, he or she will not be permitted to deny any matter that he or she has asserted therein for a deed is a solemn act to any part of which the law gives effect as the deliberate admission of the maker; to him or her it stands for truth, and in every situation in which he or she may be placed with respect to it, it is true as to him or her. Estoppel by deed promotes the judicious policy of making certain formal documents final and conclusive evidence of their contents.

28 Am. Jur. 2d Estoppel and Waiver § 5; *see also Shedden v. Anadarko* E. & P. Co., L.P., 635 Pa. 381, 394, 136 A.3d 485, 492 (Pa. 2016); *Moore v. Energy States, Inc*., 71 S.W.3d 796, 799 (Tex. App.—Eastland 2002) (*quoting Williams v. Hardie*, 85 Tex. 499, 22 S.W. 399, 401 (Tex. 1893)) ("[A] man may bind himself irrevocably by putting his seal to a grant or covenant, and will not be allowed to disprove or contradict any declaration or averment contained in the instrument and essential to its purpose.").

[63] The successors of Angus Kennedy cannot disclaim his declarations in the 1963 Mineral Deed concerning the effect of the 1960 Deeds. This estoppel arose long before any estoppel that could theoretically arise against Lois and her successors under the Final Decree because 1963 Mineral Deed was of record at the time of the probate. *Gilbertson v. Charlson*, 301 N.W.2d 144, 148 (N.D. 1981) ("One of the requirements for estoppel . . . [is] that the party seeking estoppel not only lack actual knowledge regarding the true state of title, but be destitute of means of acquiring such

knowledge. A public record is such a means."). Moreover, Angus's declarations in the 1963 Mineral Deed were made after his Last Will and Testament. He stated that the 1960 Deeds reserved 50% of the mineral interest unto Lois, and it necessarily follows that the reserved interest was not part of his estate. Angus's declarations cannot be reversed years later by individuals involved in the probate who had no knowledge of the 1960 Deeds. For this additional reason the district court erred in applying res judicata and collateral estoppel.

d. *Res judicata and collateral estoppel do noy apply in any event.*

[64] Most fundamentally, Angus Kennedy's probate could not expand the assets he owned at the time of his death and the preclusive doctrines do not apply. A probate court adjudicates heirship and the distribution of an estate; it does not try title as against a person who holds an interest adverse to the estate from a source other than the decedent's will. *Gjerstadengen v. Van Durzen*, 76 N.W. 233, 234 (N.D. 1898). In *Gjerstadengen*, the Court said:

> As the land did not belong to the estate of the deceased, it is obvious that the court was without jurisdiction to order the sale thereof. When the land directed to be sold is the property of a stranger, the probate court possesses no jurisdiction over such property; nor has it any power to try the question of title in such a proceeding, or at all. Should the owner of the land appear in the proceeding, and set up his title, and be defeated, it would nevertheless be true that the court would be without jurisdiction. For the statutes do not contemplate that a probate court shall hear and determine questions relating to the title to land. It has power to act only when the real estate is in fact the property of the decedent. All that it ever pretends to do in a proceeding of the character of that which is here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof. Nor can it decide such question, even when voluntarily litigated before it.

Id. Similarly, in *Arnegaard v. Arnegaard*, this Court elaborated that a probate court

> [H]as has no power to try the question of title, as between the representative and persons claiming adversely to the estate. If the decedent has in fact conveyed his land before his death, that court cannot, by any order or judgment it may make, settle one way or the other the question whether the decedent owned the land at the time of his death. The fact that the grantee in such a conveyance may happen to be a person interested in the estate does not alter the rule. As to such property, he is in the same position as an entire stranger. The court in which the estates of deceased persons are administered has no jurisdiction of a proceeding to determine whether the decedent has or has not transferred the property to another. Such a controversy must be settled in the District Court, and it can make no difference that the question is fully contested in the county court, for the parties cannot by consent confer jurisdiction over the subject matter.

7 N.D. 475, 501-02, 75 N.W. 797, 806 (N.D. 1898). This court has consistently acknowledged the foregoing limits on the jurisdiction of a court sitting in probate. *See Sturdevant v. SAE Warehouse*, 270 N.W.2d 794, 799 (N.D. 1978); *Riebe v. Riebe*, 252 N.W.2d 175, 178 (N.D. 1977); *O'Connor v. Immele*, 43 N.W.2d 649, 655 (N.D. 1950); *Harris v. Erickson*, 77 N.D. 69, 75, 40 N.W.2d 446, 449 (1949) (stating that that listing of property in an inventory "does not affect the true title"); *Nw. Tr. Co. v. Getz*, 67 N.D. 15, 22, 269 N.W. 53, 55-56 (N.D. 1936); *Goodwin v. Casselman*, 51 N.D. 543, 549, 200 N.W. 94, 97 (1924).

[65] The notion that probate proceedings cannot enhance the ownership of the decedent's estate through a decree or deed of distribution stems from the broader real property concept that an instrument cannot convey a greater interest than the grantor has. *See Van Sickle v. Olsen*, 92 N.W.2d 777, 784 (N.D. 1958). In *Green v. Gustafson*, this Court held that a personal representative may dispose of estate property only to the extent of the decedent's interest therein. 482 N.W.2d 842, 846 (N.D. 1992). "It is axiomatic that the personal representative is not thereby empowered to exercise

dominion over property which was never owned by either the decedent or the estate." *Id*. The jurisdiction of a probate court is limited to the decedent's property interests and it cannot, by distribution, expand that ownership or jurisdiction.

[66] Accordingly, any attempt by a probate court to distribute property not owned by the estate is a nullity. *Sabot v. Fox*, 272 N.W.2d 280, 281 (N.D. 1978). In *Sabot*, children of the deceased, Emil, appealed a judgment quieting title in their mother, Francis, to property that was held in joint tenancy by both Francis and Emil. *Id*. at 280. The children attempted to argue that Emil's probate proceedings precluded Francis from claiming an interest in the disputed property. *Id*. at 281. Disagreeing with the children, this Court held that – because the property vested in Francis by operation of law immediately at the time of Emil's death – it passed by right of survivorship and was outside of the probate. *Id*. *See also Bolyea v. First Presbyterian Church*, 196 N.W.2d 149, 161 (N.D. 1972) (recognizing that an inter vivos transfer occurred before death and was therefore not subject to probate).

[67] *Sabot* is also noteworthy because it made clear that participation in the probate proceedings does not place a person's property interests acquired outside of the will under the jurisdiction of the probate court. *Sabot* at 281-282. There, Francis's Appearance and Waiver of Service and Citation to the probate proceedings did not cause her to assign, relinquish or otherwise alter her interest in the property acquired by right of survivorship. *Id*. at 282.

[68] Applying these principles here, the probate court presiding over the administration of Angus Kennedy's Last Will and Testament did not purport to transfer Lois's mineral title under the 1960 Deeds. The county court did not have the jurisdiction

to do this, nor is there any indication that it tried. The proceedings before the probate court were limited to the heirship and distribution of Angus Kennedy's estate. It could not determine disputed title, if any, arising from transfers that occurred outside of the Last Will and Testament (whether the transferee was also a beneficiary under the Will or not).

[69] The Final Decree can operate to preclude any objection to the distribution of the 1/2 mineral interest in the Property that Angus Kennedy owned at the time of his death.[9] However, it does not preclude Lois and her successors from owning the other 1/2 interest that passed to her under the 1960 Deeds. The elements of res judicata and collateral estoppel are not satisfied, and the Court should reverse and remand the district court on that determination as well.

VIII. CONCLUSION

[70] Based on the arguments above, the Court should reverse the trial court and remand with instructions to (i) quiet title to the disputed mineral and working interests in the Property in Northern and Mr. Nevin's names, and (ii) hold further proceedings on Northern's accounting claims.

E. CERTIFICATE OF COMPLIANCE

[71] This 36-page brief complies with the page limitation pursuant to N.D.R. App. P. Rule 32(a)(8).

Dated this August 22, 2022.

[9] Note that the Final Decree did not schedule any mineral interests in the Section 19 Lands and the Section 24 Lands. Although this fact supports Mr. Nevin and Northern, it is immaterial because probate courts do not try title.

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NORTH DAKOTA SUPREME COURT

Stanley R. Nevin,

Plaintiff,

and

Northern Oil and Gas, Inc.,

Plaintiff-Intervenor/

Appellant,

v.

Helen L. H. Kennedy; Gena Baker f/k/a Gena Kennedy; Nona Kennedy; Jason Craig Newburn, as personal representative of Maura Kay Newburn, deceased: Keira Kennedy Adams; Jess Anne Knutson; Charles Herbert Jacobson; Miles G. Johnsrud and Marlene Kay Johnsrud, as Co-Trustees of the Miles and Marlene Johnsrud Family Mineral Trust under Agreement dated July 13, 2011; JoAnn Kennedy; Scott Cameron, as Trustee of the Scott Cameron Trust dated June 13, 2013; Shannon Kristine Dusek and David Alan Dusek, as Trustees of the Shannon and David Dusek Family Revocable Trust; Tiffany Papagno, as Personal Representative of the Estate of Thomas W. Kennedy, deceased; Robert W.

Supreme Court No. 20220136

McKenzie County Civil No. 27-2018-CV-97

Kennedy; Michael Kennedy; Lisa Marie Kennedy; Lisa Marie Kennedy; James M. Kennedy; Jodie Thompson Woroniecki, as Personal Representative of the Estate of Barbra Kennedy Johnson a/k/a Barbara Kennedy Johnson, deceased; Michelle Grass; Colleen Zychowicz f/k/a Colleen Kennedy; Debra Kennedy Griffie; Donald James Kennedy, Jr.; Steven Shannon Kennedy; Benjamin J. Larson; Rainbow Energy Marketing Corporation; Northern Energy Corporation; Landmark Oil and Gas, LLC, Missouri River Royalty Corporation; Spartan Minerals & Royalty LLC; Sven Resources, LLC; Continental Resources, Inc.; Burlington Resources Oil & Gas Company LP; XTO Holdings, LLC; PetroShale (US), Inc.; Bole Resources LLC; Brooks Energy Inc.; CJC Energy Inc.; KT Energy Inc., Mel Energy Inc.; Noble Royalty Access Fund 12 LP; Noble Access Royalty Fund 13 LP; North Fork AD3, LLC; Outdoor Entourage Inc.; G. William Hurley Revocable Trust; Hurley Oil Properties Inc.; Wind River Resources Inc.; WHC Exploration LLC; Dakota West, LLC; Marvin J. Masset; Avalon North, LLC; Peter Masset; Newport Minerals, Ltd.; Deep Rock Resources, LLC; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representative of any of the above-named

persons who may be deceased or under any other title or interest,

Defendants/Appellees.

DECLARATION OF SERVICE

I hereby certify that on the 22nd day of August, 2022, I served the BRIEF OF APPELLANT NORTHERN OIL AND GAS, INC. in the above-captioned matter on the following parties over Odyssey.

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STATE OF NORTH DAKOTA

NORTH DAKOTA SUPREME COURT

Stanley R. Nevin,

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and

Northern Oil and Gas, Inc.,

Plaintiff-Intervenor/

Appellant,

v.

Helen L. H. Kennedy; Gena Baker f/k/a Gena Kennedy; Nona Kennedy; Jason Craig Newburn, as personal representative of Maura Kay Newburn, deceased: Keira Kennedy Adams; Jess Anne Knutson; Charles Herbert Jacobson; Miles G. Johnsrud and Marlene Kay Johnsrud, as Co-Trustees of the Miles and Marlene Johnsrud Family Mineral Trust under Agreement dated July 13, 2011; JoAnn Kennedy; Scott Cameron, as Trustee of the Scott Cameron Trust dated June 13, 2013; Shannon Kristine Dusek and David Alan Dusek, as Trustees of the Shannon and David Dusek Family Revocable Trust; Tiffany Papagno, as Personal Representative of the Estate of Thomas W. Kennedy, deceased; Robert W. Kennedy; Michael Kennedy; Lisa Marie Kennedy; Lisa Marie Kennedy; James M. Kennedy;

Supreme Court No. 20220136

McKenzie County Civil No.
27-2018-CV-97

Jodie Thompson Woroniecki, as Personal Representative of the Estate of Barbra Kennedy Johnson a/k/a Barbara Kennedy Johnson, deceased; Michelle Grass; Colleen Zychowicz f/k/a Colleen Kennedy; Debra Kennedy Griffie; Donald James Kennedy, Jr.; Steven Shannon Kennedy; Benjamin J. Larson; Rainbow Energy Marketing Corporation; Northern Energy Corporation; Landmark Oil and Gas, LLC, Missouri River Royalty Corporation; Spartan Minerals & Royalty LLC; Sven Resources, LLC; Continental Resources, Inc.; Burlington Resources Oil & Gas Company LP; XTO Holdings, LLC; PetroShale (US), Inc.; Bole Resources LLC; Brooks Energy Inc.; CJC Energy Inc.; KT Energy Inc., Mel Energy Inc.; Noble Royalty Access Fund 12 LP; Noble Access Royalty Fund 13 LP; North Fork AD3, LLC; Outdoor Entourage Inc.; G. William Hurley Revocable Trust; Hurley Oil Properties Inc.; Wind River Resources Inc.; WHC Exploration LLC; Dakota West, LLC; Marvin J. Masset; Avalon North, LLC; Peter Masset; Newport Minerals, Ltd.; Deep Rock Resources, LLC; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representative of any of the above-named persons who may be deceased or under any other title or interest,

Defendants/Appellees.

DECLARATION OF SERVICE

I hereby certify that on the 23rd day of August, 2022, I served the BRIEF OF APPELLANT NORTHERN OIL AND GAS, INC. in the above-captioned matter on the following parties over Odyssey.

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Attorney for PetroShale (US), Inc.

I further certify that on the 23rd day of August, 2022, I served the BRIEF OF APPELLANT NORTHERN OIL AND GAS, INC. in the above-captioned matter on the following parties by depositing the same, postage prepaid, by first class mail in the United States mail at Denver, Colorado.

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Casper, WY 82601

Hurley Oil Properties Inc. at
R.A. G. William Hurley
1738 S Poplar St.
Casper, WY 82601

Wind River Resources at
R.A.: William N. Heiss
123 W. 1st St. Suite 675
Casper, WY 82602

WHC Exploration LLC at
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Bismarck, ND 58501

Dakota West Energy, LLC at
1120 College Dr. #112
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Marvin Masset at
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By: */s/ Nick Swartzendruber*
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