

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Joe Waldock,)	
)	
Plaintiff/Appellant,)	
)	Supreme Court No. 20120064
vs.)	
)	
Amber Harvest Corp., <i>et al.</i> ,)	Mountrail County District
)	Court No. 31-09-C-201
Defendants/Appellees,)	
)	
)	

APPEAL FROM THE JUDGMENT ENTERED NOVEMBER 10, 2011,
PURSUANT TO THE ORDER FOR SUMMARY JUDGMENT
DATED OCTOBER 17, 2011
IN THE MOUNTRAIL COUNTY DISTRICT COURT,
NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GARY H. LEE, PRESIDING

REPLY BRIEF OF PLAINTIFF/APPELLANT *& Addendum*

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¶2 I. AN ADMINISTRATOR’S DEED IS A MORE THAN A MERE QUITCLAIM DEED.

¶3 The Appellees rely primarily upon Idhe v. Kempkes, 422 N.W.2d 788 (Neb. 1988), a Nebraska case that has not been expanded on or explained in any reported form to support the interpretation of “administrator’s deed = quitclaim.” Yet it remains that operationally, administrator’s deeds function more like special warranty deeds than quitclaim deeds. Mr. Waldock is flattered that Amber Harvest thinks he invented the term “fiduciary deed” (Brief, ¶ 11), but that is a common term in other states for a deed issued by a fiduciary, such as a personal representative, trustee, or conservator. *See, e.g. Merryman v. Cargile*, 2012 Ark. App. 248, 2012 Ark. App. LEXIS 363 (2012); In re Melber, 315 B.R. 181 (Bankr. D. Mass. 2004). The Appellees complain that Mr. Waldock does not rely on any case law to support his claim that an administrator’s deed is in the nature of “quitclaim PLUS” or that they are something “more.” Mr. Waldock admits that there is no specific case to support that contention; however, as his brief explains, all probate practitioners recognize that a personal representative’s deed or an administrator’s deed is something more than a quitclaim deed, which is why they do not use a simple quitclaim deed to make real estate transfers. Functionally, fiduciary deeds are more in the nature of a special warranty deed.

¶4 The Appellees all discuss Carkuff v. Balmer, 2011 ND 60, 795 N.W.2d 303, and claim that either it prohibits Mr. Waldock’s position (Gensch Brief, p. 5) or that Mr. Waldock is “carving out an exception” to Carkuff. (Amber Harvest Brief, ¶ 13). On the contrary, Alice Carkuff explicitly conveyed only her “right, title and interest (if any) therein” in the property. *See Carkuff*, ¶ 5. The Carkuff deed is different from the Edwardson deed

because the Edwardson deed did not simply convey only the "right, title and interest" with the "if any" caveat as did the Carkuff deed. The Edwardson deed conveyed much, much more:

all the right, title, estate and interest, of the said above named decedent, at the time of his death, *and also* all the right, title, and interest that the said estate, *by operation of law or otherwise*, may have acquired other than or in addition to, that of said deceased, at the time of his death, in and to all that certain lot, piece or parcel of land

(Emphasis added) (See Deed, Appellant's App. p.288.) This granting clause conveyed what the decedent had, but also what the estate had "by operation of law or otherwise may have acquired other than or in addition to." The Estate of W. C. Edwardson, deceased acquired "by operation of law or otherwise" the real property formerly owned by the living W.C. Edwardson. N.D.C.C. § 47-10-13 in effect when the Administrator's Deed was executed provides:

A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

Clearly, the all-inclusive granting language of the Administrator's Deed does not express that a "grant of a lesser estate was intended"; instead, the effect of the broad granting language was a grant of a conveyance of property in fee simple. It was a grant in every sense, and after-acquired title passed by operation of law to Clark Van Horn or his successors in interest.

¶5 II. THE ADMINISTRATOR'S DEED IS A SPECIAL WARRANTY DEED UNDER STATE BANK & TRUST V. BREKKE.

¶6 The Appellees dispute Mr. Waldock's position that an administrator's deed is the equivalent of a special warranty deed conveying an interest in property, but none of them refute that under the definition of State Bank & Trust v. Brekke, 1999 ND 212, 602 N.W.2d

681, the administrator's deed must be a special warranty deed, defined as follows:

A deed in which covenants are limited to defects which arise by, through, or under the actions of the grantor is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the grantor.

Our court recognized this language of a special warranty deed in Stracka v. Peterson, 377 N.W.2d 580, 583 n. 6 (N.D.1985):

A special warranty deed warrants title only against claims held by, through, or under the grantor, or against encumbrances made or suffered by her, and it cannot be held to warrant title generally against all persons. Therefore, under a special warranty deed a grantor is liable if the grantee's ownership is disturbed by some claim arising through an act of the grantor.

State Bank & Trust v. Brekke, 1999 ND 212, at ¶ 11 (*emphasis added*). By the word "grant" in the Administrator's Deed, under N.D.C.C. § 47-10-19 Edward Edwardson was warranting title against claims arising under *his* acts - the very definition of a special warranty deed.

¶7 III. THE DEED CONTAINS A DEFECT IN WHAT IT RESERVED AND SO DID NOT RESERVE THE MINERALS.

¶8 Appellees Holt Oil and Cade Oil argue that the Administrator's Deed complied with the required provisions of N.D.C.C. § 30-19-20 and that under Sittner v. Mistelski, 140 N.W.2D 360 (N.D. 1966) it conveyed only a limited interest and is therefore comparable to a quitclaim deed. (Brief, ¶¶ 32-41) The applicable statute in effect in 1954 provides as follows:

30-19-20. Land, how conveyed -- Whole estate granted. -- A conveyance of real property of an estate sold as provided in this chapter must be executed to the purchaser by the executor or administrator and must refer to:

1. The orders of the county court authorizing and confirming the sale of the property of the estate and directing conveyance thereof to be executed; and

2. The record of the order of confirmation in the office of the register of deeds, by the date, volume, and page of the record.

Such reference shall have the same effect as if the orders were inserted in the conveyance. A conveyance so made conveys all of the right, title, interest, and estate of the decedent in the premises at the time of his death. If prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises other than, or in addition to, that of the decedent at the time of his death, such right, title, or interest also passes by such conveyance.

N.D.C.C. § 30-19-20 (*emphasis added*). The statute provides that what is *conveyed* by the deed is valid, as may be seen by the order of the county court. However, this would not fix the deed's defect in that what is reserved must *still* be referenced by the deed. One can look at the order to give validity or legal effectiveness to the *conveyance*, but not the *reservation* - reserving and conveying are separate actions. Under N.D.C.C. § 30-19-20 the granting clause of a deed would still need to refer to the exception, here the interest of the United States. Put another way, even if the Administrator's Deed is the equivalent of a quitclaim deed under Sittner v. Mistelski, 140 N.W.2D 360 (N.D. 1966), it is still defective in its reservation and did not make a proper reservation of the mineral interest.

¶9 Too, it is clear that the Administrator's Deed did not comply with the requirements of Royse v. Easter Seal Society for Crippled Children and Adults, Inc., 256 N.W.2d 542 (N.D. 1977) and so did not effectively except or reserve any minerals unto the Estate of W.C. Edwardson. The granting language of the Administrator's Deed did not contain any exceptions to the *grant*. In Royse, this Court stated that

". . . reservations must be clearly expressed in the deed. **See 6 Powell on Real Property**, Section 892. Further, the property which is to be excepted from the grant must be described with enough certainty so it can be identified

as to location. Many cases hold that to meet this requirement, the exception must contain a description of the property as definite and certain as the designation of the property used in the grant itself (*citations omitted*). Thus, a reference to property which is vague and indefinite, or so general that the property cannot be identified, will fail as an exception

Id. at 545. Additionally, this Court noted that along with the requirement for “certainty” an exception must be an exception to the *grant* and not an exception to some other provision of the deed. Clearly, the exception in the Administrator’s Deed is not effective if merely contained in a habendum clause of a deed:

"We believe exceptions or exclusions of property should be set forth in the granting clause with the same prominence as the property granted, or, if placed elsewhere, should be so explicit as to leave no room for doubt. Were we to endorse anything short of this, we would be encouraging practices that would lend themselves readily to fraud and deception. This we propose not to do."

Royse, 256 N.W.2d at 545. The granting language of the Administrator’s Deed did *not* reference the interest of the United States; without excepting that interest, the logical consequence is that the Estate is transferring the entire fee simple, including 100% of minerals. The Administrator’s Deed was not drafted in a manner that met the Royse requirements to reserve the minerals.

¶10 In sum, not only did the Administrator’s Deed convey the property in fee simple, when it reserved unto W.C. Edwardson’s estate a 25% interest “in *all* of the oil, gas, and other minerals upon, or in said [subject property]” the reservation was ineffective. The “all” referred to the entire 100% of the minerals rather than the 50% of the minerals actually owned by W.C. Edwardson. Accordingly, the reservation was defective and reserved nothing.

¶11

IV. CONCLUSION

¶12 For all of the reasons set out above, Joe Waldock respectfully requests that this Court reverse the trial court, granting him summary judgment quieting title in him in and to 50% of the minerals in and under the subject property as a matter of law.

Dated this 7th day of June, 2012.

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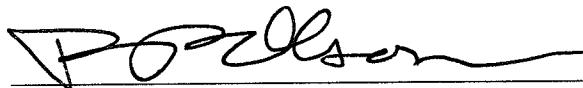
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CERTIFICATE OF COMPLIANCE

I, Richard P. Olson, attorney for the Appellant Joe Waldock, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Reply Brief of Appellant contains the following number of words: 1,716 (excluding table of contents, table of authorities, and addendum), and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 7th day of June, 2012.

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North Dakota Century Code

47-10-13. Grant presumes fee simple title.

A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

47-10-19. Covenants implied from use of word grant.

From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns, are implied unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, nor any right, title, or interest therein, to any person other than the grantee; and
2. That such estate, at the time of the execution of such conveyance, is free from encumbrances done, made, or suffered by the grantor, or any person claiming under the grantor. Such covenants may be sued upon in the same manner as if they had been inserted expressly in the conveyance.