Davis v. COG Operating, LLC: The Estate-Misconception Issue

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Davis v. COG Operating, LLC, No. 08-20-00205-CV, 2022 Tex. App. LEXIS 8894 (Tex. App.—El Paso Dec. 6, 2022, no pet. h.)

In a recent opinion of the Court of Appeals of Texas for the Eighth District, El Paso Division, the Court construed a 1939 warranty deed from Andreas and Johanna Sessler ("the Sesslers"), as Grantors, to Dora Roberts, as Grantee. The opinion, in detail, explains issues surrounding the estate-misconception theory, stemming from the historic (and inaccurate) use of 1/8th to denote a grantor's retained interest in the mineral estate after executing a mineral lease. The opinion also discusses the applicability of certain defenses such as the *Duhig* doctrine and the presumed grant doctrine. The primary issue was whether a 1/4 nonparticipating royalty interest ("NPRI") was reserved in the 1938 warranty deed.

Background

In 1908, the Sesslers purchased the entire surface and mineral estate of Section 45, the property at issue. Later that year, the Sesslers executed a Royalty Deed ("the 1926 Deed") which conveyed a questionable quantum of their interest in Section 45 to W. H. Haun ("Haun"). In 1939, the Sesslers executed a Warranty Deed ("the 1939 Deed"), which conveyed the remainder of the Sesslers' interest in Section 45, except for a 1/4 NPRI, to Dora Roberts ("Roberts").

Since the execution of the 1926 Deed, Haun and his successors had been paid 1/4 of all mineral royalties. The parties agreed that Haun and his successors had received the correct sum of royalty payments. However, since the execution of the 1939 Deed, 3/4 of the mineral royalties have been paid to Roberts and her successors ("Roberts' Successors"), and the Sesslers and their successors ("the Sessler Successors") had not received royalty payments. In their trespass-to-try-title claim, the Sessler successors argued that they were vested with a portion of the NPRI. On the other hand, Roberts' Successors argued that a literal reading of the 1939 Deed established that Roberts did not have notice of the extent of Haun's ownership, and therefore, the Sesslers breached their warranty to Roberts.

The Sessler Successors filed suit in April of 2018. They asserted several claims, including the trespass-to-try-title claim against the Roberts' Successors. They also brought several claims against COG Operating, LLC ("COG"), the current lessee of Section 45's minerals. The trial court granted summary judgment in favor of the Roberts' Successors and rendered take nothing judgments in favor of COG on all claims against COG. The Sessler Successors appealed. Subsequent to the appeal while the trial court retained its plenary power, it granted the Sesslers Successors motion to sever and abate defendant COG. The Sessler Successors' claims against COG were reinstated under a new case number. The trial court abated that case until a final determination of ownership was made on appeal. In reaching a final determination of ownership, the Court of Appeals analyzed the plain language of the two Deeds to ascertain the intent of the parties.

The 1926 Deed

The Court first looked to the plain language of the 1926 Deed. In relevant part, the 1926 Deed reads:

> That We, Andreas Sessler and wife Johanna Sessler . . . by these presents, do grant, bargain, sell, convey, set over and assign, and deliver unto W.H. Haun the following to-wit:
>
> 1/32 interest in and to all of the oil, gas, and other minerals, in and under and that may be produced from [Section 45] together with the right of ingress and egress at all times for the purpose of mining, drilling, and exploring said lands for oil, gas, and other minerals, and removing the same therefrom.
>
> . . . .
>
> It is agreed and understood that 1/4 of the money rentals, which may be paid to extend the terms within which a well may . . . begin under the terms of said lease is to be paid to said W. H. Haun.

The Court noted that certain language—a reference to the oil, gas, and other minerals "in and under" the described land—is traditionally used to create an interest in the mineral estate, as opposed to merely an interest in the royalties alone. Further, where a deed uses "in and under" language, but then proceeds to strip certain traditional rights of

mineral fee ownership, the deed still conveys an interest in the mineral estate, less those rights specifically stripped by the deed. Because the 1926 Deed used "in and under" language and did not claim to strip Haun of any traditional interests included in the mineral estate, the Court held that the Deed "clearly and unambiguously conveyed an interest in the mineral estate itself, not merely a royalty interest."

The 1939 Deed

In 1939 the Sesslers executed a Deed in favor of Dora Roberts. The language of the 1939 Deed in the second paragraph includes the following exception for the interest previously conveyed to Haun in the 1926 Deed:

> It is understood, however, that 1/32 of the oil, gas, and other minerals has heretofore been conveyed to W. H. Haun, and this conveyance does not include such mineral interest so conveyed.

The next paragraph of the 1939 Deed states the following regarding the Sesslers' interest in the property:

> It is further understood and agreed that we [the Sesslers] reserve unto ourselves, our heirs and assigns, one-fourth (1/4) of the 1/8 royalty usually reserved by and to be paid to the land owner in event of execution of oil and gas leases, so 1/4 of the 1/8 royalty to be paid to us, our heirs or assigns, if, as and when produced from the above described land, but it is understood that the mineral interest so reserved by and for us is royalty interest only . . . .

The Sessler Successors argued that the 1/32 fraction used in the second paragraph was the result of a common practice to "express[] the size of an undivided mineral interest conveyed or reserved as multiples of the once-common 1/8th landowner's lease royalty." However, Roberts's Successors argued that the parties intended for a literal meaning of the 1/32 fraction. If the parties intended a literal reading of the 1/32 fraction, Roberts would not have had notice of the extent of Haun's ownership at the time of entering the Deed.

Estate-misconception

The Court determined that the parties' intent hinged on whether the parties were operating under the estate-misconception theory, which refers to the once-common misunderstanding that a grantor-landowner retained only a 1/8 interest in the mineral estate after executing a mineral lease, rather than a fee simple determinable with the possibility of reverter.[1] If the parties were operating under such estate-misconception, Roberts would have understood the third paragraph to mean a 1/4 interest in the mineral estate, rather than a 1/32 interest in the mineral estate.

The Court found that the parties were operating under an estate-misconception for three reasons. First, the date of the 1926 Deed placed it in a time when the estate-misconception was common. Second, 1/32 is a product of multiplying 1/4 by 1/8. Third, the use of the double fraction in the third paragraph evidenced the parties' intent. The Court noted that none of these three (3) factors are determinative alone, but the factors should be viewed together in making a determination. Because the parties were operating under the estate-misconception, Roberts would have been on notice of the extent of Haun's ownership. However, the Court noted that certain defenses argued by Roberts' Successors must be considered before the Court could make a final determination.

The *Duhig* doctrine

Roberts' Successors argued for the application of the *Duhig* doctrine. In *Duhig v. Peavy-Moore Lumber Co.*, the landowner-grantor purported to convey more of the mineral estate than he owned.[2] As a result, the Texas Supreme Court affirmed that he had breached his general warranty to the purchaser. Further, the Court held that if a landowner-grantor reserves an interest in the mineral estate for the exact amount to remedy a breach of a general warranty, immediate title is passed to the grantee at the time of the breach. It remains unclear whether the *Duhig* doctrine can be applied to royalty interests, as the Court did not choose to decide this issue, reasoning that

[1] *Hysaw v. Dawkins*, 483 S.W.3d 1, 10 (Tex. 2016).

[2] *See Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (Tex. 1940).

the outcome in this case is the same regardless of whether *Duhig* applies to royalties. The Court noted that the 1939 Deed described two different interests: (1) Roberts' notice of Haun's ownership found in the second paragraph; and (2) the Sesslers' 1/4 NPRI reservation noted in the third paragraph. The Court held that the 1939 Deed was made in accordance with both interests, and therefore, *Duhig* does not apply.[3]

The presumed grant doctrine

Roberts' Successors also argued that the presumed grant doctrine applies. The doctrine of presumed lost deed or grant is similar to a common law form of adverse possession.[4] The presumed grant doctrine is only applied when there is an incomplete chain of title but a long history of possession of the property. The doctrine usually arises to settle disputes arising from ancient documents from the nineteenth century. The Court noted that there were no gaps in the chain of title of either Deed. Therefore, the presumed grant doctrine was inapplicable.

In addition to the other two defenses, the Court denied Roberts' Successors' statute of limitations and laches defense for the Sesslers' trespass-to-try-title action. The Court rejected these defenses because the right to bring suit is based on the plaintiff's legal title.

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Summary

The Court concluded from the language of the Deeds that the parties had operated under the estate-misconception theory. Therefore, Roberts had notice of the extent of Haun's ownership. Further, the Sesslers had reserved a 1/4 NPRI in the 1939 Deed. For these reasons, the Sesslers did not breach their general warranty to Roberts and *Duhig* does not apply. Further, the Court rejected Roberts' Successors' arguments regarding presumed grant doctrine, statute of limitations, and laches because a clear chain of title demonstrated that the Sesslers had legal title to their portion of the 1/4 *of royalty* NPRI.

On December 21, 2022, the Roberts' Successors filed a Motion for Rehearing. The Roberts' Successors present two issues for rehearing. First, that the Court of Appeals erred in its interpretation of the 1939 Deed, arguing that the Court strayed from the four corners of the document. Second, that the Court of Appeals erred by adding an incomplete chain of title requirement to the presumed grant doctrine, arguing that prior precedent suggests that a gap in title is not a requirement. The motion was submitted to the Court of Appeals on January 4, 2023. We will continue to watch this case closely for updates on the Court's determination on the Roberts' Successors motion.

About the authors:

M. Ryan Kirby is a founding Partner, Timothy Truong is an Associate Attorney, and Julia Salzman is a Law Clerk with Kirby, Mathews & Walrath, PLLC, a firm founded on the idea that oil and gas operators are best served by individuals that understand the needs of the industry, as well as fulfilling those needs in an efficient, cost-effective and timely manner, all the while establishing a relationship and a dialogue with the client. In addition to his legal practice, M. Ryan Kirby is also a frequent speaker at seminars for various Landmen's organizations; he also serves as an Adjunct Professor at South Texas College of Law, where he teaches the Texas Oil, Gas and Land Titles course. Timothy Truong is an attorney licensed and practicing in Texas. Julia Salzman is currently a 2L at the University of Houston School of Law.

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[3] The Court did not discuss that adverse possession does not apply to NPRIs, as such interests are non-possessory.

[4] *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 626 (Tex. App.—Tyler 2014, no pet.) (citing *Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 765 (Tex. App.—Beaumont 2011, no pet.)).