# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-17-00637-CV

**MELLENBRUCH FAMILY PARTNERSHIP, LP**,
Appellant

v.

Annette Louise Klattenhoff **KENNEMER**, Naomi Klattenhoff Peters, William Young, Carolyn Young, Carla Schreiber as Co-Trustee of the Lois K. Matteck Trust, and Carl W. Matteck as Co-Trustee of the Lois K. Matteck Family Trust,
Appellees

From the 81st Judicial District Court, La Salle County, Texas
Trial Court No. 16-03-00029-CVL
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 29, 2018

AFFIRMED IN PART, REVERSED IN PART AND RENDERED

In this oil and gas deed construction case, the trial court concluded that the minerals initially conveyed reverted to the grantor. The trial court denied Appellant's claims for adverse possession and title by limitations, granted summary judgment for Appellees, and awarded Appellees their segregated attorney's fees for the declaratory judgment action. We agree there were no genuine issues of material fact, and Appellees were entitled to judgment as a matter of law; we affirm the

trial court's judgment on the deed construction, adverse possession, and trespass-to-try-title questions, but we reverse its award of attorney's fees.

## BACKGROUND

John H. Klattenhoff owned 160 acres of land (the Property) in La Salle County in fee simple. His will devised an undivided one-half interest in the Property to each of his two sons, Fred and Walter.

On September 5, 1956, as part of a partition and distribution of John's estate, Walter[1] conveyed all his undivided interest to Fred. But Walter reserved a twenty-year term NPRI and included a deed provision that, according to Appellees, if there was no paying production on the Property on September 5, 1976, the minerals Walter conveyed to Fred reverted to Walter.

After Fred died, Appellant Mellenbruch Family Partnership, LP, a partnership comprised of Fred's descendants, became Fred's successor in interest. When Walter died, he devised his estate to his four daughters; two are living, and two are deceased. Walter's two living daughters, Annette Louise Klattenhoff Kennemer and Naomi Klattenhoff Peters, and his deceased daughters' successors in interest (i.e., William Young, Carolyn Young, Carla Schreiber as Co-Trustee of the Lois K. Matteck Trust, and Carl W. Matteck as Co-Trustee of the Lois K. Matteck Family Trust) are appellees (collectively Kennemer).

In March 2016, about the time a well began producing on the Property, Mellenbruch filed a declaratory judgment action to determine who owned the minerals conveyed under the 1956 Deed. Kennemer moved for partial summary judgment. She asserted that, because there was no paying production on the term expiration date (i.e., September 5, 1976), then on that date, the minerals Walter had conveyed to Fred reverted to Walter.

[1] The 1956 Deed grantors were Walter and his wife Nettie. For brevity, we refer to the 1956 Deed grantors in the singular: Walter and grantor.

The trial court granted Kennemer's motion for partial summary judgment, and later granted Kennemer's motion for final summary judgment; it decided all issues against Mellenbruch. Mellenbruch appeals. Before we consider the issues, we briefly recite the standard of review for a motion for summary judgment.

## STANDARD OF REVIEW

"We review the trial court's summary judgment de novo." *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 865 (Tex. 2018) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)). In our review, "we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.* (citing *Provident Life*, 128 S.W.3d at 215). We determine whether the movant has proved that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). "When a movant conclusively negates an essential element of a cause of action, the movant is entitled to summary judgment on that claim." *Helix Energy Sols. Group, Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017); *accord Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014) (per curiam).

## CONSTRUCTION OF 1956 DEED

In its first issue, Mellenbruch argues that, at the expiration of the twenty-year term, the minerals Walter conveyed to Fred remained with Fred; they did not revert to Walter, and the trial court erred in its deed construction.

### A. Reviewing Deed Construction

"The construction of an unambiguous deed is a question of law for the court." *Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017) (quoting *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991)); *accord Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333

(Tex. 2011). "[W]e review the trial court's construction of a deed de novo." *Kardell v. Acker*, 492 S.W.3d 837, 842 (Tex. App.—San Antonio 2016, no pet.); *see Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (reviewing contract construction de novo); *Anadarko Petrol. Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002) (lease construction).

**B. Deed Construction Objective**

"Our objective in construing a [deed] is to discern and effectuate the [parties'] intent as reflected in the [deed] as a whole." *See Hysaw v. Dawkins*, 483 S.W.3d 1, 7 (Tex. 2016) (citing *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980)).

In construing a deed, we read it as a whole and use a holistic and harmonizing approach to determine the parties' intentions as expressed by all the words the parties used. *See id.* at 4, 8; *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "We discern the parties' intent from the deed's language in its entirety 'without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.'" *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 20 (Tex. 2015) (per curiam) (quoting *Luckel*, 819 S.W.2d at 462). We do not apply "mechanical rules of construction, such as giving priority to certain types of clauses over others or requiring the use of magic words." *Hysaw*, 483 S.W.3d at 8; *accord Wenske*, 521 S.W.3d at 794. We adopt the construction that gives meaning to all the words and phrases and that does not render any provision meaningless. *Coker*, 650 S.W.2d at 393; *see also Italian Cowboy*, 341 S.W.3d at 333.

"The parties' intent, when ascertainable, prevails over arbitrary rules." *Wenske*, 521 S.W.3d at 795–96.

**C. Parties' Arguments**

Mellenbruch argues the 1956 Deed used "language commonly found in royalty deeds of that era" and the deed invokes "the 'two-grant' theory." Mellenbruch explains that under the two-

grant theory view, Walter conveyed his entire interest to Fred (the first grant), then Fred granted Walter the twenty-year term NPRI (the second grant) that could continue while there was paying production, and when production ceased, Walter's NPRI would end.

Kennemer disagrees; she contends that the deed's plain language shows Walter conveyed his undivided one-half interest in the mineral estate to Fred, reserved a twenty-year term NPRI that could continue, and made Walter's mineral interest grant to Fred conditional on Walter receiving ongoing royalties. Kennemer reasons that the two-grant theory is a legal fiction courts use to protect interests from the rule against perpetuities and it is not applicable in this case.

**D. 1956 Deed**

The parties do not dispute the existence or validity of the 1956 Deed, nor do they challenge the description of the Property. The parties agree that John devised to each of his sons (Fred and Walter) an undivided one-half interest in the Property's surface and mineral estates. The parties also agree that Walter conveyed all of his undivided one-half interest in the surface and mineral estates to Fred, but they dispute the meaning of the last paragraph below. We recite the body of the deed here.

> KNOW ALL MEN BY THESE PRESENTS:
>
> That we, WALTER O. KLATTENHOFF and wife, NETTIE KLATTENHOFF, of Travis County, Texas, for an in consideration of the sum of ONE AND NO/100 ($1.00) DOLLAR to us cash in hand paid by Fred L. Klattenhoff, the receipt of which is hereby acknowledged, and the for further consideration of the partition and dividing of certain property inherited by us from our father, John H. Klattenhoff;
>
> Have GRANTED, SOLD AND CONVEYED and by these presents do GRANT, SELL AND CONVEY unto the said FRED L. KLATTENHOFF of LaSalle County, Texas, subject to the reservations hereinafter set out, all of our undivided interest in and to that certain tract or parcel of land lying and being situated in LaSalle County, Texas, and described as follows:
>
> [Property description omitted]
>
> [Warranty provision omitted]

> SAVE AND EXCEPT an undivided one-fourth (1/4th) interest of the usual one-eighth (1/8th) royalty (same being a 1/32nd) out of the entire tract herein described in and to all the oil, gas and other minerals in, to and under, or that may be produced from, the land herein described, to be paid or delivered unto said Walter O. Klattenhoff, his heirs or assigns, as his or their own property free of costs from royalty oil, gas and/or other minerals forever, together with the right of ingress and egress at all times for the purpose of storing, trading, marketing and removing the same therefrom. Said interest in and to said minerals hereby reserved is a nonparticipating royalty interest and shall not participate in the bonus paid for any oil, gas or other mineral lease covering said land nor shall it participate in the money rentals which may be paid to extend the time in which a well may be begun under the terms of any lease covering said land. In the event oil, gas and/or other minerals are produced from said land, then the said Walter O. Kattenhoff, his heirs or assigns, shall receive a full 1/4th of a 1/8th (or 1/32nd) portion thereof as his or their own property, to be paid or delivered to the said Walter O. Klattenhoff, his heirs or assigns, free of cost.
>
> It is further agreed and herein stipulated that in case there is no paying production on said land on September 5, 1976, that this grant shall become null and void, and the minerals hereby conveyed shall revert to the said Grantor, his heirs and assigns, but should there be such production, then and in that event, this grant shall remain in full force and effect until such production ceases, after which this reservation shall become null and void.

For convenience, we will refer to the last paragraph as the possibility of reverter provision.

**E. Plain Language Construction**

The 1956 Deed conveys Walter's undivided one-half interest in the surface and mineral estates to Fred, but it withholds "an undivided one-fourth (1/4th) interest of the usual one-eighth (1/8th) royalty." It defines the "said minerals hereby reserved [as] a nonparticipating royalty interest."

The parties agree there was no production at the end of the twenty-year term, and the following language was invoked: "this grant shall become null and void, and the minerals hereby conveyed shall revert to the said Grantor."

The meanings of "shall become null and void" and "shall revert to" are self-evident, but we are left to determine the meanings of "this grant," "the minerals hereby conveyed," and "the said Grantor."

After reading the entire deed and considering all its words and parts in relation to each other, we think the meanings of these key terms and the entire 1956 Deed are not difficult to ascertain. *See Hysaw*, 483 S.W.3d at 13 (requiring a "holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument"); *see also Wenske*, 521 S.W.3d at 794 ("[G]enerally, if we can ascertain [the parties'] intent, that should also be the end of our analysis.").

We begin with "the minerals hereby conveyed" and "the said Grantor." In the first portion of the deed that the parties do not dispute, it states "WALTER [and his wife] . . . [h]ave GRANTED, SOLD AND CONVEYED and by these presents do GRANT, SELL AND CONVEY unto [Fred] . . . all of our undivided interest in and to [the Property]." No other parts of the deed conflict with this granting statement: no parts identify Fred as the grantor or Walter as the grantee, and no parts identify any minerals conveyed besides Walter's undivided one-half interest conveyed to Fred. Thus, we conclude that in the possibility of reverter provision, "the said Grantor" is Walter and "the minerals hereby conveyed" means Walter's undivided one-half of the mineral estate.

The remaining term is "this grant." The only mineral interest granted is Walter's undivided one-half interest in the Property's mineral estate, and the only identified grantor is Walter. Thus, "this grant" is Walter's grant of his undivided one-half interest in the Property's mineral estate.

Therefore, having carefully examined the entire deed as a whole to determine the parties' intentions from all the words they used, *see Hysaw*, 483 S.W.3d at 7, we can ascertain the parties' intent, *see Wenske*, 521 S.W.3d at 795. The plain language shows the parties' intent that the clause "this grant shall become null and void, and the minerals hereby conveyed shall revert to the said Grantor" is to be understood as "[Walter's grant of his undivided one-half interest in the Property's mineral estate] shall become null and void, and [Walter's undivided one-half of the mineral estate] shall revert to [Walter]." This construction gives meaning to all the words and phrases, is

inherently harmonious, and does not render any provision meaningless. *See Coker*, 650 S.W.2d at 393; *see also Italian Cowboy*, 341 S.W.3d at 333.

**F. Distinguishing Mellenbruch's Authorities**

Mellenbruch argues for a different construction, and it cites authorities to support its view. We agree with Mellenbruch that the 1956 Deed used language commonly found in royalty deeds of that day, *see Clark v. Holchak*, 254 S.W.2d 101, 102 (Tex. 1953), but we do not agree with the conclusions Mellenbruch seeks to draw from that similarity.

In *Clark*, the royalty interest deed contained a limitation very similar to the possibility of reverter provision in the 1956 Deed.

> It is further agreed and herein stipulated that in case there is no paying production on said land on December 10, 1945, and for six months thereafter, that this grant shall become null and void, and the minerals hereby conveyed shall revert to the said Grantor, their heirs and assigns, but should there be such production, then and in that event, this grant shall remain in full force and effect until such production ceases, after which this instrument shall become null and void.

*Id.*

Mellenbruch implies or asserts that *Clark*'s similar language invokes the two-grant theory and supports Mellenbruch's view of the 1956 Deed that Walter conveyed everything to Fred and Fred granted a defeasible NPRI back to Walter. But *Clark* construed the "no paying production" provision; it did not apply a two-grant theory to rewrite the provision's plain language. *See id.* at 103; *see also Koopmann*, 547 S.W.3d at 872 (critically examining the two-grant theory in a rule against perpetuities case and reiterating that "the two-grant theory is not a canon of construction; it is a substitute for the written language of the instrument, created by the court to achieve a result that would not otherwise occur"). *Clark* did not question the clear, plain language that, if the paying production requirement was not met, the minerals conveyed would revert to the grantor.

Neither *Clark* nor any of the other three cases Mellenbruch cites with provisions similar to the 1956 Deed's reverting provision support Mellenbruch's two-grant theory view of the 1956 Deed. *See Clark*, 254 S.W.2d at 103; *Sellers v. Breidenbach*, 300 S.W.2d 178 (Tex. Civ. App.—San Antonio 1957, writ ref'd); *Weidel v. Hofmann*, 269 S.W.2d 945, 946 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); *Bain v. Strance*, 256 S.W.2d 208 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.).

Similarly, the majority opinions in the two-grant theory cases Mellenbruch cites are readily distinguishable because they each involve a potential perpetuities violation; there is no such issue in this case, and Mellenbruch has not demonstrated why the two-grant theory should override the 1956 Deed's plain language. *See Bagby v. Bredthauer*, 627 S.W.2d 190 (Tex. App.—Austin 1981, no writ) (developing a two-grant theory to avoid a rule against perpetuities problem), *criticized by Koopmann*, 547 S.W.3d at 872; *Walker v. Foss*, 930 S.W.2d 701 (Tex. App.—San Antonio 1996, no writ) (concluding grantor created a springing executory interest in the grantee); *ConocoPhillips Co. v. Koopmann*, 542 S.W.3d 643 (Tex. App.—Corpus Christi 2016) (addressing savings clause and rule against perpetuities), *aff'd on other grounds*, 547 S.W.3d 858 (Tex. 2018).

We need not reach for an outcome-oriented legal fiction to "substitute for the written language of the [deed]," *see Koopman*, 547 S.W.3d at 872, because we can ascertain the parties' intent from the deed's plain language, *see Wenske*, 521 S.W.3d at 795–96 ("The parties' intent, when ascertainable, prevails over arbitrary rules."). Mellenbruch's argument that we should apply the two-grant theory to substitute for the written language of the deed is not persuasive. *See Koopman*, 547 S.W.3d at 872.

**G. First Motion for Summary Judgment**

Given the plain language of the 1956 Deed, and the undisputed fact that there was no paying production on the date the term NPRI expired, we conclude that the minerals Walter granted

to Fred reverted to Walter on September 5, 1976. Thus, when the trial court granted Kennemer's motion for partial summary judgment and declared that Walter's undivided one-half mineral interest in the Property reverted to Walter or his successors in interest, the trial court did not err. We overrule Mellenbruch's first issue.

**ADVERSE POSSESSION, TITLE BY LIMITATIONS CLAIMS**

Because the disposition of Mellenbruch's second issue depends on our disposition of Mellenbruch's third issue, we address Mellenbruch's third issue now.

In its third amended petition, Mellenbruch argued in the alternative that it acquired title to Walter's undivided one-half interest in the mineral estate through the 3, 5, 10, and 25-year statutes of limitation. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024, .025, .026, .027, .028 (West 2002). Mellenbruch asserts that Fred and his descendants fenced in, cultivated, and used the Property for over four decades; Walter's descendants did not make any claim to the mineral estate until 2016; and the executors of Walter's and his daughters' estates did not list the mineral interest in the inventories. Mellenbruch argues the trial court erred in denying its claims of ownership by adverse possession.

In response, Kennemer contends that Mellenbruch failed to meet an essential element of each adverse possession limitations statute: actual possession of the minerals conveyed. Kennemer notes it is undisputed that no production took place until at least January 2016, and Mellenbruch filed its declaratory judgment action suit in March 2016. Thus, Kennemer reasons, the trial court properly granted summary judgment against Mellenbruch's claims to title by adverse possession.

We briefly review the law pertaining to adverse possession of a severed mineral estate.

**A. Elements of Adverse Possession**

"'A mineral estate, even when severed from the surface estate, may be adversely possessed under the various statutes of limitations,' so long as the statutory requirements are met." *BP Am.*

*Prod. Co. v. Marshall*, 342 S.W.3d 59, 69 (Tex. 2011) (quoting *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192–93 (Tex. 2003)).

"[I]n order to mature title by limitations to a mineral estate, actual possession of the minerals must occur. In the case of oil and gas, that means drilling and production of oil or gas." *Pool*, 124 S.W.3d at 193 (footnote omitted); *accord Coates Energy Tr. v. Frost Nat'l Bank*, No. 04-11-00838-CV, 2012 WL 5984693, at *9 (Tex. App.—San Antonio Nov. 28, 2012, pet. denied) (citing *Pool* and denying lessor's adverse possession claim because "[t]here is no evidence that [lessor] took actual possession of the minerals by drilling and producing oil and gas"); *XTO Energy Inc. v. Nikolai*, 357 S.W.3d 47, 61 (Tex. App.—Fort Worth 2011, pet. denied).

"When the surface is separated from the minerals, adverse possession of mineral rights is accomplished by drilling and producing for the statutory period of time." *Sun Operating Ltd. P'ship v. Oatman*, 911 S.W.2d 749, 757 (Tex. App.—San Antonio 1995, writ denied); *accord Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 768 (Tex. App.—Beaumont 2011, no pet.) ("Adverse possession of the severed mineral estate requires both drilling and production.").

**B. Summary Judgment Evidence**

Kennemer's summary judgment evidence includes an affidavit from a petroleum engineer. The expert averred that there were no hydrocarbons produced from the Property between September 5, 1976 and December 31, 2015, and the first production was in January, 2016. Mellenbruch did not dispute or controvert the expert's statement. *See* TEX. R. CIV. P. 166a(c) ("A summary judgment may be based on uncontroverted testimonial evidence of . . . an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 676 (Tex. 1979).

The expert's statement that there was no production from the Property from September 5, 1976, until a few months before Mellenbruch filed its suit was clear, positive, direct, consistent, and "could have been readily controverted," but it was not. *See* TEX. R. CIV. P. 166a(c); *Clear Creek*, 589 S.W.2d at 676.

**C. No Adverse Possession**

To obtain title to the severed mineral estate by adverse possession, Mellenbruch had to show, inter alia, it did all of the following: drilled and produced oil or gas from the Property, did not pay Kennemer according to Kennemer's claimed interest, and continued producing and not paying for the statutory period. *See Pool*, 124 S.W.3d at 193; *see also Marshall*, 342 S.W.3d at 70 (holding that a cotenant that paid another cotenant a royalty in lieu of the cotenant's claimed share gave notice of an attempt to disseize the underpaid cotenant).

But the summary judgment evidence conclusively establishes that there was no production from the Property until at least January 2016, and Mellenbruch first claimed title by adverse possession on May 5, 2016. The summary judgment evidence conclusively disproves an essential element of Mellenbruch's claim of title by adverse possession, *see Helix Energy Sols. Group, Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017), and of its affirmative defense of adverse possession, *see Rife v. Kerr*, 513 S.W.3d 601, 616 (Tex. App.—San Antonio 2016, pet. denied). We overrule Mellenbruch's third issue.

**TRESPASS TO TRY TITLE CLAIM—JUDICIAL ESTOPPEL**

In its second issue, Mellenbruch argues the trial court erred in determining that Kennemer had superior title because the trial court failed to apply the doctrine of judicial estoppel. Mellenbruch contends judicial estoppel applies because the inventory from Walter's estate and the inventory from his daughters' estates failed to list the mineral interest. Mellenbruch insists these

inventory omissions prevent Kennemer from introducing any evidence of Walter's title to the mineral interest at the time of his death or any evidence of title in Appellees.

Kennemer responds that the inventories cannot divest Walter or his daughter of their ownership interests and judicial estoppel does not apply.

We briefly review the applicable law.

**A. Judicial Estoppel**

"Because [judicial estoppel] is an equitable doctrine, the trial court has discretion whether to invoke it, and we review the trial court's decision for abuse of that discretion." *Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 117 (Tex. 2018); *accord Siller v. LPP Mortg., Ltd.*, No. 04-11-00496-CV, 2013 WL 1484506, at *5 (Tex. App.—San Antonio Apr. 10, 2013, pet. denied) (mem. op.).

Judicial estoppel is a common law principle consisting of these essential elements: "(1) a sworn, inconsistent statement be made in a prior judicial proceeding; (2) the party making the statement gained some advantage by it; (3) the statement was not made inadvertently or because of mistake, fraud, or duress; and (4) the statement was deliberate, clear, and unequivocal." *Galley v. Apollo Associated Services, Ltd.*, 177 S.W.3d 523, 528–29 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see In re Marriage of Stroud*, 376 S.W.3d 346, 356 (Tex. App.—Dallas 2012, pet. denied). "Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage." *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009) (per curiam). Judicial estoppel "is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit." *Id.*; *accord Cleaver v. Cleaver*, 140 S.W.3d 771, 774 (Tex. App.—Tyler

2004, no pet.) ("[I]t is employed to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage.").

**B. Discussion**

The trial court had discretion on whether to apply the equitable doctrine of judicial estoppel. *See Perryman*, 546 S.W.3d at 117; *Siller*, 2013 WL 1484506, at *5. But the trial court was bound to follow the law that "a failure to list property of a decedent in the inventory [does not have] the effect of removing such property from the estate." *See Smoot v. Woods*, 363 S.W.2d 798, 802 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.); *see also Koppelmann v. Koppelmann*, 57 S.W. 570, 572 (Tex. 1900) (rejecting inventories as conclusive evidence of property ownership or as invoking estoppel). And the trial court would recognize that inventories are not conclusive evidence of property ownership, *see Koppelmann*, 57 S.W. at 572, and an "order of the probate court approving an inventory and appraisement is not an adjudication of title to property," *McKinley v. McKinley*, 496 S.W.2d 540, 542 (Tex. 1973).

Mellenbruch cited no authorities to show how the inventories take a "position" against an opponent, how the incomplete inventory list gave the heirs an unfair advantage, or how the heirs somehow prevailed based on the incomplete inventories. *Contra Ferguson*, 295 S.W.3d at 643; *Cleaver*, 140 S.W.3d at 774.

The trial court acted within its discretion by not applying judicial estoppel to bar Kennemer's chain-of-title evidence. *See Ferguson*, 295 S.W.3d at 643; *Cleaver*, 140 S.W.3d at 774.

**TRESPASS-TO-TRY-TITLE CLAIM—SUPERIOR TITLE**

In its second issue, Mellenbruch also argues the trial court erred in granting summary judgment for Kennemer on her trespass to try title claim because she cannot show superior title. Mellenbruch asserts that the estate inventories—which do not list a mineral interest—are prima

facie evidence that neither Walter nor his daughters claimed title to the mineral interest from the 1956 Deed. Therefore, according to Mellenbruch, the prima facie evidence, at a minimum, raises a fact issue on the title question.

In contrast, Kennemer contends she met her summary judgment burden of proof to show good title from a common source, and she was entitled to judgment as a matter of law.

Before we address the issue, we briefly review the law pertaining to a common-source argument under a trespass-to-try-title claim, including the shifting burdens for summary judgment.

**A. Applicable Law**

"To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004); *Rife*, 513 S.W.3d at 609. *See generally* TEX. PROP. CODE ANN. § 22.001 (West 2014) ("Trespass to Try Title").

Where both parties claim title from a common source, the plaintiff "need only demonstrate good title coming from that common source to meet its burden of proof." *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994); *see Davis v. Gale*, 330 S.W.2d 610, 612 (Tex. 1960). By submitting evidence of an unbroken chain of title from the common source, the plaintiff "[makes] out a prima facie case which entitle[s] [the plaintiff] to recover on [the plaintiff's] count of trespass to try title, unless the defendant [shows] the better right or superior title under the common source." *See Davis*, 330 S.W.2d at 612 (citing *Simmons Hardware Co. v. Davis*, 27 S.W. 62, 63 (Tex. 1894) ("[W]hen the plaintiff shows that he has a valid chain of title from a certain grantor, and that the defendant claims under the same grantor, . . . [the plaintiff] shows prima facie that he is owner of the land, and it then devolves upon the defendant to show the authority of his own title.")).

"The [plaintiff's] prima facie showing actually shifts the burden of persuasion to the defendant to show that the plaintiff's [title] claim is inferior to the defendant's." *Volunteer Council of Denton State Sch., Inc. v. Berry*, 795 S.W.2d 230, 234 (Tex. App.—Dallas 1990, writ denied); *Walsh v. Austin*, 590 S.W.2d 612, 616 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd) (noting that when "the plaintiff has established a prima facie case . . . at a summary judgment hearing . . . the defendant then has the burden of introducing some defensive evidence to raise an issue of material fact"); *accord AIC Mgmt. v. Baker*, No. 01-02-01074-CV, 2003 WL 22724629, at *4 (Tex. App.—Houston [1st Dist.] Nov. 20, 2003, pet. denied) (mem. op.) (recognizing the shifting burden in trespass-to-try-title suit).

When the burden shifts, the defendant has "the burden . . . to show a superior title under the common source, or to show that he holds under a superior title not connected with the common source, or to show that the true title is outstanding." *Davis*, 330 S.W.2d at 612 (citing *Krasa v. Derrico*, 193 S.W.2d 891, 893 (Tex. Civ. App.—San Antonio 1946, no writ)).

**B. Discussion**

Mellenbruch and Kennemer both claim ownership of the undivided one-half mineral interest in the Property under the John Klattenhoff will and the 1956 Deed. Under the 1956 Deed, the mineral interest did not revert to Mellenbruch; it reverted to Walter and his successors in interest. Given that determination, we consider the parties' burdens.

*1. Kennemer's Burden*

Kennemer's burden was to show good title from the common source. *See Rogers*, 884 S.W.2d at 768. Kennemer met her burden by submitting a Rule 793 abstract and copies of the applicable wills and probate documents to show an unbroken chain of title from the common source—John Klattenhoff's will through the 1956 Deed—to each of the appellees. *See id.*; *see*

*also* TEX. R. CIV. P. 793 (abstract requirements). Walter's will devised his "entire estate, of whatsoever nature and wheresoever situated" to his four daughters, two of whom are still living; Kennemer's evidence includes Walter's will and the order admitting Walter's will to probate. Kennemer's evidence also includes Walter's two deceased daughters' wills, the orders admitting the wills to probate, and the corresponding testamentary trusts and trustees.

*2. Mellenbruch's Burden*

After Kennemer made out her prima facie case, the burden shifted to Mellenbruch "to show a superior title under the common source, or to show that [it] holds under a superior title not connected with the common source, or to show that the true title is outstanding." *See Davis*, 330 S.W.2d at 612 (citing *Krasa*, 193 S.W.2d at 893). Mellenbruch insists that the sworn inventories demonstrate a break in Kennemer's chain of title, but the sworn inventories are no evidence of Mellenbruch's superior title or that true title is outstanding. *See id.*

*3. Resolving the Claim*

Kennemer met her burden to prove good title from the common source. *See Rogers*, 884 S.W.2d at 768. But Mellenbruch produced no evidence of superior title in itself or that true title is outstanding.[2] *See Davis*, 330 S.W.2d at 612; *Berry*, 795 S.W.2d at 234; *Walsh*, 590 S.W.2d at 616.

Because the mineral interest conveyed under the 1956 Deed reverted to Walter when there was no production on the term end date, Mellenbruch cannot show superior title under the 1956 Deed. Because Mellenbruch did not adversely possess the minerals conveyed, Mellenbruch cannot claim superior title by adverse possession. Thus, in light of these legal conclusions, and taking

[2] Mellenbruch also argues that each appellee had to submit "admissible title documents establishing proper conveyances out of Walter's estate," its argument is inapt; upon a testator's death, property "that is devised by the will vests immediately in the devisees." *See* TEX. ESTATES CODE ANN. § 101.001 (West 2014); *Kelley v. Marlin*, 714 S.W.2d 303, 305 (Tex. 1986).

Mellenbruch's evidence as true, we nevertheless necessarily conclude that Mellenbruch's summary judgment evidence is no evidence of a superior title in itself or that true title is outstanding. We overrule Mellenbruch's trespass-to-try-title complaint.

*4. Judicial Admissions*

In its second issue, Mellenbruch also argues the trial court could not have relied on Mellenbruch's statements in its original and first amended petitions to conclude Kennemer had superior title. Because Kennemer was entitled to judgment on her trespass-to-try-title claim on the basis of her prima facie evidence independent of any consideration of judicial admissions, we need not address Mellenbruch's judicial admission argument.

## ATTORNEY'S FEES

In its fourth issue, Mellenbruch argues the trial court erred in granting Kennemer her attorney's fees under the Declaratory Judgment Act. Mellenbruch insists the parties were contesting title to the mineral interest, the legislature has mandated a trespass-to-try-title action as the only method to determine title to real property, and a trespass-to-try-title claim does not allow for recovery of attorney's fees.

Kennemer responds that it was entitled to attorney's fees for the portion of the suit pertaining to Mellenbruch's declaratory judgment action. Kennemer insists that Mellenbruch was master of its pleadings; Mellenbruch's original, first amended, and second amended petitions all sought declaratory relief and attorney's fees; and it was only after Mellenbruch lost its declaratory judgment claim that it changed its pleadings to raise a trespass-to-try-title claim.

### A. Attorney's Fees in Title Dispute

Under the Declaratory Judgment Act, the trial court has discretion to award attorney's fees, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2014); *Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 161 (Tex. 2004), and some deed construction disputes may be resolved by

a declaratory judgment action, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (deed construction question); *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 19 (Tex. 2015) (per curiam). For example, a declaratory judgment action is proper to determine the nature and type of an interest under a will or deed. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 6 (Tex. 2016) (construing a will to determine the type of royalty interest in a double-fraction question); *Graham v. Prochaska*, 429 S.W.3d 650, 653 (Tex. App.—San Antonio 2013, pet. denied) (construing a "deed to determine the nature and size of the royalty interest retained by the grantors").

But "[t]he trespass-to-try-title statute . . . applies when the claimant is seeking to establish or obtain the claimant's ownership or possessory right in the [real property] at issue." *Lance v. Robinson*, 543 S.W.3d 723, 736 (Tex. 2018) (emphasis removed); *see McKinney v. White*, 281 S.W.2d 327, 327 (Tex. 1955) (reviewing a trespass-to-try-title action "over the ownership of undivided mineral interests in the land"); *Radcliffe v. Tidal Petroleum, Inc.*, 521 S.W.3d 375, 379 (Tex. App.—San Antonio 2017, pet. denied) (reviewing a trespass-to-try-title claim for ownership of a mineral interest). The trespass-to-try-title statute does not authorize recovery of attorney's fees. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 926 (Tex. 2013) (citing TEX. PROP. CODE ANN. § 22.001(a)); *Martin*, 133 S.W.3d at 267.

If a litigant asks the court to determine ownership of real property in a declaratory judgment action, the "litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit." *See Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). "[W]hen 'the trespass-to-try-title statute governs the parties' substantive claims . . . [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.'" *Coinmach Corp.*, 417 S.W.3d at 926 (second, third alterations in original) (quoting *Martin*, 133 S.W.3d at 267); *accord I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 475 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("[A] party may not artfully plead

a title dispute as a declaratory judgment action just to obtain attorney's fees when that claim should have been brought as a trespass-to-try-title action.").

**B. Discussion**

In its original, first amended, and second amended petitions, Mellenbruch sought declaratory relief to construe the 1956 Deed as giving it ownership of Walter's undivided one-half interest in the mineral estate. The three petition versions each cited Civil Practice and Remedies Code section 37.004 and stated "plaintiff seeks a declaration that it is the *sole owner of the mineral interests* on the 160[-]acre tract, and that defendants have no present interest in the minerals on that tract." (emphasis added).

Kennemer argued the proper deed construction is that the minerals conveyed reverted to Walter, and as his successors-in-interest, they now own the minerals.

From the beginning, the parties contested *ownership* of the conveyed minerals, and a trespass-to-try-title action was the sole method to determine ownership. *See* TEX. PROP. CODE ANN. § 22.001(a); *Lance*, 543 S.W.3d at 736; *Martin*, 133 S.W.3d at 267. Although Mellenbruch sought relief using a declaratory judgment action, its choice did "not alter the underlying nature of the suit." *See Sawyer Tr.*, 354 S.W.3d at 388. Mellenbruch's substantive claim was for ownership of the minerals conveyed, and for that claim, neither Mellenbruch nor Kennemer could properly seek attorney's fees under the Declaratory Judgments Act. *See Coinmach Corp.*, 417 S.W.3d at 926 (quoting *Martin*, 133 S.W.3d at 267).

A trespass-to-try-title claim was the sole method to determine ownership of the conveyed minerals, the legislature has not authorized attorney's fees for such a claim, and the trial court abused its discretion by awarding fees under the Declaratory Judgments Act. *See id.*; *I-10 Colony*, 393 S.W.3d at 475.

We sustain Mellenbruch's fourth issue.

## CONCLUSION

Given the undisputed fact that there was no production of oil or gas on the day the NPRI's twenty-year term ended, the 1956 Deed's plain language caused the minerals Walter conveyed to Fred to revert to Walter. Because production is an essential element of Mellenbruch's adverse possession claim and its affirmative defense, and there was no production, Kennemer was entitled to judgment against Mellenbruch's adverse possession claim and affirmative defense. Further, the trial court acted within its discretion by not applying judicial estoppel, and it did not err in concluding Kennemer met her trespass-to-try-title summary judgment burden, but Mellenbruch did not. Thus, Kennemer was entitled to judgment as a matter of law on her trespass-to-try-title claim, but the statute does not authorize recovery of her attorney's fees. Therefore, we reverse the trial court's award of attorney's fees. We affirm the remainder of the judgment.

Patricia O. Alvarez, Justice