



**Jasmine B. Bertrand**  
Onebane Law Firm  
P. O. Box 3507  
Lafayette, Louisiana 70502  
337-237-2660

[bertrandj@onebane.com](mailto:bertrandj@onebane.com)

[www.onebane.com](http://www.onebane.com)

### **Making the Case for Legal Good Faith through Diligent Landwork**

A recent decision out of the United States District Court for the Western District of Louisiana provides an excellent example of how diligent landwork can benefit a client in unexpected ways.

The legal issues involved in *Chesapeake Louisiana, L.P. v. HTP and Associates, LLC*, 2011 WL 2899058 (W.D. La. July 15, 2011) were the result of a lessor's misrepresentation of his marital status and the community nature of property subject to a mineral lease. The sixty acre DeSoto Parish tract at issue (the "**Subject Property**") had been purchased by David Whitaker in 1992 (the "**1992 Acquisition**"). In the 1992 Acquisition, Whitaker was described as a "single man," despite the fact that he was married at the time to Dessie Whitaker, to whom he was married from 1955 until her death in 2005. Initially, the Judgment of Possession rendered in the *Succession of Dessie Whitaker*, which was filed in both Caddo and DeSoto Parishes in January of 2008, did not recognize the decedent's interest in the Subject Property. Thereafter, in March of 2008, Whitaker granted a mineral lease covering the Subject Property in favor of Land Endeavors, LLC (the "**Lease**"), which was recorded in April of 2008. All interest in the Lease was assigned to Chesapeake (the "**Assignment**") in August of 2008 and said assignment was recorded in December of 2008. However, in the interim between the execution and recordation of the Assignment, an Amended Judgment of Possession was rendered in the *Succession of Dessie Whitaker*, in which Dessie's community interest in the Subject Property was recognized. The Amended Judgment of Possession was filed in Caddo Parish, but was not filed in DeSoto Parish. Thereafter, in December of 2009, the heirs of Dessie Whitaker executed mineral leases covering the Subject Property in favor of HTP and Associates, LLC, and recorded same in DeSoto Parish on January 19, 2010 (the "**2009 HTP Leases**").

Litigation ensued in 2009 when Whitaker filed for a declaratory judgment seeking to have the Lease declared null and void. The litigation later settled when Whitaker agreed to

ratify, confirm and adopt the Lease. Chesapeake then filed a complaint against HTP and the Whitaker heirs, seeking declaratory relief that the Lease was in full force and effect and seeking a permanent injunction preventing HTP from interfering with the Lease. In response, HTP and the Whitaker heirs counterclaimed for declaratory judgment that the 2009 HTP Leases were in effect while the Lease was null and void.

In rendering its decision, the Court first discussed Louisiana's presumption that property acquired during marriage is community property, noting that because Whitaker was married at the time he acquired the Subject Property, it was presumably community property. The Court then noted that Louisiana Civil Code Article 2347 requires the concurrence of both spouses in order to lease community property. Because Whitaker never received Dessie's concurrence when leasing the Subject Property, the litigation was focused on the extent that third parties could rely upon Whitaker's representations that he owned and leased the property as a single man.

In setting forth their arguments, the plaintiff relied upon Louisiana Revised Statute 35:11, which states in pertinent part that:

*“A. Whenever notaries pass any acts they shall give the marital status of all parties to the act .... B. A declaration as to one's marital status in an acquisition of immovable property by the person acquiring the property creates a presumption that the marital status as declared in the act of acquisition is correct and except as provided in Subsection C of this Section, any subsequent alienation, encumbrance, or lease of the immovable by onerous title shall not be attacked on the ground that the marital status was not as stated in the declaration. C. Any person may file an action to attack the subsequent alienation, encumbrance, or lease on the ground that the marital status of the party as stated in the initial act of acquisition is false and incorrect; however, such action to attack the alienation, encumbrance, or lease shall not affect any right or rights acquired by a third person acting in good faith.”*

In contrast, the defendants relied upon Louisiana Civil Code Article 3341, which provides in pertinent part that:

*“The recordation of an instrument: ... (2) does not create a presumption as to the capacity or status of the parties.”*

In discussing the statutes, the Court noted that application of La. R.S. 35:11 created a presumption of the validity of Whitaker's declaration that he was a single man in the notarized 1992 Acquisition. On the other hand, application of Article 3341 resulted in the recordation of the 1992 Acquisition *not* creating a presumption as to the validity of Whitaker's declaration. Importantly, the Court found that Article 3341 did not negate the presumption created by La. R.S. 35:11, i.e., application of Article 3341 upon recordation of the instrument did not preclude application of La. R.S. 35:11 upon notarization of the instrument. Thus, the presumption of La. R.S. 35:11 applied.

The next step in the Court's analysis was to determine the meaning of "good faith," as used in La. R.S. 35:11. The Court noted that the term was undefined in this context, and upon the suggestion of all parties in the case, analogized to the rules of good faith for purposes of acquisitive prescription. After discussion of whether an objective or subjective standard of good faith was more appropriate, the Court adopted the standard enunciated by the Louisiana Supreme Court in *Phillips v. Parker*, 483 So.2d 972 (La. 1986), in which the Court rejected the theory that good faith includes constructive knowledge of all public records, and instead adopted a "totality of the circumstances" test, where good faith is determined by a consideration of all relevant factors of the particular case. The Court noted that good faith is presumed, and that the defendant has the burden of showing that, under objective considerations of the case, Chesapeake was not in good faith when it acquired the Lease. In this vein, the Court set forth four objective factors it would consider in its analysis of good faith: (i) whether Chesapeake checked the public records or obtained a title examination; (ii) whether a reasonable search of the conveyance records related to the Subject Property would have informed Chesapeake that the declaration of marital status may have been incorrect; (iii) whether the circumstances surrounding the acquisition of the Lease have suggested a title defect; and (iv) whether Chesapeake had actual knowledge that Whitaker did not own the Subject Property as a single man.

In examining the first factor, the Court noted that both Chesapeake and Land Endeavors either personally searched the title or hired an outside firm to do it, and that additionally, Chesapeake received a verbal title opinion from an attorney. The Court found that nothing in the first consideration weakened the presumption that the parties were in good faith.

In examining the second factor, the Court noted that the chain of title between the 1992 Acquisition and the 2009 HTP Lease was found to be "devoid of any clear statement controverting the presumption that David Whitaker owned the property as a single man." Specifically, the Court examined the steps that the landman who performed the due diligence before acquiring the Lease took with respect to the Subject Property, noting that he first checked the plat at the tax assessor's office, which showed David Whitaker's name only, then performed a vendee search in which the 1992 acquisition was found, and then performed a vendor search from 1992, which revealed a mineral lease taken by Whitaker in 2005 covering the Subject Property. The 2005 lease also stated that Whitaker owned the Subject Property as a single man, which reinforced the landman's belief that Whitaker owned the Subject Property as a single man. The Court then discussed the expert testimony for this issue, noting the plaintiff's expert's statement that "to render a title opinion a landman only looks to the public records on the applicable property; there is no reason to look at the records regarding other property," as well as the defendant's title examiner's admission of the importance of a landman's ability to rely on an appearance clause that states the status of a party. The Court further noted that the landman used his knowledge that Whitaker had been married at some point to check outside the chain of title by finding the Judgment of Possession rendered in the *Succession of Dessie Whitaker* in order to ensure that the Subject Property was not listed as a part of her estate, which further confirmed the separate nature of the property. Although the defendants claimed there was adequate information in the public records to alert the plaintiffs as to Whitaker's marital status, the Court

found that information was either not specific to the Subject Property or did not provide a clear indication that Whitaker did not own the property as a single man. The Court took particular issue with the fact that the Judgment of Possession rendered in Dessie Whitaker's succession clearly noted the Subject Property was not part of her estate. The combination of the Judgment of Possession and repeated assertions by Whitaker of the nature of the property provided ample information upon which a title examiner should be able to rely. "To require title examiners to delve into any potential lead that would suggest a person was married when he acquired property as a single man would transform the role of a title examiner into that of a private investigator."

In examining the third factor, the Court discussed the inclusion of a non-warranty provision in the Lease, addressing the defendants' suggestion that its inclusion casted doubt as to the good faith of the parties in acquiring the Lease. The Court noted that Louisiana courts have indicated that the inclusion of such a provision could potentially put a purchaser on notice of a title deficiency. However, the Court stated that while such a potential must be acknowledged, "Louisiana jurisprudence states that such a conclusion can only be drawn if there was no investigation to assess the validity of the seller's title." In this case, both the original lessee as well as Chesapeake ran the title to the Subject Property, and nothing of record indicated that the property was not owned by Whitaker as a single man.

Finally, in examining the fourth factor, the Court found that there was no evidence presented at trial to suggest that the original lessee or Chesapeake had actual knowledge that Whitaker did not own the property as a single man. Therefore, under the totality of the circumstances, the Lease was acquired in good faith. After the Court made a finding of good faith, it then granted Chesapeake's request for declaratory relief.

This case presents an excellent example of how application of laws protecting the rights of third parties can result in a just outcome, in spite of title imperfections. It also should be read as an example of good due diligence practices on the part of both the original lessee as well as the assignee, which, especially considering the Court's analysis of the inclusion of the non-warranty provision in the Lease, were crucial to a finding of good faith. Additionally, the landman in this case appears to have done everything correctly, especially with respect to conducting follow-up research to ensure that the Subject Property was not included as part of the deceased wife's estate, thus emphasizing the importance of the role of a thorough, conscientious land professional.

#### **DISCLAIMER**

The information contained herein presents general information about a legal issue and should not be considered legal advice. Before acting on any of the materials presented here, we advise you to seek legal counsel. We welcome your calls, letters, and e-mail; however, contacting us does not create an attorney-client relationship. Please refrain from sending any confidential information to us until such time as an attorney-client relationship has been established.