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Ohio Supreme Court Adopts "Reasonable Diligence" Standard for Surface Owners Seeking to Abandon Severed Mineral Interests Under the Dormant Mineral Act

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On December 17, 2020, in yet another significant case involving severed mineral interests, the Supreme Court of Ohio issued its opinion in *Gerrity v. Chervenak*, 2020-Ohio-6705. In a unanimous decision to affirm, the Court held that surface owners who are attempting to abandon severed mineral interests under the Dormant Mineral Act, R.C. 5301.56, et seq. ("DMA") must "exercise reasonable diligence to identify all holders of the severed mineral interests…," and only where a surface owner's reasonable search does not identify the names and addresses of severed mineral interest holders may the surface owner skip the required step of providing certified mail service and may provide notice by publication as required by R.C. 5301.56(E)(1). *Id.* at ¶ 41.

In its decision, the Court, citing to several of its prior recent DMA decisions, observed that mineral rights are frequently severed from surface rights in oil and gas regions such as Ohio and, as a consequence, it can be "difficult or even impossible, to find owners of such severed mineral rights." *Id.* at ¶ 8, quoting *Dodd v. Croskey,* 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 7. The General Assembly enacted the DMA to address this scenario and if "no savings events" apply to the severed mineral interest, a surface owner who follows the mandatory notice procedures in the DMA may have dormant mineral interests deemed abandoned and reunited with the surface estate. However, if a surface owner fails to satisfy all of the statutory requirements, the DMA cannot be utilized to abandon severed mineral interests. Thus, the issue before the *Gerrity* Court was whether the surface owners complied with the DMA's requirement of providing certified mail service on all holders of severed mineral interests before publishing their affidavit of abandonment. As an initial matter, Gerrity, the severed mineral holder, urged the Court to hold that strict compliance with the notice requirements of the DMA was required; and therefore, if all severed mineral holders could not be identified and served, then the DMA was inapplicable. The Court ultimately rejected this argument, concluding that "consistent with the codified and undisputed purpose of the Dormant Mineral Act" the act does not require the surface owner to specifically identify by name every holder, as broadly defined in R.C. 5301.56(A)(1). *Gerrity* at ¶ 21. The Court also rejected "Gerrity's related argument that a surface owner must attempt service of notice by certified mail on every holder before the surface owner may resort to notification by publication under R.C. 5301.56(E)(1)." *Id.* at ¶ 22.

The Court went on to discuss what "R.C. 5301.56(E)(1) does require of a surface owner." *Id.* at ¶ 25 (emphasis in original). In this regard, Gerrity, the severed mineral holder, and Chervenak, the surface owner, each urged the Court to adopt (very different) bright-line tests. On one hand, Gerrity advocated for a rule that would require a surface owner to search not only public records but also online resources, including subscription-based genealogy services, and also to document those efforts. On the other hand, Chervenak argued that the Court should restrict a surface owner's due diligence strictly to a search of the public records in the county where the minerals are located. Declining to create any bright-line test, the Court followed the reasoning set forth in recent line of cases from the Seventh District Court of Appeals that included *Sharp v. Miller*, 2018-Ohio-4740, and *Shilts v. Beardmore*, 2018-Ohio-863, which

held that a surface owner must use reasonable diligence to identify all holders of a severed mineral interest in order to utilize the DMA and that the reasonableness of the diligence utilized depends on the unique facts and circumstances of each case.

The Court went on to provide guidance that the starting point for determining who the surface owner must attempt to notify pursuant to R.C. 5301.56(E)(1) is the chain of title to determine the record holder or record holders of the mineral interest. The Court instructed that "[i]n addition to property records in the county in which the land that is subject to the mineral interest is located, a reasonable search for holders of a severed mineral interest will generally also include a search of court records, including probate records, in that county." *Id.* at ¶ 35. Importantly, however, the Court went on to state that "[t]here may, however, be circumstances in which the surface owner's independent knowledge or information revealed by the surface owner's review of the public-property and court records would require the surface owner, in the exercise of reasonable diligence, to continue looking elsewhere to identify or locate a holder." *Id.*

Ultimately, the Court concluded that Chervenak's search met the standard for reasonable diligence.

Finally, the Court, relying on United States Supreme Court's holding in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), rejected Gerrity's due-process challenge to R.C. 5301.56(E)(1) and the application of the DMA situations where a mineral-interest holder cannot be identified.

As a result of this ruling, there will be a significant amount of quiet title litigation to determine whether surface owners who have attempted DMA abandonments have complied with the reasonable diligence standard so as to avail themselves of the remedies under the DMA. In the wake of the Ohio Supreme Court's recent ruling in *West v. Bode*, surface owners may also continue to utilize the Marketable Title Act ("MTA") to seek to extinguish severed mineral interests. Thus, there are still two statutes, containing two separate tests, applicable to the validity of valuable severed mineral interests in Ohio.

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