Ohio Appellate Court Limits the MTA and the DMA in Mineral Rights Dispute

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On February 6, 2019, the Seventh District Court of Appeals issued its decision in a closely-followed case known as *Miller v. Mellott*, 2019-Ohio-504. This case was an appeal from the Monroe County Common Pleas Court, which had previously ruled that Ohio's Marketable Title Act (the "MTA") could not be applied to extinguish mineral interests because it was in conflict with the more specific provisions of the Ohio Dormant Mineral Act (the "DMA").

Before *Miller v. Mellott* was decided, however, on December 13, 2018, the Supreme Court of Ohio, in *Blackstone v. Moore*, 2018-Ohio-4959, issued an opinion that applied the MTA to a dispute over the validity of an oil and gas royalty interest. Interestingly, the Supreme Court did not expressly state that the MTA applies to mineral interest because the issue was not before it to consider. Relying on the implied precedent in the *Blakestone* case, the Seventh District Court of Appeals in *Miller v. Mellott* held that both the MTA and DMA apply to mineral interests, and therefore, the trial court erred in holding that the MTA did not apply. In a surprise twist, however, the court of appeals affirmed the trial court's decision using completely different grounds that were never briefed or argued by either party to the appeal. The court also affirmed the trial court's ruling that, because the surface owners failed to introduce evidence of their attempts to locate the mineral owners, they failed to comply with the notice provisions of the DMA. Thus, the trial court's decision in favor of the mineral owners was affirmed.

The facts in *Miller v. Mellott* are not unlike hundreds of other disputes between surface owners and mineral owners throughout Southeastern Ohio. The Millers were the surface owners who owned approximately 70 acres in Monroe County, Ohio. The mineral owners, the Mellots, derived their interest from a deed dated May 8, 1947, in which the grantors, Elbert and Anna Mellott, reserved all oil and gas rights. The Millers filed suit against the Mellott heirs, claiming that the Mellotts' reserved oil and gas rights were extinguished by the MTA, or in the alternative, were abandoned under the DMA.

In general, the MTA automatically extinguishes property interests created prior to a landowner's chain of title to property, if the landowner has an unbroken chain of title for more than 40-years after the prior property interest was created, and there were no specific references to the prior interest in the landowner's chain of title. Conversely, the DMA deems a mineral interest abandoned only after a surface owner serves a notice of abandonment on the mineral holders and the mineral owners do not timely respond by filing a preservation of their mineral interest. Since the MTA automatically extinguishes mineral interests while the DMA requires the surface owner to first give notice and gives the mineral owner an opportunity to preserve, the MTA is viewed as more favorable to surface owners, if it applies to mineral interests; hence the interest in the *Miller v. Mellott* case.

Regarding the MTA analysis, the *Miller v. Mellott* Court noted that the surface owners' root of title deed (from which the 40-year extinguishment period was measured) was a warranty deed in which there was a general reservation of all "oil and gas in and under said real estate." Applying the MTA, the court of appeals held that the surface owners' root of title was not a proper root of title because "it does not contain a fee simple title, free and clear of any such oil and gas exception and reservation." *Id*. at ¶ 28. In other words, the original deed in which the surface owners were claiming to be their root of title deed to the property did not transfer the oil and gas rights to them. For this reason, the Millers could not establish a proper root of title and the 40-year ex-

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tinguishment period never ran. Although, the trial court ruled that the MTA did not apply, the court of appeals still affirmed the trial court's decision for a different reason.

Regarding the DMA, the issue on appeal was whether the Millers complied with the notice requirement of the DMA by publishing its notice of abandonment, rather than first attempting to serve it on the Mellotts by certified mail. Under the DMA, a surface owner seeking to abandon severed mineral interests must first serve a notice of its intent to abandon the minerals via certified mail. If certified mail service cannot be completed, the surface owner may publish its notice of abandonment in the local newspaper.

The Seventh District Court of Appeals has issued two recent rulings that set forth when a surface owner may publish its notice of abandonment, rather than serving it via certified mail. In *Shilts v. Beardmore*, 2018-Ohio-863, the court of appeals held that surface owners must use "reasonable diligence" in attempting to locate heirs before they can skip the certified mail requirement and serve publication. And then in *Sharp v. Miller*, 2018-Ohio-4740, the Court ruled that there is no "bright-line rule" as to what efforts constitute "reasonable due diligence" and a surface owner's reasonable diligence will be determined on a case-by-case basis. Id. at ¶ 17. Turning back to *Miller v. Mellott*, the court then determined that, because the Millers failed to submit any evidence of their efforts undertaken to identify the names and addresses of Mellott heirs, the Millers failed to comply with the DMA notice requirements, and therefore the Millers' abandonment notice was legally ineffective. Thus, according to *Miller v. Mellott*, the burden of proof is on the surface owner to demonstrate compliance with the DMA.

Miller v. Mellott is the first decision by the Seventh District Court of Appeals (which covers Monroe, Noble, Belmont, Jefferson, Harrison, Carroll, Columbiana and Mahoning Counties) that applies both the MTA and the DMA to determine whether a mineral interest is terminated. *Miller v. Mellott* limited the application of the MTA to those cases where the surface owner can establish a clear root of title deed that will start the 40-year extinguishment period. If there is no deed in the

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surface owner's chain of title that transfers oil and gas rights to the surface owner, the surface owner will likely not be able to rely on the MTA to extinguish a mineral owner's oil and gas rights.

In short, to say that Ohio law regarding the termination and preservation of mineral rights is in flux and evolving every day is an understatement. Even after the ruling in *Miller v. Mellott*, surface owners and severed mineral owners in Ohio continue to face significant hurdles under both the MTA and the DMA in disputes over ownership of valuable mineral interests. This uncertainty highlights the importance of retaining an experienced oil and gas attorney to advise clients with regard to the abandonment, preservation, and the ownership of mineral interests.

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