OHIO'S FIFTH APPELLATE DISTRICT RULES IN A DORMANT MINERAL ACT NOTICE CASE

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On June 28, 2019, Ohio's Fifth District Court of Appeals issued its opinion in *Gerrity v. Chervenak*, 2019-Ohio-2687, holding that the surface owner's attempts to locate the heir of a severed mineral holder were reasonable, and, therefore, the reserved mineral interest was deemed abandoned under the 2006 version of Ohio's Dormant Mineral Act, O.R.C. 5301.56 (the "DMA").

The *Gerrity* case involved a fact pattern that is typical in many DMA cases. The property in question, located in Guernsey County, was transferred in 1961 by warranty deed from T.D. Farwell to Robert C. Shaefer, with Farwell reserving all the mineral rights to the property. Farwell died in 1965 in Guernsey County, and the reserved mineral interest was transferred to his daughter, Jane Richards, through the estate. Meanwhile, in 1999, Robert Schaefer conveyed the surface rights of the property to the Chervenaks, who on June 14, 2012, recorded an affidavit of abandonment with the Guernsey County Recorder pursuant the DMA.

In August 4,2017, Tim Gerrity, the sole heir of Jane Richards, filed a lawsuit, challenging the validity of the Chervenaks' affidavit of abandonment, and the Chervenaks counterclaimed, seeking to enforce their DMA affidavit. The trial court ruled in favor of the Chervenaks, holding the mineral interest was deemed abandoned under the DMA. Title to the minerals was ordered to be vested in the surface owner.

Gerrity appealed this decision to the Fifth District Court of Appeals (which covers Ashland, Coshocton, Delaware, Fairfield, Guernsey, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark, and Tuscarawas Counties). The issue on appeal was whether the Chevenaks complied with the notice requirements of the DMA by publishing their notice of abandonment, rather than first attempting to serve it on the heir of Jane Richards by certified mail. Under the DMA, a surface owner seeking to abandon severed mineral interests must first

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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 (which covers Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe, and Noble Counties) has already issued several recent rulings that set forth when surface owners may skip the step of first serving it via certified mail and directly publish their notice of abandonment. In *Shilts v. Beardmore*, 2018-Ohio-863, the Seventh District held that surface owners must use "reasonable diligence" in attempting to locate heirs before they can skip the certified mail requirement and serve via publication. 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 although an internet search is not required in every case, each case is different and should be reviewed on an individual basis. In *Miller v. Mellott*, 2019-Ohio-504, the Seventh District then determined that, because the surface owners failed to submit any evidence of their efforts undertaken to identify the names and addresses of mineral holder's heirs, the surface owners failed to comply with the DMA notice requirements, and therefore their abandonment notice was legally ineffective. Finally, in *Soucik v. Gulfport Energy*, 2019-Ohio-491, the Court held that service by publication is a "last resort" and can only be used "only after actual service cannot be obtained."

Turning back to the *Gerrity* appeal, the Fifth District noted that the Chervenaks attempted to serve Jane Richards via certified mail at her last known address in 1965 and also searched the public records of Guernsey County but were unable to locate any address for her. (In reality, Jane Richards had died in December 1997 in Florida, and her will was probated in Florida. Ms. Richards' sole heir was Tim Gerrity, a Columbus Ohio attorney.)

The Chervenaks argued that their searches for Jane Richards were reasonable. Gerrity argued that the Chervenaks did not use reasonable diligence because an internet search would have located the online obituary of Jane Richards. The court of appeals agreed with the Chervenaks, holding that, "We do not find that the ODMA contemplates a worldwide exhaustive search for a 'holder.'" The court also noted that Gerrity did not show proof of how discoverable her obituary was. One judge dissented, noting that, "Given that very few people remain at the same address for 45 years due to the transitional nature of modern society, along with the availability of online obituaries, person locator websites and other internet resources, such an attempt by Appellee falls woefully short of being reasonable in the 21st century."

The *Gerrity* case is most recent case in a series of cases in which Ohio courts have been grappling over the surface owner's compliance with the mandatory notice requirements of the Ohio. The *Gerrity* court seems to depart from the Seventh District's line of cases, which hold that the issue of whether a surface owner's reasonable diligence should include an internet search is measured on a case-by-case basis and that service by publication is only to be used as a "last resort." At the very least, it seems that the court could have remanded the case back to the trial court for a trial on the factual issue of the reasonableness of the surface owner's diligence, in light of Gerrity's evidence that an internet search would have located the Jane Richards estate.

However, the court rejected the mineral owner's argument that a reasonable search, in this case, should have required an internet search since, according to Gerrity, Jane Richards' 1997 obituary was "readily available." It is not apparent from the decision whether the mineral owner properly argued the "reasonable diligence" standard on appeal or made an appropriate record at the trial court level to establish that an internet search would have located the heir of Jane Richards, which would have most certainly rebutted the surface owner's claim of reasonable diligence. As the Seventh District held in *Sharp v. Miller,* although an internet search is not required in every case, each case is reviewed individually. In other words, in cases where an internet search would locate mineral owner's heirs, a surface owner's reasonable diligence would necessarily include an internet search. Here, had Gerrity made a proper record before the trial court that an internet search in 2012 would have located the 1997 obituary of Jane Richards, which would have identified her heir, Tim Gerrity, perhaps the outcome of the case may have been different.

In short, Ohio law regarding the abandonment and preservation of mineral rights under the DMA is still evolving. Although the rights and obligations of surface owners and mineral holders under the DMA were seemed to be more defined, with the rulings in *Miller v. Mellott, Soucik v. Gulfport Energy, and Stalder v. Bucher, Gerrity v. Chervenak* shows us that each case is unique, the law is interpreted differently between appellate districts and evidence of reasonable diligence differs in each case. Thus, it is safe to say that surface owners and mineral owners continue to face significant challenges in disputes over ownership of valuable mineral interests. This uncertainty and the need for litigation 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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