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Ohio Court of Appeals for the Fifth District Lowers the Bar on what Constitutes Reasonable Diligence under the Ohio Dormant Mineral Act

The Ohio Court of Appeals for the Fifth District released a significant opinion in *Gerrity v. Chervenak* regarding the Ohio Dormant Mineral Act ("ODMA"), Ohio Rev. Code Ann. § 5301.56 (2006), on June 28, 2019. 2019 Ohio App. LEXIS 2795 (Dist. Ct. App. June 28, 2019). Refining the unclear standard of "reasonable diligence" implicitly required under the ODMA, the Fifth District Court of Appeals affirmed the trial court's holding that "reasonable diligence" to notify a "holder" **does not** mandate the use of online research techniques. *Id*. at *11–12. The Court further explained that "we do not find that the ODMA contemplates a worldwide exhaustive search for a 'holder.'" *Id*. at *12.

In *Gerrity*, the action arose out of an heir's right to subsurface minerals of real property located in Guernsey County, Ohio. *Id*. at *1. Beginning on November 6, 1961, the reservation of mineral rights was originally created in a warranty deed from T.D. Farwell to Robert C. Shaefer. *Id*. at *1. Mr. Shaefer received the surface rights, and Mr. Farwell reserved the mineral rights to the property. *Id*. On October 19, 1965, Mr. Farwell's reserved mineral rights were conveyed by a certificate of transfer from his estate to his daughter, Jane F. Richards. *Id*.

In 1997, Ms. Richards died in Florida. *Id*. at *6. Ms. Richards' estate was probated in Florida, leaving all of her real estate interest to her son, Timothy Gerrity. *Id*. In 1999, John and Gloria Chervenak became the owners of the surface rights to the subject property. *Id*. The Chervenaks attempted to conduct a search with "reasonable diligence" in order to identify and locate the current holders of the severed mineral interest. The Chervenaks searched the county records of both the county where the property was located and the Ohio county where Ms. Richards last lived but no other addresses were recorded for Ms. Richards or heirs. *Id*.

Lacking an updated address, the Chervenaks attempted serving notice of abandonment via certified mail to Ms. Richards' last known address (in Cleveland, Ohio). *Id*. at *8. However, the notice was returned "vacant-unable to forward." *Id*. In a final attempt, and pursuant to the statute, the Chervenaks published a notice of abandonment in the county newspaper where the property was located. *Id*. Notably, the Chervenaks did **not** search internet sources before serving notice by publication. *Id*. at *11–12. On June 14, 2012, the Chervenaks recorded an affidavit of abandonment. *Id*. at *2. Finally, on July 9, 2012, the Chervenaks recorded a notice of failure to file which, according to the court, "resulted in [the Chervenaks] becoming the title owners of the mineral rights." *Id*.

The *Gerrity* Court reviewed whether, when implementing the abandonment procedures under the ODMA, the surface owners are required to perform an internet search to reveal any potential heirs or addresses thereof prior to publishing a notice of abandonment and recording the affidavit of abandonment. *Id*. at *7. Rejecting the Appellee's argument that "reasonable diligence" requires the use of online techniques, the Court noted that the "**plain language** of the ODMA requires [notice served by] certified mail 'to each holder or each holder's successors or assignees, at the last known address of each.'" *Id*. at *11–12 (emphasis added). Based on this statutory language, the Court did not feel that an exhaustive search, such as the use of websites like ancestry.com, was necessary.

This is not the first time an Ohio Court of Appeals was presented the question of whether "reasonable diligence" was exercised by a surface owner attempting to declare the right to abandoned subsurface minerals. *Id*. at *9. The Ohio

Court of Appeals for the Seventh District in *Shilts v. Beardmore*, 2018 Ohio App. LEXIS 906 (Dist. Ct. App. Mar. 5, 2018), *appeal not accepted*, 101 N.E.3d 434 and *Sharp v. Miller*, 114 N.E.3d 1285 (Dist. Ct. App. Nov. 26, 2018), were also called to examine the "reasonable diligence" standard under the ODMA imposed on surface owners in determining the last known heirs and location of "holders" of mineral interests. The Court of Appeals for the Seventh District in both *Shilts* and *Sharp* found that an online search coupled with searches of county records satisfied the "reasonable diligence" burden. See *Shilts*, 2018 Ohio App. LEXIS 906 at *9; *Sharp*, 114 N.E.3d at *10. Ultimately, the Court in *Sharp* explained "reasonable actions in one case may not be reasonable in another case." *Sharp*, 114 N.E.3d at *10. The *Shilts* Court also acknowledged that, "[i]t would be absurd to absolutely require an attempt at notice by certified mail when a reasonable search fails to reveal addresses or even the names of potential heirs who must be served." *Shilts*, 2018 Ohio App. LEXIS 906 at *10.

With the *Gerrity* decision, the case law on what constitutes "reasonable diligence" in a search to identify and locate mineral interest holders has finally begun to take shape. From these cases, we have seen that "reasonableness" is dependent upon the facts in each case. Furthermore, the Court of Appeals for the Fifth District in *Gerrity* essentially lowered the threshold of "reasonable diligence" under the ODMA by eliminating the internet search requirement, at least in certain circumstances. However, *Gerrity* may yet be appealed to the Ohio Supreme Court.

For a copy of the *Gerrity*, *Shilts*, or *Sharp* opinions, or for any additional insights on how the ODMA continues to impact your ownership or development plans in Ohio, do not hesitate to contact the Energy Group at Dickie, McCamey & Chilcote, P.C.

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