



Jul 11, 2019

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The Search for Holders Under the ODMA: The 5th District Says You Don't Always have to Use the Internet for ODMA Due Diligence

On June 28, 2019, the Court of Appeals for the Fifth District issued its opinion in *Gerrity v. John E. Chervenak, Trustee of the Chervenak Family Trust, et al.*, No. 18 CA 26 Guernsey, 2019–Ohio–2687, 2019 WL 2745501 (5th Dist.). A copy of the opinion can be found [here](#). The central issue in *Gerrity* was whether, in implementing the abandonment procedures under the Ohio Dormant Mineral Act (R.C. 5301.56) (ODMA), the surface owners were required to perform an internet search (e.g. ancestry.com, myheritage.com, beenverified.com) to locate the current holder of the severed mineral interest so the notice of abandonment could be served directly on him via certified mail, rather than by publication in a local newspaper. The Guernsey County Court of Common Pleas held that the surface owners were not and granted summary judgment in their favor. The 5th District Court of Appeals affirmed, explaining, “[W]e do not find that the ODMA contemplates a worldwide exhaustive search for a ‘holder.’” *Id.* at ¶ 25.

The relevant facts of *Gerrity* are summarized as follows:

The subsurface minerals of the Guernsey County property were severed in 1961 and transferred to Jane F. Richards in 1965. *Gerrity* at ¶ 2. Jane F. Richards thereafter moved to Florida where she died in 1997. *Id.* at ¶ 15. Her estate was probated in Florida, leaving everything to her son, Timothy Gerrity, the Plaintiff/Appellant. *Id.* No evidence of this transfer was filed in Ohio. The Chervenaks, the defendants/appellees, acquired the surface estate in 1999 and implemented the ODMA beginning in 2012. *Id.* at ¶ 15, 18. A search of the Guernsey County public records showed Richards as the last titled owner with an address in Cleveland (Cuyahoga County). *Gerrity* at ¶ 18. The Chervenaks served notice of abandonment via

certified mail on this address, but it was returned “vacant–unable to forward.” Id. A further search of Cuyahoga County records did not reveal any other addresses or heirs of Jane Richards. Id. The Chervenaks thereafter served the notice of abandonment via publication, and, when no filing under R.C. 5301.56(C) and (H)(1) was made within the time period, they filed the notice of failure to file. Id. at ¶ 19. The Chervenaks did not search internet sources before serving via publication.

Timothy Gerrity filed a declaratory judgment and quiet title action against the Chervenaks on August 4, 2017, arguing that the ODMA abandonment was void because the Chervenaks did not conduct reasonable due diligence in attempting to locate him before serving via publication. Id at ¶ 4.

Why is *Gerrity* significant?

The cases dealing with similar questions thus far (e.g. *Shilts v. Beardmore*, 7th Dist. Monroe No. 16 MO 0003, 2018–Ohio–863 and *Sharp v. Miller*, Jefferson No. 17 JE 0022, 2018–Ohio–4740—both discussed in *Gerrity* at ¶¶ 21–23) have given some shape to what level of due diligence is required under the ODMA. However, both cases included an internet search component and, as such, the question of whether an internet search is necessary at all was never before those courts. *Gerrity* provides important guidance and demonstrates that the lack of an internet component to a holder search is not necessarily fatal for purposes of the reasonableness standard.

Nevertheless, it should be borne in mind that the specific facts of each case matter a lot. There is no bright–line rule; the reasonableness of the due diligence will depend on the facts and circumstances of each individual case. See *Gerrity* at ¶ 22 (quoting *Sharp*). Furthermore, *Gerrity* was not a unanimous decision with Judge Patricia Delaney penning a well–reasoned dissent asserting that, in summary, the search fell short of being reasonable in light of the circumstances (e.g. there was no way Richards was still at the Cleveland address after 45 years) and the availability of online resources to locate a current address for Ms. Richards or her heirs. This should be clear evidence that *Gerrity* was a close case and that

a slight change of facts could have resulted in the decision going the other way. Likewise, this should be clear evidence that best practices for ODMA due diligence will include an internet search of common resources to remove any question that the search was reasonable before notice by publication was pursued.

Why does *Gerrity* matter to you? Producers and purchasers of oil and gas assets (and their land brokers) in Ohio will inevitably encounter prospective lessors and sellers that acquired, or claimed to have acquired, a mineral interest via the ODMA. The ability to properly evaluate these ownership claims therefore requires an understanding of what is required to properly implement the ODMA, including the due diligence requirements. *Gerrity* adds to this understanding and provides important template producers and purchasers of mineral assets can utilize in scrutinizing opportunities.

Gerrity is subject to appeal to the Supreme Court of Ohio until August 12, 2019 (45 days after the entry of judgment). The Supreme Court of Ohio has the discretion to reject jurisdictional appeals; it rejected the appeal in *Shilts and Sharp*. See 153 Ohio st.3d 1433 and 155 Ohio St.3d 1421, respectively. *Gerrity* may be compelling enough to be accepted.

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