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Hutchins v. Baker: Affidavits of Heirship and the Ohio DMA

Does an affidavit of heirship function as a title transaction? Would it constitute notice to a surface owner seeking to implement the Ohio DMA? Continuing the saga of Ohio Dormant Mineral Act jurisprudence, the Seventh District Court of Appeals answered “no” to both of these questions in its February 26, 2020 decision *Wanda Hutchins v. Troy E. Baker et al.*, 7th Dist. Monroe No. 19 MO 0005, 2020-Ohio-1108. The full opinion can be found [here](#).

Hutchins involved a 50-acre parcel of property in Center Township, Monroe County. In 1959, Bertha Edna Baker sold the property, reserving all the oil and gas. *Hutchins*, ¶ 3. She died intestate and her property went to her children, Hazel E. Baker and Kenneth E. Baker. *Id.* Hazel died intestate, unmarried, and without children, so her interest went to her brother, Kenneth.” *Id.* Kenneth died married to Myrtle Virginia Bolinger, but they had no children. *Id.* His estate was therefore left to Myrtle, who died testate leaving everything to Wanda Hutchins, the plaintiff/appellant (hereinafter, “Ms. Hutchins”). *Id.*

The public records of Monroe County contained no evidence of the transfers of Bertha’s severed mineral interest prior to July 26, 2013 when Louis Trosch, who was apparently well-acquainted with the Baker heirship, recorded his affidavit of heirship (the “Trosch Affidavit”) describing the lineage of the Baker severed mineral interest. *Hutchins*, ¶ 5. Fifty-three days after the Trosch Affidavit was recorded, the respective surface owners, Troy Baker (who thereafter transferred to Bayco) and the Dierkes (the “Surface Owners”), served their Notice of Abandonment via publication. *Id.*, ¶ 32. On December 18, 2013, the Surface Owners filed their joint Affidavit of Abandonment, which made no mention of the Trosch Affidavit. *Id.*, ¶¶ 4, 7. On November 7, 2016, Ms. Hutchins filed her “Notice of Claim to Preserve Mineral Interest.” *Id.*, ¶ 8.

Ms. Hutchins filed the initial complaint for quiet title, declaratory judgment, and slander of title, and the Surface Owners counterclaiming with similar claims as well as a claim challenging the

constitutionality of R.C. 5301.56. *Hutchins*, ¶¶ 9–10. Gulfport, who had leases from the Surface Owners, was also named a defendant and it answered asserting the validity of its leases. *Id.* After discovery, the parties filed cross-motions for summary judgment, with Ms. Hutchins arguing that the Trosch Affidavit placed the Surface Owners on notice of her identity, meaning service by publication was improper. *Id.* ¶ 12. The Surface Owners argued the Trosch Affidavit was not indexed, not in the chain of title, and therefore did not constitute notice to them, meaning service by publication was proper. *Id.* ¶ 13.

The trial court granted summary judgment to the Surface Owners, holding that the Trosch Affidavit did not constitute notice to the Surface Owners because it was not indexed and therefore would never be found by a title search of the property. *Hutchins*, ¶ 15. Thus, the Surface Owners were entitled to serve the Affidavit of Abandonment by publication. *Id.*

On appeal, the Seventh District addressed two assignments of error: (1) whether the Trosch Affidavit was a title transaction and (2) whether the trial court erred in granting summary judgment when the recorder's office failed to index the Trosch Affidavit (i.e. whether the Trosch Affidavit placed the Surface Owners on notice such that service by publication was improper). *See generally, Hutchins.*

For the first assignment of error, the Seventh District agreed with Gulfport's argument: the Trosch Affidavit was not a title transaction because although it described prior title transactions, it itself was not a title transaction. *Hutchins*, ¶¶ 20, 26. The Seventh District cited the MTA's definition of title transaction, being "any transaction affecting title to any interest in land..." in support. *Id.* ¶ 24.

As for the second assignment of error, the Seventh District agreed that the Trosch Affidavit was not constructive notice to the Surface Owners because it was not indexed as part of the property's chain of title, which is required to make it discoverable to a title searcher: "The fact that an affidavit was recorded with the Recorder's Office does not necessarily mean that it could have been discovered through reasonable efforts. **It must be cross-referenced in some manner to make it discoverable.**" *Hutchins*, ¶ 36 (emphasis added). Importantly, only the Surface Owners' motion for summary

judgment contained a supporting affidavit (that of their title examiner), which set forth that no one searching for Bertha Edna Baker or other owners of the property in 2013–2014 would be able to find the Trosch Affidavit, which was indexed only under “Lois A. Trosch”[sic]. *Id.*, ¶ 35–36. Ms. Hutchins did not submit a counter-affidavit asserting that the Trosch Affidavit could have been found by a title searcher, which is normally required to rebut such evidence on summary judgment. *Id.*, ¶ 36 and Civ.R. 56(E).

Lastly, the Seventh District rejected Ms. Hutchins’ argument that the Recorder’s Office’s failure to index the Trosch Affidavit was not a valid basis for the Surface Owners’ inability to locate it and identify Ms. Hutchins as the holder of the Baker severed mineral interest—that a reasonable search should have found it regardless. Here, the Seventh District enumerated the ways in which the Trosch Affidavit lacked basic information necessary for indexing, such as the volume and page of the Baker reservation, and observed that the Recorder could have rejected it outright for failing to follow the requirements for affidavits of preservation. *Id.*, ¶¶ 37–40. On top of this, the Seventh District made clear that recorders of deeds have no duty to inspect and fill in missing pieces of information necessary for recording and indexing instruments. *Id.*

The *Hutchins* decision is very fact-specific. Had the Trosch Affidavit contained more information and been properly indexed, it could have functioned as notice to the Surface Owners and, perhaps, as an affidavit of preservation. On the other hand, it is unlikely an affidavit of heirship could ever function as a title transaction because describing title transactions is not the same thing as effecting a title transaction. *Hutchins* is not a watershed decision, but it does highlight two important takeaways: (1) Recorded does not automatically mean constructive notice—proper indexing is required for the latter; and (2) an affidavit of heirship, or some other commonly recorded document, should not be overlooked as part of a DMA analysis merely because it is not normally filed as part of a DMA implementation.

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