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Gerrity v. Chervenak: Reasonableness Remains the Same

Hot on the heels of [West v. Bode](#), the other shoe in the world of Ohio oil and gas jurisprudence has finally dropped—just in time for the holidays. Arguably a win for surface owners, the Ohio Supreme Court decision in [Gerrity v. Chervenak](#)¹ lays to rest any notion that a surface owner seeking to utilize the Ohio Dormant Mineral Act (“DMA”) must engage in an exhaustive, likely futile, search to identify all mineral holders before resorting to publication of the notice of abandonment. With *Gerrity*, the Ohio Supreme Court has rejected any bright-line rule and instead kept the status quo. This means the amorphous standard of “reasonableness” remains the question of the day for determining the validity of any abandonment. And for those with a stake in these cases, it means an encyclopedic knowledge of what has been deemed reasonable and what has not will continue to be critical, as the risk of an abandonment being deemed void is not going anywhere.

The facts in *Gerrity* are not complicated, but as with all cases of this type, they are critical to understanding what *Gerrity* does and does not say. Through a 1961 warranty deed, T.D. Farwell severed minerals underlying 108 acres in Guernsey County.² These mineral rights passed to T.D.’s daughter, Jane Richards, by virtue of a certificate of transfer filed in 1965, which listed her as residing at a Cleveland address.³ However, sometime after 1965, Jane moved to Florida and became a resident there.⁴ She died in 1997 a resident of Florida and was survived by her sole heir, Timothy Gerrity.⁵ However, nothing related to Ms. Richards’ death or Mr. Gerrity’s heirship was recorded in Ohio.⁶

John and Gloria Chervenak bought the surface of the 108 acres in 1999.⁷ Seeking to implement the DMA to reunite the minerals and their surface estate, the Chervenaks searched the records of both Guernsey and Cuyahoga Counties for mineral holders and located the 1965 certificate of transfer into Jane Richards with her last known address near Cleveland.⁸ The Chervenaks sent their notice of abandonment by certified mail to this address (the last known

address), but it was returned “Vacant – Unable to Forward.”⁹ Unable to serve via certified mail, the Chervenaks published their notice of abandonment in The Daily Jeffersonian newspaper.¹⁰ Receiving no response after the requisite time period, they submitted an Affidavit of Abandonment pursuant to the DMA.¹¹

As this story always goes, the former holder, Mr. Gerrity, subsequently learned of the abandonment. In 2017, he brought suit against Chervenak arguing that because he had not received notice of the intention to abandon via certified mail, the Chervenak’s DMA proceeding was ineffective.¹² His claims rested on two alternative arguments: that the DMA requires a surface owner to identify and attempt service by certified mail on every holder of a mineral interest (or the DMA cannot be utilized at all), or, alternatively, that a surface owner must use certain specified search methods to locate all holders and satisfy the reasonable diligence requirement.¹³ The trial court implicitly rejected Gerrity’s arguments by granting summary judgment to Chervenak, which was appealed to the Court of Appeals for the Fifth Judicial District.¹⁴ That court affirmed the trial court’s decision.¹⁵ Gerrity then appealed to the Ohio Supreme Court, which accepted the case.

From a general standpoint, the Court rejected Gerrity’s legal positions because they conflicted with the legislative intent of the DMA.¹⁶ Simply put, it could not be reconciled with the actual text of the statute: “[i]t would strain credulity to read R.C. 5301.56(E)(1) to allow notice by publication when a holder cannot be identified, but at the same time to require identification of the holder in the notice itself.”¹⁷ The Court found that the best reading of the statute is that “a surface owner need not specifically identify by name every holder, as broadly defined by R.C. 5301.56(A)(1).”¹⁸ The Court also pointed out the inherent uncertainty and futility of Gerrity’s proposition, i.e. that in requiring a surface owner to identify every holder, there could almost never be certain that the DMA requirements have been satisfied.¹⁹

In rejecting Gerrity’s second argument (that certain reasonable search methods be used that are designed to locate all holders before publication is allowed under the DMA), the Court looked to the reasonableness standards enunciated in *Sharp v. Miller* and

Shilts v. Beardmore.²¹ In summary, when “a reasonable search fails to reveal the names or addresses of the potential heirs who must be served,” a surface owner need not attempt to provide notice by certified mail.²² This is inherently not a bright-line rule and, not surprisingly, the *Gerrity* Court refused to create one. Thus leaving the status quo in place: what constitutes reasonable diligence will depend on the facts and circumstances of each individual case.

Perhaps the most interesting part of the *Gerrity* opinion is the discussion of the current legislation pending before the General Assembly. This house bill, 2019 H.B. 100, would amend the DMA to allow service by publication when a surface owner cannot attempt or complete notice by certified mail after conducting a search of public records. Critically, it defines “public records” as “any document pertaining to a mineral interest filed or recorded with the auditor, recorder, and all courts situated within each county in which the lands subject to the mineral interest are located.”

Unlike *Gerrity*, this proposed legislation would constitute a very significant shift in DMA implementation because, in limiting the search to just the county records, it would conceivably create a bright line for due diligence that does not require an internet search. Of course, without express language addressing it, this definition could still leave questions unanswered. For instance, would this completely preempt any “reasonableness” test? If a surface owner finds a name of a potential holder in the county records, but not an address, must that surface owner go beyond the county records? How much? Would a surface owner with individual/personal knowledge of a holder’s whereabouts be able to ignore it and rely solely on public records? Would there be some reasonableness test applied to the thoroughness of the public records search? A court interpreting this proposed law could very well conclude that none of that matters anymore—the General Assembly could have baked those requirements into the law but chose not to. However, it is premature to speculate on how this would play out at this point. Perhaps there is more to come on this front.

For now, however, 2019 H.B. 100 is not the law—*Gerrity* is. And what *Gerrity* says is that the reasonableness test is still the test. For those involved, then, the game remains the same: A thorough,

check-list approach to searching for holders and, when in doubt, attempting notice via certified mail before resorting to publication. Anything less leaves room for a challenge and the risk that all was for naught. And while *Gerrity* and its predecessor cases provide guidance, “reasonableness” is inherently mushy, which means continued litigation, and job security for Ohio lawyers, is all but assured.

For more information, please contact [Michael Brewster](#), [Christopher Rogers](#) or any attorney in Frost Brown Todd’s [Oil & Gas](#) Industry Team.

¹Slip Opinion No. 2020-Ohio-6705.

²*Gerrity*, 2020-Ohio-6705 at ¶ 2.

³*Id.* at ¶ 3.

⁴*Id.* at ¶ 4.

⁵*Id.*

⁶*Id.*

⁷*Id.* at ¶ 2.

⁸*Id.* at ¶¶ 5, 11.

⁹*Id.* at ¶ 5.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.* at ¶ 6.

¹³*Id.* at ¶ 12.

¹⁴*Id.* at ¶ 7.

¹⁵2019-Ohio-2687, 140 N.E.3d 164.

¹⁶See *Gerrity* at ¶ 20 (that the DMA “be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title.”)

¹⁷*Id.* at ¶ 17.

¹⁸Id. at ¶ 19.

¹⁹Id. at ¶ 21.

²⁰2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.)

²¹2018-Ohio-863 (7th Dist.); Gerrity at ¶¶ 28-30.

²²Gerrity at ¶ 28 (quoting Sharp at ¶ 16).

²³Id. at ¶ 31.

²⁴Id. (quoting 2019 H.B. 100).

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