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Peppertree II: Ohio Supreme Court Holds Recorded Will Not a Title Transaction Under the Marketable Title Act

In *Peppertree Farms, L.L.C. v. Thonen*, 2022-Ohio-395 (“*Peppertree I*”), the Ohio Supreme Court held that two pre-1925 deeds reserving oil and gas royalties were “exceptions,” not “reservations,” and distinguished between accrued and unaccrued royalties: the latter are a real property interest. See generally, *Peppertree I*. [That article can be found here](#). That same day, the Ohio Supreme Court issued a second opinion (“*Peppertree II*”),^[1] which addressed a different issue: whether a handwritten deed that did not specifically devise a reserved oil and gas royalty and contained no residuary clause could constitute a title transaction under the Ohio Marketable Title Act, R.C. 5301.47. **Spoiler alert** – The Court said no.

As we know from *Peppertree I*, in 1921, Mary Fleahman conveyed two tracts of land in Monroe County, Ohio to H.J. Jones, carving out “the $\frac{3}{4}$ of oil Royalty and one half of the gas....”^[2] In *Peppertree I*, the Court validated Ms. Fleahman’s carveout as an exception, meaning it was not a life estate; but what about the portion that went to Mr. Jones? *Peppertree II* picks up here. Mr. Jones conveyed the property to James Foughty via a deed that included the following language: “All the oil and gas underlying the above described premises is hereby reserved and is not made a part of this transfer.”^[3] Mr. Jones thereafter conveyed to S.E. Headley “the one half part of his one fourth royalty of all the oil and gas.”^[4] What was left with Mr. Jones is the “Jones Interest.”

Mr. Jones died intestate in 1932 and Earl S. Ward, the administrator of his estate, sold the Jones Interest to Beatrice J. Pfalzgraf and Irene Jones in August 1936.^[5] Pfalzgraf thereafter conveyed her one-half interest in the Jones Interest to Ward.^[6] Mr. Ward died testate in 1972 and his handwritten will was filed with the Monroe County probate court in April, 1972. **The will did not specifically devise the Jones Interest or contain a residuary clause.**^[7] In

2017, Stacey L. Lucas (presumably an heir to Mr. Ward) filed an affidavit of preservation for the Jones Interest.[\[8\]](#)

Surface owners of the two tracts, Peppertree, and Jay and Amy Moore, brought suit in the Court of Common Pleas of Stark County, Ohio and claimed the Jones-to-Foughty deed created a reservation that, without words of inheritance, was only a life estate.[\[9\]](#) Even if it wasn't a life estate, they argued it was extinguished by the Marketable Title Act (MTA). Both the trial court and Fifth District Court of Appeals agreed.[\[10\]](#)

Relying on the *Peppertree I* rationale and explanation, *Peppertree II* disagrees with both lower courts and holds that the carveout in the 1921 Jones-to-Foughty deed was not a life estate.[\[11\]](#) This victory, however, was short-lived, as the Court held the 1972 handwritten will was not a title transaction, meaning the Jones Interest was extinguished under the MTA:

The will at issue in this case is not a recorded title transaction under R.C. 5301.49(D). The will did not contain a specific devise of the Jones Interest, nor did it include a residuary clause distributing the remainder of Ward's property to a beneficiary. Therefore, although it was recorded after the effective date of the root of title, it did not transfer, encumber, or in any way affect title to the Jones Interest.
[\[12\]](#)

Peppertree II thereafter draws a very important distinction: "In contrast, the transfer of the Jones Interest to Ward's heirs through intestate succession *did* affect title to an interest in land and was a title transaction. But this title transaction was not *recorded* within 40 years of the effective date of title."[\[13\]](#)

Peppertree II tells us that in applying the MTA, concepts of constructive transfer, such as the legal concept that transfer occurs on the death of the testator, alone is not enough to constitute a title transaction under the MTA. **There must be something recorded establishing the transfer and it must be within the relevant period.** Hence why the Court drew a distinction between the handwritten will, which was recorded within the 40-year period but lacked any specific devise of the Jones Interest or a residuary clause, and the intestacy "gap filler," which did legally pass the

Jones Interest to Mr. Ward's heirs but was recorded outside of the relevant 40-year period for the determination of marketability.^[14]

Peppertree II, like *Peppertree I*, is curiously fact-specific, dealing with a relatively unique set of facts that likely has little impact on the public.^[15] Nevertheless, *Peppertree II* bolsters the overall goal of the MTA of creating certainty in reliance on the chain of title by highlighting the all-important requirement that the title transaction **must be recorded** to be a "title transaction" under 5301.49(D).

For more information, contact [Chris Rogers](#) or any attorney with Frost Brown Todd's [Oil & Gas](#) industry team.

^[1] *Peppertree Farms, L.L.C. v. Thonen*, Slip Opinion No. 2022-Ohio-396 ("*Peppertree II*"). A full copy can be obtained [here](#).

^[2] *Peppertree II* at ¶ 9.

^[3] *Id.*

^[4] *Id.* at ¶ 10.

^[5] *Id.*

^[6] The opinion does not specify, but the author assumes "Ward" means Earl S. Ward, the administrator of Mr. Jones' estate. See *id.*

^[7] *Peppertree II*.

^[8] Ms. Lucas is listed as one of the "Jones Defendants," but specific relationships are not mentioned in the opinion. *Id.* at ¶ 12.

^[9] *Id.*

^[10] *Id.* at ¶¶ 13-14.

^[11] *Id.* at ¶¶ 19-23.

^[12] *Id.* at ¶ 26.

^[13] *Id.* (italics in original).

^[14] *Id.*

^[15] And once again, Justice Michael P. Donnelly dissented asserting the appeal should not have been granted in the first place. See *id.* at ¶ 32.

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