

OG ENERGY EDUCATION SERIES



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# AN OVERVIEW OF LAND, TITLE, AND LEASING ISSUES IN OHIO

WEDNESDAY, AUGUST 16, 2023

12:00 PM TO 1:00 PM CT



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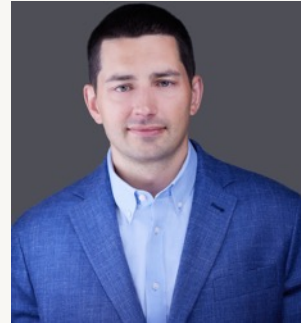


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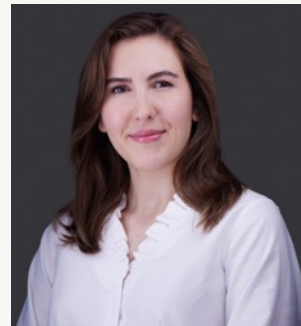
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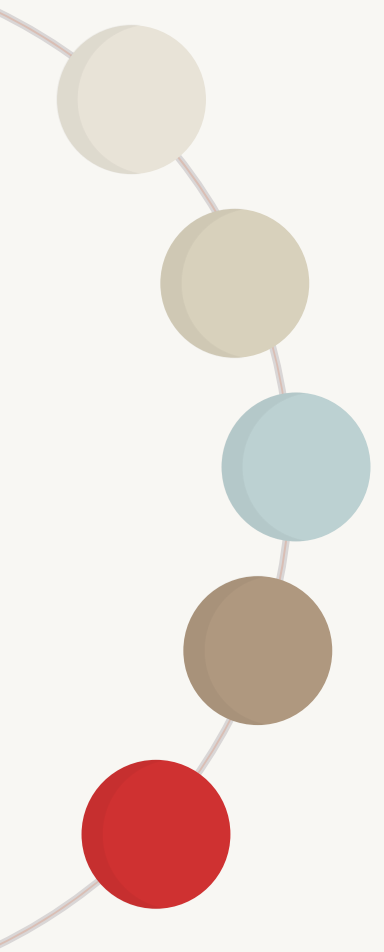
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# Overview

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- I. Ownership of land
  - II. Sample Title Issues
  - III. The Dormant Mineral Act

# Ownership of Land in Ohio

- ❖ Separate Property
- ❖ Cotenancy
  - Tenancy in Common
  - Right of Survivorship
  - Tenancy by the Entirety
- ❖ Dower Interests
- ❖ Life Estates / Open Mine Doctrine

# Separate Property

- ❖ Under Ohio Rev. Code § 3105.171(A)(6)(a), separate property includes:
  - Any property obtained by either spouse before the marriage
  - Separate inheritances by either spouse
  - Passive income from separate property during the marriage
  - Property acquired after a legal separation as defined in the Ohio Revised Code
  - Property excluded by a valid prenuptial agreement
  - Gifts that can be proven by clear and convincing evidence to be made solely to one spouse
  - Compensation for personal injury

# Tenancy in Common

## ❖ Words of Conveyance

- The operative words must convey or devise an interest in real property to two or more people. Ohio Rev. Code § 5302.19.
- “To A and B,” or substantially similar language, is sufficient to create a tenancy in common.

## ❖ Implications

- Tenants in common may own unequal shares. However, each tenant has an undivided interest in the property and may possess the entire property.
- When a tenant in common dies, the tenant’s share will transfer to their heirs and devisees.
  - If a deed is silent as to the distribution of the tenant’s share amongst their heirs and devisees, the presumption is that each heir will receive an equal share.

# Joint Tenancy with Right of Survivorship

## ❖ Words of Conveyance

- The operative words must clearly express an intention to create a right of survivorship.
- The conveyance must contain the names of the grantees and reference that the survivor is entitled to the remainder.
- “To A and B for their joint lives, remainder to the survivor of them,” or substantially similar language, is sufficient to create a joint tenancy with right of survivorship.
- The use of the word “or” between the names of grantees or devisees does not by itself create a joint tenancy with right of survivorship but shall be construed and interpreted as if the word “and” had been used instead. Ohio Rev. Code § 5302.20(A).

## ❖ Implications

- Under Ohio Rev. Code 5302.20(B) and 5302.20(C)(1), each tenant has an undivided interest in the entire property. So, each tenant may possess the entire property.
- At death, a joint tenant’s share is extinguished.
- The remaining joint tenants absorb the extinguished share when a certificate of transfer or an affidavit accompanied by a certified certificate of death is filed with the county auditor. Ohio Rev. Code § 5309.081.

# Divorce & Joint Tenancy with Right of Survivorship:

- ❖ What happens to joint tenancy after a divorce?
  - “If the entire title to a parcel of real property is held by two survivorship tenants who are married to each other and the marriage is terminated by divorce, annulment, or dissolution of marriage, the title, except as provided in this division, immediately ceases to be a survivorship tenancy and becomes a tenancy in common. Each tenant in common of that nature holds an undivided interest in common in the title to the real property, unless the judgment of divorce, annulment, or dissolution of marriage expressly states that the survivorship tenancy shall continue after termination of the marriage. The interest of each tenant in common of that nature shall be equal unless otherwise provided in the instrument creating the survivorship tenancy or in the judgment of divorce, annulment, or dissolution of marriage.” Ohio Rev. Code § 5302.20(C)(5).
  - “If a survivorship tenancy includes one or more survivorship tenants in addition to a husband and wife whose marriage is terminated by divorce, annulment, or dissolution of marriage, the survivorship tenancy is not affected by the divorce, annulment, or dissolution of marriage unless the court alters the interest of the survivorship tenants whose marriage has been terminated.” Ohio Rev. Code § 5302.20(C)(5)

# Tenancy by the Entirety

## ❖ Words of Conveyance

- There are three requirements to create a tenancy by the entirety:
  - The language “estate by the entireties” must be written in the title or text of the deed.
  - There must be language of survivorship in the text of the deed.
    - “To husband and wife for their joint lives, remainder to the survivor of them,” or substantially similar language, is sufficient.
  - Grantees must be legally married at the time the deed is executed. *In re Estate of Shelton*, 154 Ohio App. 3d 188, 2003-Ohio-4593, 796 N.E.2d 955, (11th Dist.).

## ❖ Implications

- Enacted in 1972 and repealed in 1985.
- Tenancy by the entireties created during the effective dates of the old statute remain valid. Ohio Rev. Code Ann. § 5302.21(A).
- The Supreme Court of Ohio found that tenancies by the entirety are not alienable by one spouse without the consent of the other. *Cent. Nat’l Bank of Cleveland v. Fitzwilliam*, 12 Ohio St. 3d 51, 54, 465 N.E.2d 408, 411 (1984).

# Dower Interests

- ❖ Under Ohio Rev. Code Ann. § 2103.02, dower is a life estate in one-third of the real property seized as an estate of the inheritance at any time during the marriage.
- ❖ Dower terminates upon granting of an absolute divorce.
- ❖ Under Ohio Rev. Code Ann § 2103.02(A)-(B), dower generally terminates upon the death of a deceased spouse except when:
  - To the extent that any such real property was conveyed by the decedent during the marriage, the surviving spouse not having relinquished or been barred from the dower.
  - To the extent that any such real property during the marriage was encumbered by the decedent by a mortgage, judgment, lien (except for a tax lien) or involuntary sale, the surviving spouse not having relinquished or been barred from dower.
- ❖ All instruments obtained by a married couple should be signed by both parties and contain language explicitly releasing and relinquishing the dower interests of both spouses.

# Life Estates and Remaindermen

## ❖ Life Tenant

- A life tenant has the right, during their life, to occupy and use the property. However, they have no right to operate for oil or gas or grant an oil or gas lease. Ohio courts have stated that a life estate tenant commits enjoined waste if they unilaterally enter into an oil and gas lease. *Fourth & Cent. Tr. Co. v. Woolley*, 31 Ohio App. 259, 165 N.E. 742 (1st Dist. 1928).

## ❖ Remainderman

- A remainderman has an ownership interest in the physical property but does not have the right to possess and use the property until termination of the life estate. A remainderman may not violate the rights of the life tenant by unilaterally occupying and disposing of the property in violation of the life tenant's rights.

# Life Estates and Remaindermen (Continued)

## ❖ Implications

- Must lease **both** to ensure the lease is valid and that operations cannot be enjoyed by non-executing party.
- Division of Proceeds?
  - General rule is that life tenant receives income from the property and the remainderman the corpus. Royalties and lease bonuses typically considered part of the corpus. Delay rentals (if any) part of income.
- Many jurisdictions, including Ohio, require the remainderman to invest the proceeds during the period of the life estate, with the interest earned from that investment paid to the life estate. Once the life estate ends, the remainderman is entitled to the amounts invested.
- **Best Practice:** Obtain a written agreement/payment directive from the parties regarding all payments, including bonus and royalties, due under the lease.

# The Exception: Open Mine Doctrine

- ❖ Ohio has recognized the Open Mine Doctrine as an exception to the general rule that a life tenant cannot produce oil and gas.
  - This rule provides that the holder of a life estate is entitled to the royalties from any wells working at the time of the creation of the tenancy and any wells opened under the authority of a grant or conveyed executed by such former owner prior to the creation of the life estate. *Foster v. Foster, 5th Dist. Coshocton No. 79-CA-19 & 79-CA-21 Ohio App. LEXIS 13928 (July 31, 1980).*



# The Exception: Open Mine Doctrine (Continued)

## ❖ Implications

- It's the lease that "opens the mine" thus, the open mine doctrine can apply even if the well wasn't producing at the time the life tenant took possession and can apply even to *new wells* during the life estate, with all royalties going to the life tenant.

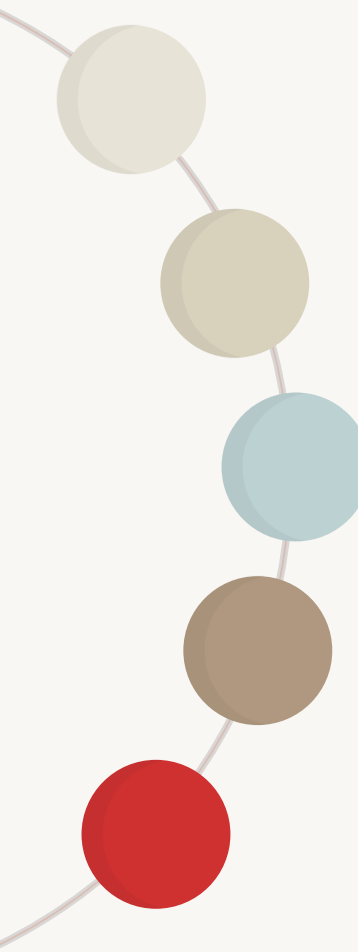
## ❖ Example:

- Owner A leased the Subject Land in 1995 and 2 shallow vertical wells are drilled such that the lease is still HBP. In 2013, owner A conveys the Subject Land to B, but reserved a life estate. In 2023, the Subject Land is pooled into a unit with multiple horizontal wells. Who is entitled to the royalties as to the Subject Land?
  - Owner A, for his life. Authority (the lease) was granted in 1995 prior to the creation of the life estate in 2013.

# Ohio's Race-Notice Statute

- ❖ Under Ohio's race-notice statute, a subsequent purchaser for value has priority if they are a bona fide purchaser and record their interest before the earlier purchaser.
- ❖ A bona fide purchaser is a subsequent purchaser who is without notice of an earlier, conflicting interest.
- ❖ This is applicable in all instruments including deeds and leases, except for mortgages (pure race applies).

# Conveyances and Encumbrances

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- ❖ Unreleased Mortgages
  - ❖ Judgment Liens
  - ❖ Transfer on Death Designation
  - ❖ Ownership by a Trust
  - ❖ Land Installment Contracts

# Unreleased Mortgages

- ❖ **Issue:** How do mortgages affect an oil and gas lease? Does the operator need a subordination agreement?
  - In Ohio, subordinations are typically not necessary. Under Ohio Rev. Code § 1509.31(D), where an oil and gas lease is recorded after a mortgage, and the oil and gas lease is not in default, the oil and gas lease will have priority over all other liens on the property, and the oil and gas lease will not be terminated by the subsequent foreclosure of the mortgage. This section applies to traditional mortgages and open-ended mortgages/credit lines.
  - **Caveat:** However, there is potential that the mortgage could include a provision (often titled Nuisance, Waste) requiring consent from the mortgagee prior to removing oil and/or gas, or the granting of a lease to remove oil and/or gas. In such cases, consent from the mortgagee is necessary.

# Unreleased Mortgages (Continued)

- ❖ What about old mortgages? Is there a statute of limitations?
  - Yes. Any mortgage which remains unsatisfied or unreleased of record for more than 21 years after the date of the mortgage, or 21 years after the stated maturity date of the principal sum, whichever is later, does not give notice or put on inquiry any person dealing with the land described in such mortgage that the debt remains unpaid or has been extended or renewed. Ohio Rev. Code § 5301.30.



# Judgment Liens

- ❖ A private judgment lien on real estate typically remains in effect for five years (even if the property changes hands) after the latter of: (a) when the judgment was issued, or (b) the last time it was used to create a lien, generate a seizure, obtain a garnishment order, or any other similar effort. After that, it becomes “dormant” and will not operate as a lien upon the estate of the judgment debtor. Ohio Rev. Code § 2329.07. An action to revive a privately held dormant judgment must be brought within ten years after the judgment went dormant. Ohio Rev. Code § 2325.15-18.
- ❖ Certificates of Judgments in favor of the state typical go dormant after fifteen (15) years of inactivity. Ohio Rev. Code § 2329.07.
- ❖ After Acquired-Property: A judgment is not a lien on after-acquired property unless a certificate of the judgment is refiled after the acquisition. *Bank of Ohio v. Lawrence*, 161 Ohio St. 543, 120 N.E.2d 88 (1954).

# Transfer on Death Designation Affidavit / Deed

## ❖ **Transfer on Death Designation Affidavit:**

Pursuant to current Ohio Rev. Code § 5302.23(B)(4), “[t]he designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest.”

- Designation Affidavits can be revoked or changed at any time, without the consent of the death beneficiary, including by executing and recording a new transfer on death designation affidavit.

❖ **Transfer on Death Deed:** Pursuant to Ohio Rev. Code § 5302.23(B)(4), as it existed prior to December 28, 2009, these designations were by Transfer on Death Deeds, and were also easily revoked or changed, including by “... recording a deed conveying the grantor's entire, separate interest in the real property to one or more persons, including the grantor, with or without the designation of another transfer on death beneficiary.”

# Transfer on Death Designation Affidavit / Deed (Continued)

## ❖ Implications

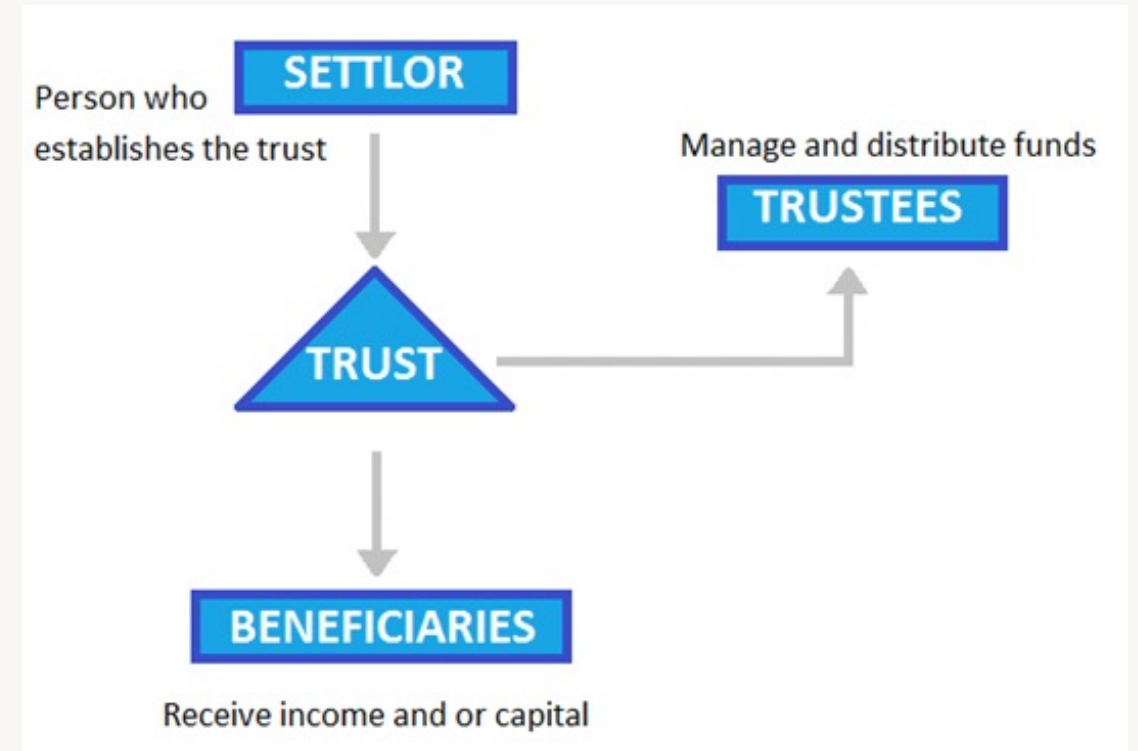
- These death beneficiary designations are very different than a life estate and remainderman situation. Here, an oil and gas lease should be executed by the owner only, not the death beneficiary.

# Divorce & Transfer on Death Designation Affidavit / Deed

- ❖ “If, after the execution and recording of a transfer on death designation affidavit under which the owner of the real property's spouse is designated the transfer on death beneficiary, the owner of the real property and such owner's spouse are divorced, obtain a dissolution of the marriage, or have the marriage annulled, then the designation of the owner's spouse as a transfer on death beneficiary on such instrument shall be terminated and the spouse shall be deemed to have predeceased the owner of the real property.” Ohio Rev. Code § 5302.23(B)(12).

# Property Acquired by a Trust

- ❖ The following materials are needed to verify that a trust lawfully exists and is acting within its designated powers:
- Documents establishing the trust;
  - Documents designating the Trustees;
  - Documents identifying the powers and duties of the Trustees.



# Property Acquired by a Trust (Continued)

## ❖ Implications

- Need to obtain the documents establishing the Trust or in the alternative, obtain and file for record a memorandum of trust that satisfies Ohio Rev. Code § 5301.255.

## ❖ “Blind” or “Undisclosed Trusts”

- “Trustees,” “as trustee,” or “agent,” or words of similar import, following the name grantee in any deed of conveyance or mortgage of land executed and recorded, without other language showing a trust or expressly limiting the grantee's or mortgagee's powers . . . [D]o[es] not give notice to or put upon inquiry any person dealing with said land that a trust or agency exists . . . that there are any limitations on the power of the grantee to convey or mortgage said land, or to assign or release any mortgage held by such grantee.” Ohio Rev. Code § 5301.03.

# Land Installment Contracts

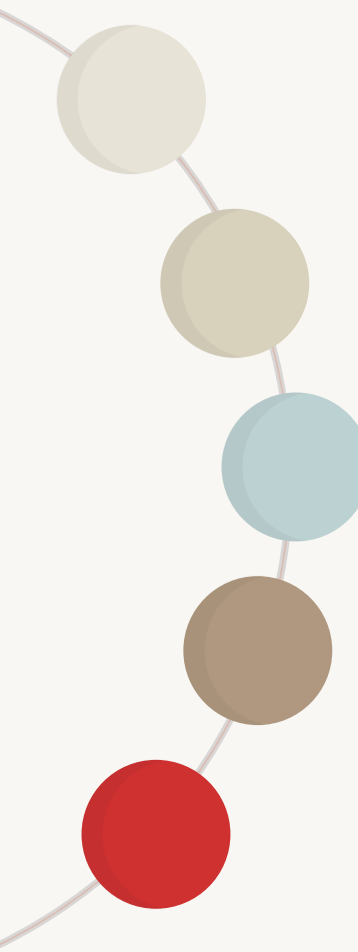
- ❖ ““Land installment contract” means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee’s obligation. Option contracts for the purchase of real property are not land installment contracts.” Ohio Rev. Code § 5313.01.
  - Essentially, this is the sale of a property where the seller finances the deal.
- ❖ Thus, the vendor retains legal title, subject to vendee’s equitable interest in the Subject Land. Once the purchase price is paid in full, the vendor will convey legal title to the vendee.

# Land Installment Contracts (Continued)

## ❖ New Lease Implications

- If the land installment contract provides that the vendor is to retain the oil and gas estate, then who should execute an oil and gas lease? **Vendor only.**
- If there are no reservations of the oil and gas estate in the land installment contract, then who should execute an oil and gas lease?
  - **Best practice requires that both the vendor and vendee execute and/or ratify the same oil and gas lease along with a payment directive – unless the contract provides otherwise.**

# Oil and Gas Leases

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- ❖ Landmen – Exemptions from Licensure Requirement
  - ❖ Determining if Held by Production
  - ❖ Failure to Pay Royalties
  - ❖ Definition of “minerals” in reservation language

# Landmen – Certain Exemptions from Licensure Requirement

- ❖ Effective 2019, Ohio Rev. Code § 4735.023 was enacted to exempt oil and gas land professionals from the real-estate licensing requirement. This amendment was necessary due to the prior ruling by the Ohio Supreme Court in *Dundics v. Eric Petro. Corp.*, which left independent oil and gas landmen facing penalties if they continued to negotiate oil and gas leases without first acquiring a real estate broker's license. *Dundics v. Eric Petro. Corp.*, 155 Ohio St. 3d 192, 2018-Ohio-3826, 120 N.E.3d 758.
- ❖ “Oil and gas land professional” means a person regularly engaged in the preparation and negotiation of agreements for the purpose of exploring for, transporting, producing, or developing oil and gas mineral interests, including, but not limited to, oil and gas leases and pipeline easements.” Ohio Rev. Code § 4735.01(GG).

# License Exemptions (Continued)

- ❖ To receive exemption under Ohio Rev. Code § 4735.023 independent landmen must:
  1. Register annually with the superintendent of real estate and pay annual fee.
  2. Provide the superintendent of real estate with evidence that the landman is in good standing in a national, state, or local professional organization that has developed ethical performance standards for oil and gas land professionals (Example, AAPL).
    - For more on ethical performance standards for oil and gas land professionals, check out our recent webinar, [Steering Clear of Legal Landmines – Lessons for Landmen](#).
  3. Provide required disclosure forms.

# License Exemptions (Continued)

## ❖ Implications

- The exemption for independent landmen does not apply to fee simple absolute transactions involving oil and gas rights, which still require the landman to be a licensed real estate broker. Ohio Rev. Code § 4735.01(I)(1)(h).
- In-house landmen who directly negotiate oil and gas leases and/or purchase minerals on behalf of their employer are exempt. Ohio Rev. Code § 4735.01(I)(1)(h).

# Determining if Lease is Held by Production

## ❖ Production in Paying Quantities (“PPQ”)

- A paying quantity is “quantity of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses even though the drilling costs, or equipping costs, are not recovered and even though the undertaking as a whole may result in a loss.”  
*Blausey v. Stein*, 61 Ohio St. 264, 265-66, 400 N.E.2d 408, 410 (1980).
- Burden is on lessor to show that lessee has forfeited the lease because of failure to produce gas in paying quantities. *Litton v. Geisler*, 80 Ohio App. 491, 496, 76 N.E.2d 741, 744 (4th Dist. 1975).
- PPQ requires first-hand evidence and not just what the ODNR’s well completions report shows. *Browne v. Artex Oil Co.*, 5th Dist. Guernsey No. 21CA000002, 2021-Ohio-2239.

# Determining if Lease is Held by Production (Continued)

## ❖ Temporary Cessation of Production

- A mere temporary cessation in the production of a gas or oil well will not terminate the lease under a habendum clause where the owner of a lease exercises reasonable diligence and good faith in attempting to resume production of the well. *RHDK Oil & Gas LLC v. Dye*, 7th Dist. Harrison No. 14 HA 0019, 2016-Ohio-4654, ¶ 20; citing *Wagner v. Smith*, 8 Ohio App.3d 90, 92, 8 Ohio B. Rep. 124, 456 N.E.2d 523 (4th Dist. 1982).
- Cessation of production is temporary when the cessation is for a short period of time. There is no case in Ohio where a court deemed a lease forfeited for less than two years of nonproduction. *Dye*, at ¶ 22.

# Does failure to pay royalties terminate the lease?

- ❖ Typically, a “lessee’s failure to pay royalty as provided by the lease will not give lessors sufficient grounds to declare a forfeiture *unless* by the express terms of that lease they are given that right and power.” *Riggenbach v. Indep. Mach. Co.*, 7th Dist. Monroe Case No. 534, 1980 Ohio App. LEXIS 11589, ¶7 (July 8, 1980) (emphasis added). In reaching its conclusion, the Court in *Riggenbach* cited that “the overwhelming majority of jurisdictions which have considered this issue are in accord.” *Id.*
- ❖ Implications
  - Most leases do not contain an express forfeiture clause, thus the appropriate remedy for failing to pay royalties is usually damages, not forfeiture of the lease.

# Definition of “Minerals”

- ❖ **Does a severance or reservation of “coal and other minerals” include oil and gas?**
  - We typically see this issue with older instruments involving “coal and other minerals” or similar variations. In Ohio, we start with the presumption that the general phrase “other minerals” may include oil and gas rights so long as the language can be reasonably seen to include these minerals in some way and other language in the deed does not exclude these minerals. *O’Brandovich v. Hess Ohio Dev., LLC*, 2021-Ohio-1287, 170 N.E.3d 1240 (7th Dist.).
  - If oil and gas was not commonly being produced at the time the deed was written, we cannot presume it was intended to include these minerals. Once production in Ohio became fairly commonplace, however, we may expect some reference to oil and gas when using the general language “other minerals.” *Id.*

# Definition of “Minerals” (Continued)

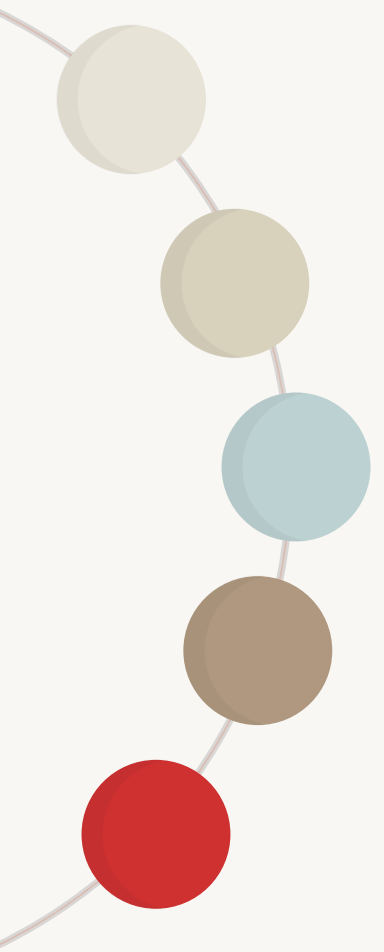
## ❖ Implications

- The first Ohio Supreme Court to address this issue was *Detlor*, where an 1890 deed included an exception/reservation of coal and “other valuable minerals.” The court held that this language was insufficient to reserve oil and gas rights.
  - The Court acknowledged that small amounts of oil were being produced within ten to twenty miles of the property, however, there was no evidence to suggest that the grantor had any knowledge of that limited production. The Court also relied on the fact that the easement language pertaining to the mineral rights could not be seen as applicable to oil production. *Detlor v. Holland*, 57 Ohio St. 492, 49 N.E. 690 (1898).
- In the 2017 case *Sheba*, a deed from 1848 reserved “all the mineral & coal.” Similarly, the court held that this language was insufficient to reserve oil and gas rights. The court relied on the fact that the deed was much earlier than the deed in *Detlor* and that there was a lack of evidence that oil and gas production were contemplated at the time or place of conveyance. *Sheba, v. Kautz*, 2017-Ohio-7699, 97 N.E.3d 893 (7th Dist.).

# Definition of “Minerals” (Continued)

- *Corso v. Miser*, 7th Dist. Jefferson No. 19 JE 0018 & 19 JE 0019, 2020-Ohio-5293, had the following reservation in a 1949 Deed: "Excepting and reserving from the above described Real Estate, all coal and mineral underlying the same with the right to mine and remove the same as shown in deed to Henry Wick, wherein said coal was conveyed, reference to which is hereby made for a more complete statement thereof."
  - Note that a 1906 Deed had conveyed the coal to Henry Wick. Thus, the court held that the phrase "all coal and mineral" did not include oil and gas interests because the phrase that followed constituted limited words.
  - The court in *Corso* explained that if that limiting phrase had not been included, the language "all coal and mineral" would have included the oil and gas interests in accordance with prior decisions.

# The Ohio Dormant Mineral Act (the “DMA”)

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- ❖ 1989 DMA
  - ❖ 2006 DMA

# The 1989 DMA - Ohio Rev. Code § 5301.56

- ❖ Effective March 22, 1989.
- ❖ Process for reuniting severed oil and gas interests with surface owners if, **in the last 20 years**, ALL of the following were true:
  1. Not the subject of a “title transaction” (as defined in Ohio Rev. Code § 5301.47)
  2. No actual or pooled production of oil or gas
  3. No storage of oil or gas
  4. No drilling or mining permit (as defined in Ohio Rev. Code § 5301.56)
  5. No Claim to Preserve filed of record
  6. No separately listed tax parcel number has been created for the subject oil and gas interest
  7. No ownership by State or Governmental body
- ❖ The 1989 DMA is not self-executing, but rather the surface owner must have filed a quiet title or declaratory judgment action and obtained a decree that the applicable severed oil and gas interest had been abandoned.

# The 2006 DMA – Ohio Rev. Code § 5301.56

- ❖ Applies to all claims after June 30, 2006.
- ❖ Process for reuniting severed oil and gas interests with surface owners; requires filing an affidavit of abandonment and proper notice.
- ❖ Abandonment procedure under the 2006 DMA:
  - Surface owner must confirm no exemptions or savings events.
  - Surface owner must serve notice of abandonment.
  - Surface owner must record affidavit of abandonment.
  - Surface owner must record notice of failure to file.

# DMA Proper Notice

## ❖ Holder of Interest is Known:

- Proper notice can be achieved by sending notice of the surface owner's intent to declare the mineral interest abandoned, via certified mail, to each holder or each holder's successors or assignees, at the last known address of each with a return receipt requested. Ohio Rev. Code § 5301.56(E)(1).

## ❖ Holder of Interest is Unknown:

- If the holder of the interest is unknown or cannot be located, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the subject land is located. Ohio Rev. Code § 5301.56(E)(1).

# *Gerrity v. Chervenak, 2020-Ohio-6705*

- ❖ In 1961, T.D. Farwell reserved the mineral rights to property in Guernsey County.
- ❖ In 1965, Farwell's estate conveyed the severed interest to his daughter, Jane Richards, by a certificate of transfer which listed her Cleveland address.
- ❖ Richards moved to Florida and passed away in 1997 – nothing related to her death was recorded in Ohio.
- ❖ The Chervenaks (surface owner) searched the records of both Guernsey County and Cuyahoga County, which revealed the certificate with Richards' Cleveland address.
- ❖ The Chervenaks served notice by certified mail to Richards' Cleveland address, which was returned as "Vacant – Unable to Forward." As a result, they published their notice of abandonment in The Daily Jeffersonian.

# *Gerrity v. Chervenak* (Continued)

- ❖ The Chervenaks received no response so they recorded an affidavit of abandonment under the 2006 DMA followed by a notice of failure to file.
- ❖ Gerrity, being the sole heir of Richards, discovered the abandonment and filed a declaratory judgment and quiet title action arguing that because he had not received notice of the intention to abandon via certified mail, the 2006 DMA proceeding was ineffective.
- ❖ The Court ruled in favor of the surface owner finding that the search under the 2006 DMA was reasonable.
- ❖ The Court refused to impose any bright-line rule so the standard will be reasonableness.

# *Fonzi v. Brown*, 2022-Ohio-901

- ❖ In 1952, Elizabeth Fonzi reserved a royalty interest in property in Monroe County. The deed specified that Elizabeth and her husband, Harry II, resided in Washington County, Pennsylvania.
- ❖ Elizabeth died in 1989 while Harry II died in 1996 – his probate reflected that his children, Harry III and Linda, were his sole heirs.
- ❖ In 2006, Brown, the surface owner, hired an attorney to have the severed interest abandoned under the 2006 DMA.
- ❖ Despite having specific knowledge that Elizabeth and Harry II had lived in Washington County, Pennsylvania, Brown only searched the records of Monroe County.

## *Fonzi v. Brown* (Continued)

- ❖ Having found no heirs, Brown published a notice of intent to declare the severed interest abandoned in the Monroe County Beacon followed by an affidavit of abandonment under the 2006 DMA and notice of failure to file.
- ❖ Harry III and Linda discovered the abandonment and argued that a search of the public records in Washington County, Pennsylvania would have uncovered Harry Fonzi II's probate proceedings and revealed that they were the heirs to the severed interest.

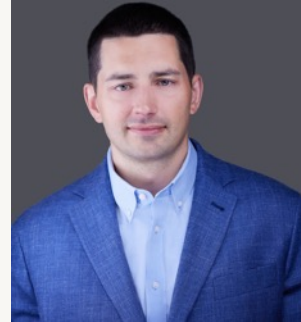
## *Fonzi v. Brown* (Continued)

- ❖ The Court found the surface owner's search unreasonable, because he knew that the holders of the severed interest resided in Washington County, Pennsylvania.
- ❖ The Court again did not set a bright-line rule, but instead applied the directive from *Gerrity* for reasonable diligence to be determined on a case-by-case basis, however, noting that “generally, a review of public records in the county where the severed interest is located will establish a baseline of reasonable diligence.”
- ❖ The Court also established that the surface owner always has the burden of proving compliance with the 2006 DMA diligence requirements.

# Credit Info

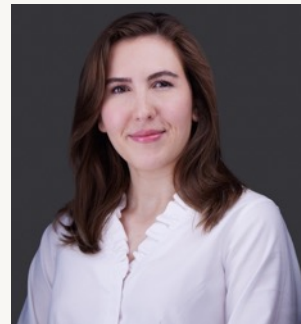
- ❖ This program is accredited for 1 RL, RPL, or CPL recertification credit(s) (CEU) and 1 core CPLTA credit.
- ❖ We have also applied for MCLE Credit in Ohio and NADOA for a CDOA Core Credit.
- ❖ We will send a follow-up email by next week with further credit information.
- ❖ **AAPL Component Code: OGLAW81623.**
  - Please download the AAPL Affidavit from the handouts section.
  - The affidavit will not be sent separately until our follow-up email has been sent.
- ❖ Please complete the post-event survey after the program has ended.

# Questions?



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