[Cite as *Warner v. Palmer,* 2019-Ohio-4078.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

FRED A. WARNER, CO-TRUSTEE OF THE WARNER FAMILY TRUST, ET AL.,

Plaintiffs-Appellants/ Cross-Appellees,

v.

KARL E. PALMER ET AL.,

Defendants-Appellees/ Cross-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0012

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 13 CV 339

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Todd Kildow, Emens & Wolper Law Firm, 250 West Main Street, Suite A, St. Clairsville, Ohio 43950. *Atty. Robert Plumby,* Phillips, Gardill, Kaiser & Altmeyer, 197 West Main Street, St. Clairsville, Ohio 43950, for Plaintiffs-Appellants/ Cross Appellees and

Atty. David Schaffner, Schaffner Law Offices, CO., L.P.A., 132 Fair Avenue, N.W., New Philadelphia, Ohio 44663, for Defendants-Appellees/ Cross-Appellants.

Dated: September 30, 2019

D'Apolito, J.

{¶1} Plaintiffs-Appellants/Cross-Appellees, Fred A. Warner, Co-Trustee of the Warner Family Trust, et al. ("Appellants"), appeal from the January 31, 2018 judgment of the Belmont County Court of Common Pleas, sustaining Defendants'-Appellees'/Cross-Appellants', Karl E. Palmer, et al. ("Appellees"), motion for summary judgment and overruling Appellants' motion for summary judgment and dismissing their complaint following a reversal and remand from this court in *Warner v. Palmer*, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080 ("*Warner I*"). On appeal, Appellants assert that a will or estate cannot be a title transaction under the Marketable Title Act and that Appellees are not proper holders of the subject mineral interests. On cross-appeal, Appellees contend that the trial court should have only applied the 2006 version of the Dormant Mineral Act rather than the general provisions of the Marketable Title Act. For the reasons stated, we affirm the trial court's judgment and dismiss Appellees' cross-appeal as moot.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellants are the co-trustees of the Warner Family Trust. The trust owns property in Belmont County. On September 17, 2013, Appellants filed a complaint seeking to quiet title to a one-half mineral interest which was severed from the property via a deed recorded on October 9, 1924 in Volume 256, Page 136, of the Belmont County Deed Records. The original grantors who severed and reserved half of the minerals were: John W. and Helen S. Kirk, H.E. and Adeline Egger, and A.C. and Blanche Peters. Appellees are descendants of John W. Kirk or heirs of his descendants, Karl E. Palmer, Marilyn Wright, Lenane Smith, Edward Turner, Margaret R. Kirk, Martha Zadvosky, Patricia Kirk-Muench, and Malinda Moore.

{¶3} A.C. Peters died in 1957, and his son died in 1981. H.E. Egger died in 1963; it is believed his wife predeceased him. It is said their estates did not list the subject mineral interest in the inventory.

{¶4} At issue here, John W. Kirk died testate in 1987 and an ancillary administration of his estate was filed in the Belmont County Probate Court. It is said Helen S. Kirk predeceased him. The estate of John W. Kirk listed as next of kin Wilma Kirk (surviving spouse), Jane Hinch, Barbara Turner, Diane Palmer, Appellee Marilyn Wright, and John D. Kirk. John W. Kirk's estate inventory did not list this mineral interest. John W. Kirk's son, John D. Kirk, died in 2004. An estate was filed in Franklin County, listing as next of kin Margaret Kirk and three daughters, Malinda Moore, Martha Zadvosky, and Patricia Kirk-Muench (all of whom are Appellees in this action). John D. Kirk's will left his property to his wife and a trust. His estate's inventory did not list this mineral interest. Appellees Edward Turner and Lenane Smith are the next of kin listed in the 2006 estate of Barbara Turner; the inventory of her estate did not list this mineral interest.

{¶5} The 2013 complaint alleged the mineral interest was abandoned and automatically vested in the surface owners as of March 22, 1992, the end of the grace period under the 1989 Dormant Mineral Act, which was, at the time, believed to be a self-executing statute. The complaint also stated notice of abandonment under the 2006 Dormant Mineral Act would be served via certified mail and notice would be provided by publication in the Times Leader newspaper as well. The complaint claimed the lack of a recorded title transaction meant there were no holders who could file a claim to preserve (or who had to be served with notice) under the 2006 Dormant Mineral Act. The complaint alternatively asserted Appellants' interest in the minerals was vested in the surface owner under an unbroken chain of title for more than 40 years with a root deed recorded on May 11, 1967. The severed mineral interest of the original grantors was said to be extinguished and null and void pursuant to R.C. 5301.50.

{¶6} Appellees filed an answer and a counterclaim seeking to quiet title to John W. Kirk's one-third of the one-half mineral interest reservation. The answer said the Kirk mineral interest was transferred as residual property by a will filed in the probate court and claimed this constituted a title transaction. They also urged the 1989 Dormant Mineral Act could no longer be utilized and was unconstitutional. As to the 2006 Dormant Mineral Act, they noted the time for filing a timely claim to preserve after the notice of

abandonment had not yet expired. They denied various paragraphs of the complaint setting forth allegations as to the Marketable Title Act.

{¶7} Appellants replied to the counterclaim and filed a motion for judgment on the pleadings. In addition to arguing there was automatic abandonment under the 1989 Dormant Mineral Act, they argued there were no holders who could file a claim to preserve under the 2006 Dormant Mineral Act due to the failure to list the mineral interest in the estate inventories. Attached to Appellants' motion for judgment on the pleadings was the November 27, 2013 claim to preserve the mineral interest filed on behalf of Appellees and other heirs by Washington Trust Bank as Trustee of the Trust of John D. Kirk. Appellants also asserted the mere filing of an estate does not constitute a title transaction if the asset at issue is not listed in the estate inventory. They alternatively asserted the reservation of minerals was extinguished under the Marketable Title Act as the root title to their property rested in a deed filed for record on May 11, 1967, more than 40 years ago.

{¶8} Appellees then filed an amended answer and counterclaim, and Appellants replied. Appellees' subsequent response to the motion for judgment on the pleadings focused on arguing that it was too late to enforce a claim of abandonment under the 1989 Dormant Mineral Act and that the Act was unconstitutional. As to the 2006 Dormant Mineral Act, Appellees argued: they were holders or the successors of holders; notice of abandonment by publication cannot be used unless certified service cannot be completed; a timely claim to preserve was recorded; and a claim to preserve by one holder preserves the mineral interest for all holders. Appellees also claimed the 1987 filing of the will with a residuary clause in a Belmont County estate constituted a title transaction under R.C. 5301.47.

{¶9} On August 7, 2014, the trial court granted judgment on the pleadings in favor of Appellants. The court found the 1989 Dormant Mineral Act self-executing with automatic vesting of the mineral interest in the surface owner absent a savings event. The trial court noted that in order to constitute a savings event, a title transaction must be filed or recorded in the recorder's office. The court concluded the passing of assets by a will or intestacy was insufficient as the transaction was not filed in the recorder's office. Because the recorder's office reflected no title transaction, the court also found Appellees

and Washington Trust Bank as trustee for the Trust of John D. Kirk had no standing to claim an interest in the minerals as they were not living holders, or successors or assignees of holders, who could file a valid claim to preserve. Within a sentence dealing with the 1989 Dormant Mineral Act, the trial court added a finding that Appellants' interest was vested in an unbroken chain of title for more than 40 years with a root deed recorded on May 11, 1967 and the mineral interest created prior to the date of recordation of the root deed was extinguished.

{¶10} Appellees filed a timely notice of appeal, Case No. 14 BE 0038. Appellees raised three assignments of error arguing that the 1989 Dormant Mineral Act (1) cannot be applied to claims asserted after the 2006 amendments; (2) did not result in automatic vesting of mineral interests in the surface owner; and (3) was unconstitutional.

{¶11} On March 22, 2017, this court concluded that a judgment on the pleadings should not have been granted. *Warner I, supra,* at ¶ 2. Specifically, this court found that the mineral interest was not abandoned under the 1989 Dormant Mineral Act as no claim was made prior to the 2006 amendments. *Id.* at ¶ 1. As the 1989 version can no longer be used, this court held that the trial court's decision finding the minerals abandoned under the 1989 Dormant Mineral Act was reversed and the matter remanded for further proceedings to allow the court to consider evidence under the Marketable Title Act and the 2006 Amendment to the Dormant Mineral Act. *Id.*

{¶12} On May 26, 2017, Appellants filed a motion for summary judgment claiming that the oil and gas reservation in the 1924 Severance Deed is extinguished pursuant to the Marketable Title Act, and thus, is null and void. Appellants also moved for summary judgment on its Dormant Mineral Act claim that none of the Appellees/Claimants are of record, thus there is no notice that any of them hold an interest in the oil and gas, and therefore, allowing them to file claims is contrary to the purpose of both the Marketable Title Act and the Dormant Mineral Act.

{¶13} On July 28, 2017, Appellees filed a memorandum in opposition to Appellants' motion for summary judgment and a cross-motion for summary judgment. Appellees asserted that they qualify as holders such that they preserved and did not abandon their interest by timely filing a claim to preserve under the Dormant Mineral Act. Appellees further alleged that Appellants may not rely upon the Marketable Title Act. In

the alternative, Appellees maintained that there were title transactions of record within the 40 years after the 1967 root of title such that their oil and gas interests were not extinguished.

{¶14} On August 18, 2017, Appellants filed a reply and an opposition.

{¶15} On January 31, 2018, the trial court sustained Appellees' motion for summary judgment and overruled Appellants' motion for summary judgment quieting title to an undivided one-sixth interest in the oil and gas under Appellants' property to Appellees. Appellants filed the instant appeal, raising two assignments of error, and Appellees filed a cross-appeal, raising one assignment of error.

SUMMARY JUDGMENT STANDARD OF REVIEW

An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

"(T)he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its

burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

Doe v. Skaggs, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 10-12.

DORMANT MINERAL INTERESTS

At common law, mineral rights severed from the surface estate were not subject to abandonment or termination for the failure to produce oil or gas or to extract other minerals. 1A Summers, *The Law of Oil and Gas,* Section 8.4, at 139 (3d Ed.2004). Abandonment of an interest in real property required proof of the owner's intent to abandon it, and it therefore could not be presumed from mere nonuse. *Gill v. Fletcher,* 74 Ohio St. 295, 305, 78 N.E. 433 (1906); *Kiser v. Logan Cty. Bd. of Commrs.,* 85 Ohio St. 129, 131, 97 N.E. 52 (1911); *W. Park Shopping Ctr., Inc. v. Masheter,* 6 Ohio St.2d 142, 144, 216 N.E.2d 761 (1966); *Beer v. Griffith,* 61 Ohio St.2d 119, 121, 399 N.E.2d 1227 (1980).

Over time, mineral rights were fractionalized through devise, descent, and conveyance, and parties seeking to develop a mineral interest often had difficulty identifying and locating its owners. *See generally Dodd v. Croskey,* 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 7; *Van*

Slooten v. Larsen, 410 Mich. 21, 45-46, 299 N.W.2d 704 (1980); 1A Summers, *The Law of Oil and Gas,* Section 8.4, at 139-140.

Corban v. Chesapeake Exploration, L.L.C., 149 Ohio St.3d 512, 2016-Ohio-5796, ¶ 15-16.

THE MARKETABLE TITLE ACT

The General Assembly enacted the Marketable Title Act, R.C. 5301.47 et seq., in 1961, Am.H.B. No. 81, 129 Ohio Laws 1040, to extinguish interests and claims in land that existed prior to the root of title, with "the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." R.C. 5301.55. This legislation provides that marketable record title—an unbroken chain of title to an interest in land for 40 years or more, R.C. 5301.48—"shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title." R.C. 5301.50. Marketable record title therefore "operates to extinguish" all other prior interests, R.C. 5301.47(A), which "are hereby declared to be null and void," R.C. 5301.50.

When initially enacted, the Marketable Title Act did not "bar or extinguish any right, title, estate, or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith." Former R.C. 5301.53(E), 129 Ohio Laws at 1046. However, the General Assembly amended former R.C. 5301.53 and former R.C. 5301.56 in 1973 "to enable property owners to clear their titles of disused mineral interests." Am.S.B. No. 267, 135 Ohio Laws, Part I, 942-943. Thus, the Marketable Title Act extinguished oil and gas rights by operation of law after 40 years from the effective date of the root of title unless a saving event preserving the interest appeared in the record chain of title—i.e., the interest was specifically identified in the muniments of title in a subsequent title transaction, the holder recorded a notice claiming the interest, or the interest "(arose) out of

a title transaction which has been recorded subsequent to the effective date of the root of title." R.C. 5301.48 and 5301.49.

Corban, *supra*, at ¶ 17-18.

THE 1989 DORMANT MINERAL ACT

The General Assembly again amended the Marketable Title Act in 1989 when it enacted the Dormant Mineral Act, Sub.S.B. No. 223, 142 Ohio Laws, Part I, 981, 985-988 ("S.B. 223"), "to provide a method for the termination of dormant mineral interests and the vesting of their title in surface owners, in the absence of certain occurrences within the preceding 20 years." 142 Ohio Laws, Part I, at 981.

The 1989 law, codified in former R.C. 5301.56, stated: "Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface," unless (a) the mineral interest was related to coal, (b) the interest was held by the United States, the state of Ohio, or another political body described in the statute, or (c) one or more of the following saving events had occurred within the preceding 20 years:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county

recorder of the county in which the lands that are subject to the pooling or unitization are located;

(iii) The mineral interest has been used in underground gas storage operations by the holder;

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located;

(v) A claim to preserve the interest has been filed in accordance with division (C) of this section;

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

Former R.C. 5301.56(B)(1), S.B. 223, 142 Ohio Laws, Part I, at 985, 986-987.

Notably, in contrast to R.C. 5301.47(A) and 5301.50 of the Marketable Title Act, the 1989 law did not use the word "extinguish," nor did it declare dormant mineral interests "null and void." Rather, it provided that dormant mineral interests "shall be deemed abandoned and vested in the owner of the surface." The word 'deem' means "(t)o treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have." *Black's Law Dictionary* 504 (10th Ed.2014).

* * *

> In enacting the 1989 law, the General Assembly created a conclusive presumption by establishing that a mineral rights holder had abandoned a severed mineral interest if the 20 year statutory period passed without a saving event. The statute remedied the difficulties faced by a surface owner seeking to quiet title to a dormant mineral interest, an action that requires proof that the mineral rights holder—who may not be locatable or identifiable from land records—had abandoned and relinquished that interest. At common law, such an action would have failed absent proof of the property owner's subjective intent. *See Beer,* 61 Ohio St.2d at 121, 399 N.E.2d 1227. Thus, by providing a conclusive presumption that the mineral interest had been abandoned in favor of the surface owner if the holder failed to take timely action to preserve it, the legislature provided an effective method of terminating abandoned mineral rights through a quiet title action.

Corban, supra, at ¶ 19-21, 25.

THE 2006 AMENDMENT TO THE DORMANT MINERAL ACT

The 2006 amendment to R.C. 5301.56(B) provides that a dormant mineral interest "shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied." 2006 Sub.H.B. No. 288 ("H.B. 288").

R.C. 5301.56(E) directs the surface holder to give advance notice to the mineral rights holder, allowing it an opportunity to preserve its mineral rights from being deemed abandoned and merged with the surface estate. R.C. 5301.56(E), (F), and (G). If neither a claim to preserve the interest nor an affidavit proving that a saving event occurred within the preceding 20 years is timely recorded, then the surface holder may record a notice that the mineral interest has been abandoned, and "the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest shall cease to be notice to the public of the

> existence of the mineral interest or of any rights under it." R.C. 5301.56(H). This statute therefore operates to establish the surface owner's marketable record title in the mineral estate.

Corban, supra, at ¶ 29-30.

APPELLANTS' APPEAL

{¶16} Appellants raise two assignments of error on appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT DETERMINED THE LAST WILL & TESTAMENT WAS A TITLE TRANSACTION DURING THE FORTY YEARS FOLLOWING APPELLANT/PLAINTIFFS' ROOT OF TITLE, THEREBY SAVING RATHER THAN EXTINGUISHING DEFENDANT/APPELLEES' OIL AND GAS INTEREST.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED WHEN IT DETERMINED APPELLEE/DEFENDANTS' WERE HOLDERS WITH STANDING TO FILE A CLAIM AFTER NOTICE OF ABANDONMENT.

{¶17} Appellants assert that a will or estate cannot be a title transaction under the Marketable Title Act and that Appellees are not proper holders of the subject mineral interests. Because the issues raised in Appellants' assignments are interrelated, this court will address them in a consolidated fashion.

{¶18} R.C. 5301.47(F) states: "'Title transaction' means any transaction affecting title to any interest in land, *including title by will* or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." (Emphasis added.)

{¶19} In *Warner I*, this court decided the issue of whether an heir can be a holder.

> "Holder" is specifically defined in R.C. 5301.56(A)(1) as: "the record holder of a mineral interest, and any person who derives the person's rights from,

or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder." There is no mention of a "living holder," as the term was used by the trial court. Notably, a successor or assignee of a holder can become a "record holder." Yet, a holder is expressly defined to include more than merely the "record holder." In *Dodd*, this court held: "holder would include any heirs or assigns of the [grantor who severed and reserved the minerals]." [*Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 54.] In *Tribett*, an argument was made that heirs were not holders, successors, or assigns and thus an heir's preservation claim had no legal effect. [*Tribett v. Shepherd*, 7th Dist. Belmont No. 13 BE 22, 2014-Ohio-4320, ¶ 64] (reversed on other grounds due to *Corban*). Like the plaintiffs argue now, the Tribetts argued the statute did not use the word "heirs." *See id.* at ¶ 66. We concluded an heir can be a holder as his rights can "succeed to the rights of" the record holder. *Id.* at ¶ 67-68, citing Black's Law Dictionary 740 (8th Ed.2004).

A person does not lose an inherited mineral interest under probate law merely because it was not listed during an estate administration; they may lose it due to other pertinent facts under a law such as the 2006 Dormant Mineral Act (via time lapse without a savings event and a failure to file a timely claim to preserve or affidavit identifying a savings event). However, if a person to whom the mineral interest should have been transferred during an estate administration (or their representative, such as an heir's trustee) files a timely post-notice-of-abandonment claim to preserve, then the person would not lose the mineral interest under the 2006 Dormant Mineral Act. Whether the mineral interest was inherited by a person who filed a claim to preserve is a different issue than whether the mineral interest was subject to a recorded title transaction. As the Supreme Court observed: "Presumably, the surface owner can challenge the accuracy of the mineral-interest holder's claim. But that is outside the operation of the Dormant Mineral Act, which addresses only whether a surface owner can employ the

> act's provisions to deem the mineral rights abandoned, reunite the mineral rights with the surface rights, and vest them in the surface owner." *Dodd*, 143 Ohio St.3d 293 at fn. 4.

Warner, *supra*, at ¶ 25-26.

{¶20} This court has defined the term "holder" to be a "broad" term and includes those who may derive rights from the record holder "either by testate or intestate succession." *M&H Partnership v. Hines*, 7th Dist. Harrison No. 14 HA 004, 2017-Ohio-923, ¶ 19.

{¶21} Regarding the Dormant Mineral Act, the notice of abandonment was served via certified mail and by publication. A timely claim to preserve was recorded under R.C. 5301.56(C)(1) and (H)(1)(a). A preservation claim filed by one mineral interest holder is deemed to be a preservation for all of the mineral interest holders. *See Warner I, supra,* at ¶ 21, citing *Dodd, supra.*

{¶22} Appellants stress that Appellees were ineligible to seek to preserve their interests because they did not qualify as holders since there was no specific, on the record conveyance, transfer, and/or assignment of the subject oil and gas interests to them, or to anyone else. This court, however, has already rejected this claim. *See Warner I, supra,* at ¶ 26 ("[I]f a person to whom the mineral interest should have been transferred during an estate administration (or their representative, such as an heir's trustee) files a timely post-notice-of-abandonment claim to preserve, then the person would not lose the mineral interest under the 2006 Dormant Mineral Act.")

{¶23} Regarding the Marketable Title Act, there is no dispute that the deed recorded on May 11, 1967 is the root of title. Appellees have proven that two of the original reservationists passed away. Helen S. Kirk's estate was administered in Belmont County, Ohio. John W. Kirk died testate in 1987 and his estate was administered in Dallas County, Texas with an ancillary administration in Belmont County, Ohio. John's will included a clause disposing of the residue of his estate to a trust for his children and grandchildren. Item IV of John's Last Will and Testament states:

> All the residue of my property of whatsoever kind and wheresoever situated, including all lapsed legacies and devises, I give, devise and bequeath to my

> Trustees in trust for the uses and purposes hereinafter set forth. This trust fund shall be called the 'Residuary Trust' and shall be divided, held, administered and disposed of as follows * * *.

(Exhibit 2).

{¶24} Appellees have established that they are the successors in title to John W. and Helen S. Kirk. The mineral interests were passed by will to the heirs of John W. Kirk, as the above clause constitutes a title transaction as defined by R.C. 5301.47 and *Warner I*. Appellees are holders to the mineral interests by succession. Even though the mineral interest was not specifically listed in the estate administration of John W. or Helen S. Kirk, that does not mean that the heirs at law are not holders or would not be given holder status. As stated in *Warner I*, the failure to list the interest during the estate administration does not mean that Appellees lost their inherited mineral interests. *See Warner I, supra,* at ¶ 26 ("A person does not lose an inherited mineral interest under probate law merely because it was not listed during an estate administration[.]") Thus, Appellees fall within the definition of a holder, entitling them to file to preserve their interests.

{¶25} Because there was a title transaction during the 40 years following Appellants' root of title, Appellees' oil and gas interest has been saved rather than extinguished under the Marketable Title Act. Accordingly, because Appellees filed a timely notice to preserve, the trial court did not err in sustaining Appellees' motion for summary judgment and overruling Appellants' motion for summary judgment and dismissing their complaint following a reversal and remand from this court in *Warner I.*

{¶26} Appellants' assignments of error are without merit.

APPELLEES' CROSS-APPEAL

{¶27} Appellees raise one assignment of error on cross-appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT BOTH THE GENERAL AND SPECIFIC PROVISIONS OF THE MTA CAN BE UTILIZED TO REUNITE SEVERED MINERAL INTERESTS WITH THE

SURFACE ESTATE, FOLLOWING THE ENACTMENT OF THE MORE SPECIFIC PROVISION "5301.56 MINERAL INTERESTS VESTING IN SURFACE OWNER, MARCH 22, 1989."

{¶28} Due to this court's disposition of Appellants' two assignments of error that the trial court properly determined that because there was a title transaction during the 40 years following Appellants' root of title, Appellees' oil and gas interest has been saved rather than extinguished under the Marketable Title Act, we find Appellees' assignment of error on cross-appeal moot. *See, e.g., Pinkney v. Southwick Investments, L.L.C.*, 8th Dist. Cuyahoga No. 85074, 2005-Ohio-4167, ¶ 51; App.R. 12(A)(1)(c).

CONCLUSION

{¶29} For the foregoing reasons, Appellants' assignments of error are not well-taken and Appellees' assignment of error on cross-appeal is moot. The judgment of the Belmont County Court of Common Pleas is affirmed and Appellees' cross-appeal is dismissed as moot.

Waite, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the Appellants' assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Appellees' cross-appeal is dismissed as moot. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.