

IN THE SUPREME COURT OF OHIO

WAYNE K. LIPPERMAN,	:	Case No.: 2015-0121
	:	
Appellant,	:	On Appeal from the Court of
vs.	:	Belmont County Court of Appeals,
	:	Seventh Appellate District
	:	
NILE E. BATMAN, <i>et al.</i> ,	:	Court of Appeals Case No.: 14 BE 2
	:	
Appellees.	:	

MERIT BRIEF OF APPELLEES NILE E. BATMAN AND KATHERYN BATMAN
IN OPPOSITION TO PROPOSITION OF LAW NO. II
AND PROPOSITION OF LAW NO. III

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STATEMENT OF THE CASE AND FACTS

Appellees Nile E. Batman and Katheryn Batman (the “Batmans”) generally adopt the statement of the case and facts as set forth in the Opinion from the Seventh District Court of Appeals in this case (the “Appellate Opinion”) (a copy of which was filed with this Court on January 23, 2015); however, specifically restating the following relevant facts for the convenience of the Court:

1. The Appellant owns the surface of approximately 41.23 acres in Pultney Township, Belmont County (the "Property"), and 1/2 of the oil and gas mineral rights underlying the Property. Appellate Opinion at ¶ 2.
2. Batman’s own 1/2 of the oil and gas mineral rights underlying the Property through inheritance (the “Batman Mineral Interest”). *Id.* at ¶¶ 2 & 7.
3. In 1981, Frances Batman (the mother of Appellee, Nile Batman) recorded an affidavit in the Belmont County Recorder's Office preserving the Batman Mineral Interest (the "1981 Affidavit"). *Id.* at ¶¶ 4 and 18.
4. Appellant did not dispute the fact the recordation of the 1981 Affidavit was a savings event under the 1989 version of R.C. 5301.56, the Ohio Dormant Mineral Act (the “1989 DMA” or “DMA”). *Id.* at ¶ 5.
5. On April 10, 1989, a certified copy of the Batman Will was recorded in the Belmont County Recorder's Office (the “Batman Will”). *Id.* at ¶ 18.
6. On May 15, 1989, the Batman Will was filed for record with the Belmont County Probate Court. Appendix to Appellant’s Brief at 20 (Judgement Entry and Decision of the Belmont County Common Pleas Court (Dec. 16, 2013)).

ARGUMENT IN OPPOSITION

Proposition of Law No. II:

The act of recording an out-of-state Will is not a title transaction.

Batmans respectfully submit that the issues raised in Appellant's Brief have been waived due to the failure to raise them before either the trial or appellate courts. An issue that was neither raised nor passed upon by the lower courts may not be raised in Supreme Court for the first time on appeal. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 107, 2006-Ohio-954, 846 N.E.2d 478, 482, ¶ 5 (2006).

A. The act of recording an out-of-state Will is a title transaction.

The act of recording an out-of-state Will is a title transaction under the 1989 DMA. The 1989 DMA provided, in pertinent part:

(B)(1) 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 if none of the following applies:

(c) Within the preceding twenty years, one or more of the following has occurred:

(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;

1989 DMA, R.C. 5301.56(B)(1)(c)(i) (emphasis added). Under R.C. 5301.47(F), a title transaction is “*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.*” R.C. 5301.47(F) (emphasis added). Therefore, abandonment of the Batman Mineral Interest is avoided if a title transaction, as defined in R.C. 5301.47(F), occurred within the twenty-year

period immediately preceding the effective date of the 1989 DMA. The Batman Will is such a title transaction and, therefore, a savings event under Section (B)(1)(c)(i) of the 1989 DMA.

The Ohio Marketable Title Act, R.C. 5301.47 to 5301.56 (the “MTA”), which includes the DMA, are part of the recording statutes under Chapter 5301 – Conveyance; Encumbrances - of the Ohio Revised Code. The primary purpose of the recording statutes is to give notice to all persons of the real condition of the land with respect to encumbrances. *Wead v. Lutz*, 2005-Ohio-2921, 161 Ohio App. 3d 580, 585, 831 N.E.2d 482, 487, ¶ 22 (12th Dist.). Further, until recorded or filed for record an unrecorded deed or instrument is fraudulent so far as it relates to the title, estate, or interest of a bona fide purchaser, lessee, or encumbrancer, for value, having, at the time of purchase, no knowledge of the existence of such former deed or instrument. R.C. §5301.25; see also *Basil v. Vincello*, 50 Ohio St. 3d 185, 190, 553 N.E.2d 602, 607 (1990). Therefore, as between the original grantor and the grantee, an unrecorded deed or instrument conveys a valid title - i.e. legal title; however, as between the grantees and the world, title does not attach until recording - i.e. record title. 35 Ohio Jur. 3d Deeds § 15 citing *Murphy v. Haynes*, 83 Ohio L. Abs. 307, 168 N.E.2d 888 (Ct. App. 7th Dist. Mahoning County 1959); see also *Riddel v. Layman*, No. 94 CA 114, 1995 WL 498812, *2 (Ohio Ct. App. July 10, 1995).

The passing of real property by will is no different. It is well established in Ohio that, upon death of its owner, real estate passes directly to the devisees under the decedent’s will, subject to divestment of the executor for the payment of the debts of the estate. *Burroughs v. Raymond*, 112 N.E.2d 82, 88 (Ohio Prob. 1951) citing *Carr v. Hull*, 65 Ohio St. 394, 397, 62 N.E. 439 (1901); *Overturf v. Dugan*, 29 Ohio St. 230 (1876). However, pursuant to R.C. 2107.61, no will is effective to pass real property unless it has been probated or, if an out-of-state will, admitted to the record. R.C. 2107.61. Therefore, much like an unrecorded deed or

instrument, legal title to real property will pass at the moment of death of the decedent to the devisees (subject to the debts of the estate); however, record title will not occur until probated or, if an out-of-state will, admitted to the record pursuant to R.C. 2107.61.

Notwithstanding the aforementioned issues of a bona fide purchaser, lessee, or encumbrancer, for value, the difference between holding legal title and record title with regard to a will is not without legal consequence. R.C. 2107.47 provides that an interest in land acquired from the beneficiary under a will is not defeated by the production of a later will, if the interest is acquired by a bona fide purchaser, lessee, or encumbrancer, for value and without knowledge of the will, unless: (1) in the case of a resident decedent, the later will is offered for probate within three months after the executor or administrator is appointed; or (2) in the case of a nonresident decedent, *the will is offered for record in this state within three months after the executor or administrator is appointed*. R.C. 2107.47 (emphasis added). Therefore, the filing of an out-of-state will does, in fact, affect title to real property by setting forth a protection against the discovery of a later will from a bona fide purchaser, lessee, or encumbrancer, for value, derived from an heir of a decedent, acquired without knowledge. *Id.* Thus, the filing of a will pursuant to R.C. 2107.61 is a transaction affecting title to real property under R.C. 2107.47 and, therefore, 5301.47(F) and the 1989 DMA as well.

Here, legal title to the Batman Mineral Interest passed to Appellee Nile E. Bateman at the moment of death of Frances Batman on October 15, 1981; however, record title did not occur until the Batman Will was filed for record with the Belmont County Probate Court on May 15, 1989 in Case No. 94752. The Batman's took the added step of recording, pursuant to R.C. 5301.56(B)(1)(c)(i), the Batman Will with the Belmont Recorder's Office at Volume 654, Page 670. Therefore, contrary to Appellant's position, the filing of the Batman Will pursuant to R.C.

2107.61 and the recording of the same pursuant to R.C. 5301.56(B)(1)(c)(i) is a transaction affecting title to the Batman Mineral Interest under R.C. 5301.47(F) and the 1989 DMA.

B. A Will need not make a specific reference to real property to be devised.

Appellant purports that, because no provisions expressly provide for the disposition of the Batman Mineral Interest, the Batman Will is not a title transaction under R.C. 5301.47(F). Appellant's Brief at 7. Article II of the Batman Will provides: "In the event that my son, Nile E. Batman, survives me for a period of thirty (30) days, then *all of the residue of my estate, whether real or personal, and wherever situated, I bequeath and devise to my son to be his absolutely.*" Appellee Nile E. Batman was the sole devisee under the Batman Will and, therefore, the bequest of 'all the residue of my estate' cannot by any stretch of the imagination be said to contain language excluding the Batman Mineral Interest. *Kellogg v. Campbell*, 3 Ohio Misc. 27, 31, 209 N.E.2d 645, 648 (Prob. 1965); see also *McClaskey v. Barr*, 54 F. 781, 790 (C.C.S.D. Ohio 1893) ("all my property" may as well include all which may be his at his decease as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it"). Therefore, the filing of the Batman Will pursuant to R.C. 2107.61 and the recording of the same pursuant to R.C. 5301.56(B)(1)(c)(i) is a transaction affecting title to the Batman Mineral Interest under R.C. 5301.47(F) and the 1989 DMA.

C. A chain of title exists for the Batman Mineral Interest.

Contrary to Appellants assertion, a chain of title exists for the Batman Mineral Interest. Appellant's Brief at 7. Appellants claim that the last person with actual title to Batman Mineral Interest was J. A. Clark. *Id.* Such a position disregards R.C. 2107.61, 5301.252 and 5301.52 and the facts set forth in the 1981 Affidavit. The 1981 Affidavit provides a clear link between J. A. Clark and Frances Batman.

Appellant next contends that the 1981 Affidavit is not a title transaction under the 1989 DMA, implying that it therefore fails to preserve the Batman Mineral Interest because “the affidavit was not a title transaction, merely a claim to ownership, and did not vest any real estate in Frances Batman.” Appellant’s Brief at P. 8. Notwithstanding the fact that Appellant did not dispute the fact that recordation of the 1981 Affidavit was a savings event under the 1989 DMA before either the trial or appellate courts. Appellate Opinion at ¶5. And even assuming that Frances Batman was not the record holder of the Batman Mineral Interest following the execution of the 1981 Affidavit, this new contention wholly ignores Sections (C)(1) and (C)(2) of the 1989 DMA, which provide:

(C)(1) *A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:*

- (a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;
- (b) Otherwise complies with section 5301.52 of the Revised Code;
- (c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

(C)(2) *A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.*

1989 DMA, R.C. 5301.56(C)(1) – (2), (emphasis added). Section (A)(l) of the 1989 DMA defines “Holder” as “the record holder of a mineral interest, and any person who derives his [or her] 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.”

R.C. 5301.56(A)(1). Thus, a person who derives her rights from the record holder and whose claim is not adverse to the same may file a preservation notice under Sections (C)(1) and (C)(2) of the 1989 DMA. The 1981 Affidavit sets forth the facts wherein Frances Batman derived her rights from J. A. Clark, it is neither expressly or by clear implication adverse to his interest and it otherwise complies with R.C. 5301.52. Appellate Opinion at ¶23. Therefore, even assuming that J. A. Clark was the record holder at the time of its recording, the 1981 Affidavit effectively preserves the Batman Mineral Interest under Sections (C)(1) and (C)(2) of the 1989 DMA.

D. An ancillary administration is not required for an effective “Title Transaction”.

Appellant contends that without an ancillary administration and the filing of a certificate of transfer under R.C. 2113.61(A) there can be no effective title transaction under R.C. 5301.47(F) and the 1989 DMA. Appellant’s Brief at 11. However, the MTA specifically recognizes filings in the probate court as being recordings of records and recognizes title by will or descent as being a title transaction, and makes no reference to a certificate of transfer. R.C. 5301.47(F); see also *Ohio N. Univ. v. Ramga*, No. 2-88-1, 1990 WL 97651, *4 (Ohio Ct. App. July 12, 1990). The court in *Ramga* noted:

The certificate of transfer is provided by R.C. 2113.61(A) and is issued by the probate court, not as a document transferring the real estate but as a certification that the real estate has been transferred either by devise under a will or by statutory intestate succession. R.C. 2113.62 provides that such certificate of transfer may be recorded by the county recorder. *The issuance of such certificate of transfer, however, is not a prerequisite to the transfer of title to the property, nor to the marketability or alienability of such real property.* R.C. 2113.61 commences with the words, “[w]hen real estate passes * * * under a will * * * clearly connoting that the transfer itself was effected by the admission of the will to probate and that the certificate is merely a memorialization of such transfer which has previously occurred.

Id. at *4 (emphasis added). Further, R.C. 2113.61(E) expressly provides that:

A foreign executor or administrator, if no ancillary administration proceedings have been had or are being had in this state, *may file* in accordance with this section an application for a certificate of transfer in the probate court of any county of this state in which real property of the decedent is located.

R.C. 2113.61(E) (emphasis added). Thus, an ancillary administration may be initiated and one may file for a certificate of title to be issued and recorded, but it is not required by R.C. 2113.61 or the MTA. Therefore, the filing of the Batman Will pursuant to R.C. 2107.61 and the recording of the same pursuant to R.C. 5301.56(B)(1)(c)(i) is a transaction affecting title to the Batman Mineral Interest under R.C. 5301.47(F) and the 1989 DMA.

Proposition of Law No. III:

XTO Energy, Inc. and Phillips Exploration, Inc. have no standing to appear in this case.

The Batmans adopt and reassert the arguments set forth in Appellees XTO Energy, Inc. and Phillips Exploration, Inc.'s Motion for Order Deeming Proposition of Law No. 3 to be Moot and Subject to Dismissal under Supreme Court Practice Rule 7.10, and Dismissing the XTO Parties from this Appeal, a copy of which was filed with this Court on July 21, 2015.

CONCLUSION

For the reasons set forth above, the filing of the Batman Will pursuant to R.C. 2107.61 and the recording of the same pursuant to R.C. 5301.56(B)(1)(c)(i) is a transaction affecting title to the Batman Mineral Interest under R.C. 5301.47(F) and the 1989 DMA. As such, the Batmans respectfully request that the judgment of the Seventh District Court of Appeals be affirmed.

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