Oil and Gas Title and Probate Issues

James ("Jay") A. Carr, II
Vorys, Sater, Seymour and Pease LLP
Columbus, Ohio

and Jacinto A. Núñez
Vorys, Sater, Seymour and Pease LLP
Akron, Ohio

Akron Bar Association Estate Planning, Elder Law and Probate Law Section
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Part One

Oil and Gas Basics

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Oil and Gas Basics

- Oil and Gas Interest
  - Mineral Deed (severance)
  - Reservation by the grantor in the conveyance of the surface (severance)
  - Oil and Gas Lease

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Interests In Oil and Gas

- Working Interest
- Royalty Interest
- Non-Participating Royalty Interest
- Net Revenue Interest
- Overriding Royalty Interest

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The Oil and Gas Lease

- Nature of Grant
- Nature of Royalty Interest

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Part Two

Ohio Dormant Mineral Act ("DMA")

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Background and History

- The DMA is codified at R.C. § 5301.56.
- The statute is part of the Ohio Marketable Title Act ("MTA").
  - The MTA is codified at R.C. § 5301.47, *et seq*.
  - The legislative purpose of the MTA is to "simplify and facilitate land title transactions by allowing persons to rely on a record chain of title."
  - The legislative purpose is accomplished by extinguishing certain ancient interests and defects that create a cloud on title.
- The DMA became effective on March 22, 1989.
- The DMA was amended on June 30, 2006 (and in 2013).

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Why was the MTA Amended to Incorporate the 1989 DMA?

- In order to extinguish ancient interests and defects under the MTA, several statutory elements must be satisfied:
  - Claimant must have the legal capacity to own land in Ohio;
  - Claimant must have a "root of title;"
  - Claimant must have an unbroken chain of title to the "root of title;"
  - Interest/defect must predate the "root of title;" and
  - None of the statutory exceptions can apply.
- *Heifner v. Bradford* (4 Ohio St.3d 49 (1983)) showed that, as to severed mineral interests, it is difficult to satisfy all of the statutory elements and extinguish ancient severed mineral interests.

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How does the 1989 DMA further the MTA's Legislative Purpose?

- A 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 such surface owner* if: (1) the mineral interests is not (a) in coal, or (b) held by the United States, State of Ohio, or any political subdivision/agency thereof, and (2) a "savings events" did not occur within the preceding 20 years.
- The 2006 DMA defines "minerals" or "mineral interest" as follows:
  - "Mineral interest" means "a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided."
  - "Mineral" means "gas, oil, coal, coalbed methane gas . . ."

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What are the "Savings Events" under the 1989 DMA?

- Mineral interest has been the *subject of* a title transaction recorded in the *county recorder's office* in which the lands are located;
- Actual production or withdrawal of minerals by the holder;
- Mineral interest has been used in underground gas storage by the holder;
- A drilling/mining permit has been issued to the holder, provided that an affidavit is recorded in the *county recorder's office* in which the lands are located;
- A claim to preserve is recorded in the *county recorder's office* in which the lands are located; and
- A tax parcel number has been created for the mineral interest.

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Changes under the 2006 DMA

- The 2006 DMA cleaned-up some of the issues surrounding the interpretation and application of the 1989 DMA, including the following:
  - Defined "minerals" and "mineral interest," discussed, *supra*;
  - Clarified the 20-year look-back period;
  - Changed the procedure to abandon mineral interests; and
  - Provided holders of a mineral interest with an additional mechanism to prevent abandonment.

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Changes under the 2006 DMA (cont'd)

- The 20-year look-back period under the 2006 DMA is the 20 years immediately preceding the date on which a notice of abandonment is served on the holder of the mineral interest.
- In order to abandon a dormant mineral interest, the surface owner must:
  - Serve a notice of abandonment upon the holder;
  - Record an affidavit of abandonment at least 30 days, but no later than 60 days, after the service of a notice of abandonment; and
  - Record a notice of failure to file after the expiration of the above 60- day period (assuming the holder does not file a claim to preserve or an affidavit in response to the notice of abandonment).
- However, the holder of mineral interest may file either: (1) a claim to preserve or (2) an affidavit identifying the occurrence of a "savings event" within the 20 years immediately preceding the date the notice of abandonment was served, which will prevent abandonment.

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Requirements for Notices of Abandonment

- The name of the holder of the mineral interest and the holder's successors and assigns;
- A description of the surface of the land that is subject to the mineral interest.
  - The description shall include the volume and page number of the recorded instrument under which the surface owner claims title;
- A description of the mineral interest to be abandoned.
  - The description shall include the volume and page number of the recorded instrument on which the mineral interest is based; and
- A statement that a "savings event" has not occurred within the 20 years immediately preceding the date on which the notice of abandonment was served.

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Requirements for Affidavits of Abandonment

- A statement that the person filing the affidavit is the owner of the surface of the lands subject to the interest;
- The volume and page number of the recorded instrument on which the mineral interest is based;
- A statement that the mineral interest has been abandoned pursuant to R.C. § 5301.56(B);
- A recitation of the facts constituting abandonment; and
- A statement that a notice of abandonment was served on each holder or each holder's successors or assignees.

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Requirements for Notices of Failure to File

- A notice of failure to file can be recorded only if the holder of the mineral interest failed to file a claim to preserve or an affidavit identifying the existence of a "savings event" within 60 days of service of a notice of abandonment.
- A notice of failure to file shall contain the following:
  - A statement that the person filing the notice is the owner of the surface of the lands subject to the mineral interest;
  - A description of the surface of the land that is subject to the mineral interest; and
  - The statement: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in Volume ___, Page ___."

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Issues Under and Surrounding the DMA

- What is the applicable 20-year look-back period under the 1989 DMA?
  - The Seventh District Court of Appeals has held that the 20-year look-back period is "fixed," which means that if no "savings events" occurred from March 22, 1969 to March 22, 1989 (plus the three year statutory grace period), then the mineral interest is abandoned.
  - However, the Supreme Court of Ohio's decision in *Corban v. Chesapeake,* which is discussed, *infra*, now makes this issue moot.
- Is the 1989 DMA self-executing (*i.e.*, automatically transfers ownership of dormant mineral rights to the surface owner by operation of law)?
  - The Supreme Court of Ohio reached this issue in *Corban v. Chesapeake,* which is discussed, *infra*.

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Issues Under and Surrounding the DMA (cont'd)

- What does "subject of" a title transaction mean?
  - The Seventh District Court of Appeals has construed this language to mean that the grantor must be conveying or reserving the mineral interest.
  - Issue has not been decided by the Supreme Court of Ohio.
- Is an oil and gas lease a "title transaction?"
  - Yes, per the Supreme Court of Ohio in *Chesapeake v. Buell*, 144 Ohio St.3d 1446 (2014).
- Is the receipt of delay rental payments a "savings event?"
  - The Supreme Court of Ohio reached this issue in *Corban v. Chesapeake,* which is discussed, *infra*.

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Issues Under and Surrounding the DMA (cont'd)

- What version of the DMA applies to claims to abandon dormant mineral rights affected after the 2006 DMA's effective date (*i.e.*, June 30, 2006)?
  - The Supreme Court of Ohio reached this issue in *Corban v. Chesapeake,* which is discussed, *infra*.
- What level of due diligence is required to locate the holder of the mineral interest and serve him with a notice of abandonment?
  - No reported case has yet decided this issue.
- Under the 2006 DMA, must a claim to preserve that is filed in response to a notice of abandonment reference a "savings event" to be effective?
  - No, per the Supreme Court of Ohio in *Dodd v. Croskey*, 140 Ohio St.3d 1406 (2014). The claim to preserve must only satisfy the requirements of R.C. § 5301.56(C)(1).

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Issues Under and Surrounding the DMA (cont'd)

- Does the MTA still apply to severed mineral interests given the DMA's enactment?
  - The Seventh District Court of Appeals has held that the MTA no longer applies (*Swartz v. Householder*, 2014-Ohio-1243 (2014)).
  - Issue has not been decided by the Supreme Court of Ohio.

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Corban v. Chesapeake Exploration, L.L.C.

- In 1959, North American Coal Corporation conveyed land to Orelen H. Corban and Hans D. Corban reserving all oil, gas and minerals.
- In 1962, Orelen Corban quitclaimed his interest to Carol Ann Corban.
- In 1967, Carol Ann Corban quitclaimed her interest to Hans Corban.
- In 1974, North American Coal Corporation leased its oil and gas rights, which lease was recorded.
  - The lease was subsequently assigned.
  - A drilling permit was obtained, however, no production was achieved.
  - The lease terminated in 1984.

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Corban v. Chesapeake Exploration, L.L.C. (cont'd)

- In 1980, Hans Corban quitclaimed his interest to Gretchen Corban.
- In 1984, North American Coal Corporation leased its oil and gas rights, which lease was recorded.
  - The lease was subsequently assigned.
  - A drilling permit was obtained. However, no production was achieved
  - Delay rental payments tendered to North American Coal Corporation in 1985, 1986, 1987, and 1988.
- In 1999, Gretchen Corban quitclaimed her interest to Hans Michael Corban.
- In 2008, North American Coal Corporation (n/k/a Bellaire Corporation) conveyed the mineral estate to North American Coal Royalty Company.

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Corban v. Chesapeake Exploration, L.L.C. (cont'd)

- In 2009, North American Coal Royalty Company leased its oil and gas rights, which lease was recorded.
  - The lease was subsequently assigned to Ohio Buckeye Energy, L.L.C.
  - A well was drilled and production began in June 2011.
  - By various assignments and mergers, Chesapeake Exploration, L.L.C., CHK Utica, L.L.C., Total E&P USA, Inc., and Larchmont Resources, L.L.C. became the lessees under the lease.
- In 2013, Hans Michael Corban filed an action in Harrison County Common Pleas Court seeking to quiet title to the oil and gas, among other relief.
  - Suit was removed to federal district court by defendants.
  - Federal district court certified two questions to the Supreme Court of Ohio.

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Questions Certified to Supreme Court of Ohio

- Question One: Does the 2006 DMA or the 1989 DMA apply to claims asserted after June 30, 2006, alleging that the right to oil, gas and other minerals automatically vested in the surface owner prior to effective date of the 2006 DMA?
  - The Supreme Court of Ohio held that: (1) the 1989 DMA is not self-executing, and (2) the 2006 DMA applies to claims to abandon dormant mineral rights asserted after its effective date (*i.e.*, June 30, 2006).
- Question Two: Is the payment of delay rental during the primary term of an oil and gas lease a "savings event" under the DMA?
  - The Supreme Court of Ohio held that payment of a delay rental is not a "savings event" under the DMA.

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Part Three

Common Ohio Title Issues Encountered relating to Trusts and Probate Matters

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Conveyance Into a Trust

- Unless the trust is a business trust or real estate investment trust, it cannot hold title in its own name. A conveyances to a trust is invalid.
- Ohio has a savings statute: R.C. § 5301.071(E)(1) - a conveyance to a trust is to be considered as a conveyance to the trustees of the trust if:
  1. The trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance, and
  2. A memorandum of trust that (1) complies with R.C. § 5301.255 and (2) contains a description of the real property conveyed by that instrument is recorded.

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Conveyance to an Undisclosed Trust

- **Example:**
  - **Conveyance 1:** From X to Bob Hope, as Trustee.
  - **Conveyance 2:** From Bob Hope, Trustee to Y.
- A conveyance to a grantee as "trustee" of an undisclosed trust, on a conveyance, without language showing that a trust exists, is insufficient to establish that a trust exist. R.C. § 5301.03.
- Consequences:
  - Does not give notice to any person dealing with the land that a trust or agency exists or that there are beneficiaries other than the grantees.
  - As to all subsequent bona fide purchasers, mortgagees, lessees, assignees for value, the grantee takes free of any claims of undisclosed beneficiaries.

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Conveyance by a Trustee of a Disclosed Trust

- **Example: From Bob Hope, Trustee of the Jay Leno Administrative Trust Dated November 30, 1985, to Y.**
- Need evidence of authority of the trustee to act on behalf of the trust.
- Title Standards require that the following be recorded:
  - excerpts of the operative provisions of the trust agreement, together with an affidavit that it is a true copy of the text in the trust agreement, or
  - a memorandum of trust in conformity with the requirements of R.C. § 5301.255.
- In practice, authority issues are limited by R.C. § 5810.12 ("a person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise"), <u>but it is difficult for a title attorney to rely on this statute.</u>

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Dower

- Dower in Ohio is <u>very limited.</u>
- Surviving spouse is seized with a life-estate in one-third of the deceased (record-holder) spouse's property. This applies to any property that the deceased spouse held during the marriage.
- <u>However,</u> the dower interest terminates upon the death of the record-holder spouse *except* in two circumstances:
  1. Where the record-holder spouse conveyed the property during the marriage and the surviving spouse did not release dower.
  2. Where the property was affected by a mortgage or other encumbrance and the surviving spouse did not release dower.
- Also terminates upon granting of absolute divorce, and certain other circumstances (adultery or waste).
- **Example:** John acquires Blackacre. John marries Suzy. Suzy has a 1/3d dower right in Blackacre. If John conveys Blackacre during his life without Suzy releasing dower, Suzy will continue to have a dower right in Blackacre after John's death.
- **Takeaway: the spouse must join in the execution of a deed or oil and gas lease.**

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Power of Attorney

- Where an instrument is executed by a party acting as an attorney-in-fact for another, the authority of the attorney-in-fact (AIF) must be confirmed.
- In Ohio, a power of attorney must be acknowledged and recorded.
- Power of attorney must grant the authority to the AIF to undertake the transaction.

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Life-Tenant / Remainderman Issues

	Who must consent?	**Distribution of Royalties**
Lease executed *after* creation of a life estate	Life tenant AND Remainderman	Life tenant = Interest from royalties/shut-in rentals/ delay rentals Remainderman – Corpus of royalty/shut-in/delay rental payments (after LT's death)
Lease executed *before* creation of a life estate ("Open Mines Doctrine")	Life tenant	Life tenant entitled to all payments due under the lease

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Affidavits Relating to Title (R.C. § 5301.252)

- States facts relating to matters that may affect title:
  - Age, sex, birth, death, capacity, relationship, family history, heirship, names, identity of parties, marriage, residence, or service in the armed forces;
  - Possession;
  - The happening of any condition or event that may create or terminate an estate or interest;
  - The existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way;
  - In an affidavit of a registered surveyor, facts reconciling conflicts and ambiguities in descriptions of land in recorded instruments.

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Affidavits Relating to Title (R.C. § 5301.252) [cont.]

- **Requirements:**
  - Include a description of the land that is subject to the affidavit and a reference to a recorded instrument containing a legal description of the land, as well as the name of the record land owner.
  - Affidavit is recorded in the same manner as a deed and indexed under the name of the record lane owner.
- **Limitations:**
  - An affidavit serves as evidence but is not conclusive.
  - Cannot itself create an interest in land or encumber title.

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Tenancy in Common

- Created when real property is conveyed or devised to two or more persons.
- Default when the grant is ambiguous or lacks the form necessary to create another form of co-tenancy.
- Each tenant holds an undivided interest. Generally, each tenant holds an equal share unless otherwise provided in the instrument creating the tenancy in common.
- Each co-tenant has an equal right to use and possess the property.
- One co-tenant cannot adversely possess against the other absent ouster.
- **Characteristics:** descendible, devisable, and alienable, without other cotenant's consent.

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Survivorship Tenancy (R.C. § 5302.20)

- Created whenever property is conveyed or devised to two or more persons for their joint lives and then to the survivor of survivors of them.
- Statutorily approved language**:** "for their joint lives and then to the survivor or survivors of them."
- Liberal construction: any deed or will containing language that shows a create intent to create a survivorship tenancy will be construed to do so.

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Survivorship Tenancy (R.C. § 5302.20) [cont.] Characteristics of a survivorship tenancy

- Each survivorship tenant holds an equal share of the property during their joint lives.
- Upon the death of any of the survivorship tenants, title of the decent vests proportionately in the remaining survivorship tenants, until only one survivorship tenant remains.
- NOT descendible, NOT devisable. But it IS alienable. A conveyance from less than all survivorship tenants to a person who is not a survivorship tenant vests title of to the grantee, *conditioned on the survivorship of the* grantor(s), and does not alter the title of any of the survivorship tenants who did not join in the conveyance.
  - Example: A, B, and C, are survivorship tenants. A, without joinder from B and C, conveys to X. X is vested with A's title, which is only good as long as A survives B and C. If B and/or C should outlive A, X's is extinguished.
- A conveyance from ALL the survivorship tenants, or from all but one of the survivorship tenants to the remaining survivorship tenant, terminates the survivorship tenancy.

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Survivorship Tenancy (R.C. § 5302.20) Characteristics of a survivorship tenancy [cont.]

- Each survivorship tenant has an equal right to share in the use, occupancy, and profits.
- Each tenant is also responsible for proportionate share of costs.
- Each tenant can pledge his or her respective interest in the property.
- A creditor of a survivorship tenant may enforce the lien against the other survivorship tenants by an action to marshal liens against the interest of the debtor(s).
- Upon court's determination that a party has a valid lien against a survivorship tenant, title to the property becomes a tenancy in common. Court may then order a sale of the fractional interest of the lien debtor.
- Divorce or annulment generally terminates a survivorship tenancy between married survivorship tenants.

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Tenancy by the Entireties

- Abolished on April 4, 1985.
- Effective dates: Between November 22, 1973 and April 4, 1985.
- If a tenancy by the entireties was created during that period, it will continue to be recognized today.

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Tenancy by the Entireties [cont.]

- **Need five unities of title.** The joint tenant must have
  1. Acquired their interest in the real property at the same time;
  2. Acquired their interest in the real property in the same instrument;
  3. Obtained an equal interest in the real property;
  4. An equal right of possession; and
  5. Been married at the time of the conveyance
- The words "estate by entireties" must appear either in the title of the instrument or in the granting clause and the deed must include survivorship language.
- Husband and wife in an estate by entireties hold the property as a single entity.
- Creditor of only one of the spouses cannot reach the property (subject to a few exceptions, such as federal tax liens).

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Transfer on Death Designation Affidavits (R.C. § 5302.22)

- Property owner can designate through a transfer on death designation affidavit that real property transfers to a designated beneficiary or beneficiaries upon his death.
- Property passes outside of probate.
- The beneficiary of a transfer on death affidavit has no present interest in the property, and takes only the interest that the deceased owner of the interest held on the date of death, subject to all encumbrances, reservations, and exceptions.
- Title subject to a transfer on death designation affidavit vests immediately upon the property owner's death.
- Transfer on death designation affidavits cannot defeat a survivorship tenancy.
  - The death of all except the last survivorship tenant automatically terminates and nullifies any transfer on death beneficiary designations made by the deceased survivorship tenant(s).
  - To avoid this, the last survivorship tenant must join in the affidavit.

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Transfer on Death Designation Affidavit Requirements

1. A description of real property which is affected by the affidavit and a reference to an instrument of record containing that description;
2. If less than the entire interest in the real property is to be transferred . . ., a statement of the specific interest or part of the interest that is . . . to be so transferred;
3. A statement by the individual executing the affidavit that the individual is the person appearing on the record . . . as the owner of the real property or interest in the real property at the time of the recording of the affidavit and the marital status of that owner. If the owner is married, the affidavit shall include a statement by the owner's spouse that the spouse's dower rights are subordinate to the vesting of title to the real property or interest in the real property in the transfer on death beneficiary . . .; and
4. A statement designating one or more persons, identified by name, as transfer on death beneficiary or beneficiaries.

Must be recorded *prior to* the owner's death.

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Transfer on Death Designation – Affidavit of Confirmation

The transfer on death beneficiary must record an affidavit of confirmation with the county recorder. The affidavit of confirmation must contain the following:

- the name and address of the transfer on death beneficiary;
- the date of death of the deceased owner;
- a description of the real property;
- the name of each transfer on death beneficiary who did not survive the deceased owner or that is not in existence on the date of the deceased owner's death; and,
- a certified copy of the death certificate for the deceased transfer on death beneficiary who did not survive the deceased owner.

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R.C. § 317.22 Affidavits

- Title to property of an intestate decedent vests at once to the intestate's heirs, subject to the right of the administrator to sell the same for the payment of the debts of the intestate.
- Before any real estate, the title to which as passed under the laws of descent, is transferred from the decedent to his heirs, and before any conveyance is made by his heirs to a third party, the heir must present an R.C. § 317.22 affidavit to the county auditor.

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R.C. § 317.22 Affidavits [cont.]

- Affidavit must be executed by the heir, or two Ohio residents with personal knowledge of the facts, and contain
  1. The date of the ancestor's death;
  2. The ancestor's residence at the time of death;
  3. The fact that the ancestor died intestate;
  4. The names, ages, and addresses, so far as known and can be ascertained, of each of the ancestor's heirs and who inherited the real estate;
  5. the relationship of each of the heirs to the ancestor;
  6. the part or portion of the real estate inherited by each heir.
- Once approved by the auditor, the affidavit must be recorded with the recorder's office before any deed conveying the property is recorded.
- Note: R.C. § 317.22 affidavits are only *evidence* of the facts therein; and a title opinion should include a Comment where title is dependent on such an affidavit.

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Application for Certificate of Transfer

- R.C. § 2113.61 – Application for Certificate of Transfer
  - When real property passes by laws of intestate succession or under a will, the administrator or executor shall file in probate court…an application requesting the court to issue a certificate of transfer as to the real property.
  - Application for a certificate of transfer shall contain all of the following:
    - Name, place of domicile at death, and death of the decedent;
    - Statement whether decedent died testate or intestate;
    - The reason the property is being transferred to the devisee or devisees;
    - Whether any spousal elections have been exercised;
    - Whether any disclaimers or assignments have been filed;
    - a statement that all of the debts of the decedent's estate have been paid or arrangements have been made to have them paid.

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Who May File an Application for a Certificate of Transfer?

- Typically made by executor or administrator;
- Whenever an administration or an estate did not take place and none is contemplated, an application may be filed by an heir or devisee or a successor in interest.
- If no ancillary administration was had, a foreign executor or administrator may file an application.

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Sale of Real Property by Executor/Administrator

- When real property is sold by an executor or administrator to a third party, the attorney drafting the title opinion must review the terms of the will, and the pleadings filed with the probate court to confirm the validity of transaction.
- If a will specifically authorizes the executor to sell, no order shall be required from the probate court for the executor to proceed with the sale. If the power is *not* specifically granted under the terms of the will, the executor may sell the estate's real property *provided:*
  - The surviving spouse, legatees, devisees, or heirs, give written consent to a power of sale;
  - The sale is for a price of at least 80% of the appraised value as set forth in an approved inventory;
  - Neither the surviving spouse, nor any legatee, devisee or heir is a minor;
  - The will does not prohibit the sale of real property.
- If an executor/administrator lacks the testamentary power of sale, or cannot obtain the necessary consent to a power of sale, then the executor/administrator must petition the court for authority to sell the property.

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Order of Sale by Court

- When will a court issue an order to sell real property?
  - **Where property is not required to be sold to pay debts or legacies:**
    - Only with the consent of all persons entitled to share in an estate upon distribution.

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Order of Sale by Court [cont.]

- **Where property is required to be sold to pay debts or legacies, only if one of the following apply:**
  1. At least 50% of all the persons interested in the real property proposed to be sold have consented to the sale; (b) Prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real property proposed to be sold, that total in excess of 25%; and (c) The court determines that the sale is in the best interest of the decedent's estate.
  2. No person's interest in the interest of the decedent in the real property proposed to be sold exceeds 10%; (b) Prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real property proposed to be sold, that total in excess of 25%; and (c) The court determines that the sale is in the best interest of the decedent's estate.;
  3. Property escheats to the state.

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Questions

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