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TABLE OF AUTHORITIES

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INTRODUCTION

The Court has accepted review of the following proposition of law:

Whether the act of recording an out-of-state will is a title transaction?

This matter concerns ownership of a severed mineral estate in Belmont County, Ohio. As is becoming increasingly more popular, Appellant Mark E. Albanese, Executor of the Estate of James F. Albanese III is attempting to quiet title and gain ownership of the severed mineral interest pursuant to Ohio Revised Code §5301.56 as originally enacted in 1989, commonly known as Ohio's Dormant Minerals Act ("the 1989 DMA").¹ However, much different from the new-normal 1989 DMA case, here, the mineral interest holders took the necessary statutory steps to preserve their severed mineral interests. In 1981, long before Ohio had a DMA, they filed a Preservation Affidavit. After enactment of the 1989 DMA they recorded the out-of-state will from which title stems to put the world on notice.

The severed mineral estate is held by Appellee Nile E. Batman ("Batman") and this ownership is of record. The mineral interest, in turn, is leased by Hess Ohio Resources, LLC and Hess Ohio Developments, LLC ("Hess Ohio"). Relying upon the chain of title and records in Belmont County, Hess Ohio determined Batman to be the proper owner of the minerals and leased Batman's interest accordingly.

Appellant's theory of how to deprive Batman of this record ownership has evolved throughout this proceeding. From one filing to the next, Appellant continues to raise new and

¹ Appellant's Proposition of Law No. 1 "The 1989 Dormant Mineral Act was prospective in nature and operated to have a severed oil and gas interest 'Deemed abandoned and vested in the owner of the surface' if none of the savings events enumerated in ORC Section 5201.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 Dormant Mineral Act was in effect" has been held for decision pending *Walker v. Shondrick-Nau*, 2014-0803. Appellee respectfully disagrees with this interpretation. A ruling by the Court affirming Proposition of Law. No. 1 would render Appellant's Second Proposition moot.

different issues. Appellant's brief to the Court for jurisdiction admits that the Batman Will transferred the severed mineral interest and that the Will was a title transaction. *Memorandum in Support of Jurisdiction* at 8. Appellant's Jurisdictional Brief argued only that the date of that title transaction was the date of death relying on a theory of relation back from *Union Sav. Bank & Trust Co. v. Baltimore & Ohio Southwestern R.R.*, 7 Ohio N.P. (n.s.) 497 (1908). *Id.* at 9. Appellant has seemingly abandoned that argument. Appellant's Merit Brief instead argues that there is no record chain of title to the severed mineral interest. *Id.* at 7. In addition to being raised for the first time, this argument lacks merit.

The severed mineral reservation that is the subject of this litigation was created by virtue of the deed from John A. Clark (J.A. Clark) and Eva Clark, husband and wife, to John S. Dunfee dated April 4, 1905, recorded May 8, 1905, Volume 155, Page 353 of the Belmont County Recorder's Office. In said deed, the Clarks excepted and reserved "to grantor his heirs and assigns the one fourth interest in the privileges and production of all oil and gas that may be in and under said premises." The premises conveyed and mineral interest reserved under the Clark-Dunfee deed is situated in the Township of Smith, County of Belmont, and State of Ohio being part of the northwest quarter of Section ten (10), Range four (4) containing 104 acres.

John Clark's wife, Eva, and his daughter Mamie E. Sulsberger acquired the assets of his estate upon his death. *Belmont County Probate Court Case No. 27870; Affidavit and Notice of Claim of Interest in Land of Frances Batman* ("Batman Affidavit") (Appendix A). Eva Clark died intestate leaving the subject severed mineral interest to Mamie through the laws of intestate succession. *Id.* at ¶4. Mamie's daughter, Frances Batman, was the sole heir-at-law at Mamie's estate and, pursuant to the terms of Mamie's will, the subject severed mineral interest

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was left to her. *Id.* at ¶ 5-6; *Belmont County Probate Court Case No. 54986 (September 22, 1952) recorded Volume 41, Page 498 of Belmont County Will Records.*

On September 9, 1981, Frances Batman, being the record owner of the subject severed mineral interest, executed an Affidavit and Notice of Claim of Interest in Land (discussed above), recorded September 15, 1981, at Volume 602, Page 38 of the Belmont County Recorder's Office. In addition to reciting the above-described facts, the Batman Affidavit also preserved Frances' interest in the subject severed mineral interest (as well as numerous other reservations stemming from J.A. Clark). The Batman Affidavit provides: "This Affidavit is intended to be recorded in the Deed Records of Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and of evidencing the claim of this Affiant [Frances Batman] in and to such interests as provided for in Sections 5301.47, et seq., Ohio Revised Code, the 'Ohio Marketable Title Act'." *Id.* at ¶7.

Frances Batman died testate in Nebraska on October 15, 1981. On April 10, 1989, the Last Will and Testament of Frances E. Batman was recorded at Volume 654, Page 670 of the Belmont County Recorder's Office (Appendix B). An authenticated copy of the Batman Will was likewise admitted and filed with the Belmont County Probate Court Case No. 94752 on May 15, 1989. Said will provides in Article II: "In the event that my son, Nile E. Batman [Appellee herein], 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."

Viewing these facts, the Trial Court held that the Batman Will, recorded on April 10, 1989, was a title transaction and savings event pursuant to the 1989 DMA. *Judgment Entry Belmont County 12CV0044 (April 28, 2014).* On appeal, the Seventh District Appellate Court

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did not address the issue of the Batman Will finding that Appellant failed to raise that issue at the trial court. *Albanese v. Batman*, 2014-Ohio-5517, ¶21 (Ohio Ct. App., Belmont County Dec. 12, 2014). Nonetheless, the Appellate Court upheld the Trial Court's ruling finding that the Batman Affidavit was a savings event under the statute. *Id.* at ¶25. This matter is now before the Court on the issue of whether recording an out-of-state will is a title transaction. Appellee, Hess Ohio, respectfully submits that it is.

LAW AND ARGUMENT

i. Appellant's arguments are waived for a failure to raise below.

Appellant is attempting to raise new arguments again for the first time before this Court. Appellant's arguments under Proposition of Law No. 2 in its Jurisdictional Memorandum are entirely different from the arguments made in its Merit Brief. Just as the Seventh District Court found that Appellant was raising issues for the first time on appeal that it failed to raise at the Trial Court, Appellant is now raising issues for the first to this Court that it failed to raise at the Appellate Court. A *de novo* review does not give an appealing party a second bite at the apple to raise issues the party could have raised at the trial court level but failed to do so. *State ex rel. Conroy v. Williams*, 185 Ohio App. 3d 69 (Ohio Ct. App., Mahoning County 2009). "The parties are not given a second chance to raise arguments that they should have raised below." *Id.* at 81 quoting *Litva v. Village of Richmond*, 172 Ohio App.3d 349 (2007) (Internal citations omitted). Accordingly, Appellee respectfully submits that Appellant's new claims have been waived.

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ii. The definition of a “title transaction”.

Without waiving any arguments as to the operation of the 1989 DMA and for purposes of Proposition of Law. No. 2 only, Appellant’s theory of the case is that the Batman severed mineral interest was abandoned and vested in Appellant by operation of the 1989 DMA for want of a savings event. *See generally, Walker, supra.* The 1989 DMA provides in relevant part as follows:

(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...*

ORC 5301.56 (B)(1)(c)(i)(eff. March 22, 1989)(emphasis added).

The 1989 DMA, however, does not define what constitutes a “title transaction.” In considering this issue, courts have instead turned to the Ohio Marketable Title Act’s Code Section 5301.47(f) for guidance. *See generally, Dodd v. Croskey*, 2013 Ohio 4257 (Ct. of App., 7th Dist., 2013). ORC 5201.47(f) defines a title transaction as “*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, administrators, or sheriff’s deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.*” (emphasis added). In *Heifner v.*

Bradford, the Court found that a 1957 conveyance of the oil and gas rights which passed under terms of a will must be considered a title transaction pursuant to the Marketable Title Act. 4 Ohio St. 3d 49, 51 (1983).

Indeed, Appellant concedes that a will is a title transaction. Appellant writes “[t]here is no question that title by will can be a title transaction if it affects title to any interest in land.” *Appellant’s Merit Brief* at 6. Here, the Batman Will devising all of the Estate of Frances Batman, including all her severed mineral interests, to her son is a transaction affecting title to any interest in land.² As required by statute, an authenticated copy of the foreign will was admitted to probate and recorded in the Belmont County Recorder’s Office. Accordingly, the devise properly affects title, the Batman Will and subsequent recording are title transactions and savings events for 1989 DMA purposes, and the severed mineral estate is held by Nile Batman.

iii. The Batman Will is a foreign will and was properly recorded as such.

It has long been the law in Ohio that a foreign will, to effectually pass title, must be admitted to record. 125 years ago in *McClaskey v. Barr*, 47 F. 154, 159 (C.C.D. Ohio 1891) the court explained:

² “Every devise in a will of lands, tenements or hereditaments, shall convey *all* the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate.” *Perdue v. Morris*, 93 Ohio App. 538, 541 (Ohio Ct. App., Belmont County 1952)(emphasis added); *Jones v. Jones*, 48 Ohio App. 138 (Ohio Ct. App., Franklin County 1933). Moreover, “courts favor the creation of a fee and cast the burden of proving a lesser estate in real property upon the one asserting that a devise is of a lesser estate than a fee simple.” *Id.* The Batman Will provides “[i]n the event that my son, Nile E. Batman [Defendant herein], 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*.” *Batman Will Article II* (emphasis added). *See also, ORC 2107.51.*

Ohio Rev. Stat. § 5937 provides that authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to any property in the state of Ohio, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies, so recorded, shall have the same validity in law as wills made in this state, in conformity with the laws thereof, are declared to have, etc. Ohio Rev. Stat. § 5942, reads as follows: No will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or record, as provided in this title. These provisions have been substantially the law of Ohio since the year 1808, and it is settled that a will is not effectual to pass real estate unless it be probated if domestic, or recorded if foreign.

The law today, codified in ORC 2129.05 is nearly identical:

Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The authenticated copies, so recorded, shall be as valid as wills made in this state.

When such a will, or authenticated copy, is admitted to record, a copy of the will or of the authenticated copy, with the copy of the order to record it annexed to that copy, certified by the probate judge under the seal of the probate court, may be filed and recorded in the office of the probate judge of any other county where a part of the property is situated, and it shall be as effectual as the authenticated copy of the will would be if approved and admitted to record by the court.

In compliance with this long standing precedent and ORC 2129.05, an authenticated copy of the Batman Will was admitted to probate (Case No. 94752, May 15, 1989) and thereafter recorded in the Belmont County Recorder's Office Volume 654, Page 670. As the Fifth District Appellate Court notes in *Riddel v. Layman* a title transaction occurs both when the conveyance is made and, consistent with the plain language of the statute, when it is recorded. *Riddel v. Layman*, 1995 Ohio App. LEXIS 6121 (Ohio Ct. App., Licking County July 10, 1995) (finding that execution of a deed in 1965 and subsequent recordation in 1973 were each title transactions for 1989 DMA purposes). This is consistent with this Court's ruling in *Heifner, supra*. In *Heifner*, Elviria Sprague died in 1931 and her will was probated in

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Tuscarawas County and devised her oil and gas rights to her daughters. *Heifner v. Bradford*, 1982 Ohio App. LEXIS 14859, *2 (Ohio Ct. App., Muskingum County Jan. 29, 1982). An authenticated copy of her will was later recorded in Muskingum County in 1957. *Id.* This Court held that “the 1957 conveyance under the terms of Elvira Sprague’s will was a ‘title transaction.’” *Heifner* at 53 (Ohio 1983).

Consistent with *Riddle* and *Heifner*, the Batman severed mineral interest was the subject of, at the least, two title transactions:³ (1) when Frances Batman died and the severed mineral interest was conveyed to her son by operation of her will; and (2) when an authenticated copy of that foreign will was admitted to probate and recorded in the Belmont County Recorder’s Office making that conveyance effectual.

The act of recording the out-of-state Batman Will and making that conveyance effectual is a title transaction. It is a transaction affecting title to an interest in land. It is of record and appears in the index for Frances Batman. It provides notice to the world of the transfer of title in the mineral interest to Nile Batman. Appellant’s own deed notes the mineral exception and reservation, recorded in Volume 72, Page 990 of the Belmont County Official Record. As such, the recording of the foreign will is properly classified as a title transaction.

iv. The additional requirements Appellant attempts to impose do not exist.

Appellant attempts to get around the fact that the Batman Will and subsequent recording are title transactions by arguing that there needed to be a certificate of transfer and legal description. Much differently, Appellant’s jurisdictional memorandum argued for a

³ Appellant now concedes that the Batman Affidavit and Notice of Claim of Interest in Land (discussed above), recorded September 15, 1981 at Volume 602, Page 38 of the Belmont County Recorder’s Office is a savings event.

relation back theory of title transactions in an effort to avoid properly classifying the Batman Will and recording thereof as title transactions.⁴ These claims lack merit.

A certificate of transfer is a convenience; it is a memorialization, but it is not a prerequisite to a conveyance. The will itself and subsequent recordation properly conveys the subject interest; it affects the title, and those acts are the title transactions. The court in *Ohio Northern Univ. v. Ramga*, 1990 Ohio App. LEXIS 2946, at 11-12 (Whiteside, J., dissenting)

notes:

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...[”]

The *Ohio Northern* Court goes on further, stating “[t]he Ohio Marketable Title Act, R.C. 5301.47 to 5301.56, specifically recognizes filings in the probate court as being recordings of records and recognizes title by will or descent as being a title transaction. No reference to the

⁴ At one point, Appellant cited to *Union Savings, supra.* for the proposition that the title transaction would relate back to the time of the testator’s death. Appellant, however, misses the point of *Union Savings, supra.* The *Union Savings* court observes “the record of a foreign will as provided by Section 5937 [formally numbered] is necessary to effectually pass the title to property in this state, but when this is done will the doctrine of relation apply and validate acts previously done which after such record may be performed?” *Union Savings* at 507. The *Union Savings* court never actually rules that Ohio recognizes a relation-back doctrine for the recording of a foreign will pursuant to ORC 2107.61. More importantly, *Union Savings* never indicates that a relation-back doctrine allows for the date of the title transaction to be changed to an earlier date. *Union Savings* only hints that a relation-back doctrine may be available to validate acts prior to record title. When title became of record, however, is the date of the title transaction, as is important here.

certificate of transfer is made in the Marketable Title Act.” *Id.* (emphasis added). The result, as noted by the *Ohio Northern* Court is that a certificate of transfer is merely a memorialization that title has been transferred by the will effective upon admission of the will to probate. *Id.* In the case of a foreign will, effective upon the filing of record.

Frances Batman died in 1981 at which time she owned a partial interest in the oil and gas in the property that is the subject of this litigation. Her will was filed for record in the County Court of Dakota County, Nebraska on October 21, 1981. An authenticated copy of her will was thereafter filed for record with the Belmont County Probate Court on May 15, 1989 with a certification from the Dakota County Court appended thereto. The Batman Will was then recorded with the Belmont County Recorder on April 10, 1989 (19 days after the 1989 DMA went into effect)⁵. The Batman Will clearly and unambiguously provides for the transfer of Frances Batman’s mineral interest to her son, Nile Batman.

The fact that the Batman Will does not include a legal description or reference to any prior conveyances is inconsequential. There is no requirement under the 1989 DMA that a title transaction must include a legal description. There is likewise no requirement that a will must include a legal description to convey title. The Batman Will appears in the index for Frances Batman and provides notice that the severed mineral interests described in the Batman Affidavit are now held by her son. The Batman Affidavit clearly establishes the chain from the severance of J.A. Clark to Frances Batman. Appellant’s claims that there is not a chain of title are without merit in addition to being raised for the first time. Moreover, consistent with ORC 2107.51 every devise of an interest in real property by will conveys all of the deviser’s estate unless clearly stated otherwise. The conveyance of the mineral interest, and thus, the title

⁵ ORC 5301.56 as enacted March 22, 1989 referred throughout this Memorandum as the 1989 DMA.

transactions occurred upon the death of the decedent and recording of the foreign will to make that conveyance effectual. Both of these things affect title to an interest in land and both are title transactions.

CONCLUSION

Appellee Hess Ohio respectfully submits that Appellant is again raising new issues for the first time before this Court. As such, Appellee respectfully asks that Appellant's appeal be dismissed and the ruling of the Appellate Court and Trial Court upheld.

Notwithstanding, on the issue of Proposition of Law No. 2, the recording of an out-of-state will is a title transaction for 1989 DMA purposes. The Batman Will conveyed Frances Batman's severed mineral interests to her son her death and those conveyances became effective upon the filing of that will of record. Both of these acts affect an interest in land and are title transactions for 1989 DMA purposes. The severed mineral interests are properly held by Nile Batman and Appellant was on notice of this when its interest was purchased. Unlike many of the 1989 DMA quiet title actions that have been filed, the Batmans did not sit on their rights. They filed a Preservation Affidavit in 1981 and, despite this savings event, when the 1989 DMA became effective, they filed Frances Batman's Will for record in Belmont County showing that her interests had passed to her son. To deprive Nile Batman of his property rights would be inequitable and contrary to statutory authority.

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CERTIFICATE OF SERVICE

8th I hereby certify that a copy of the foregoing was served by regular U.S. Mail on the
day of October, 2015 on the following:

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HESS OHIO DEVELOPMENTS LLC BATMAN MATTER APPELLEE'S MERIT BRIEF

FOR WILL OF FRANCES E. BATMAN SEE VOLUME 654, PAGE 670, DEED RECORDS.
SEE: NOTICE INDEX

\$260.00

Paid

NO. 602 PAGE 38

AFFIDAVIT

and
NOTICE OF CLAIM OF INTEREST IN LAND

161364

STATE OF NEBRASKA
COUNTY OF DAKOTA, ss:

FRANCES E. BATMAN, of South Sioux City, Nebraska, being first
duly sworn, states as follows:

1) This Affiant is the daughter of Edward Everett Sulsberger
and Mayme E. Sulsberger, and is also the granddaughter of John A.
Clark and Eva M. Clark.

2) The said John A. Clark, Eva M. Clark and Edward Everett
Sulsberger acquired and/or reserved oil, gas and other mineral
interests in several tracts of real estate situated in the County
of Belmont, State of Ohio as is evidenced by Abstracts of Deeds to
and from the said parties, conveying and reserving such interests,
which said Abstracts are attached hereto and made a part hereof,
numbered Items 1 through 156.

3) The said John A. Clark, also known as J. A. Clark, died in-
testate on July 18, 1930, leaving as his sole heirs-at-law, his
wife, Eva M. Clark, and his daughter, Mamie E. Sulsberger. The
Estate of John A. Clark was administered under No. 27870, Probate
Court of Belmont County, Ohio.

4) The said Eva M. Clark died intestate on the 16 day of
June, 1946, leaving as her sole heir-at-law, her daughter,
Mamie E. Sulsberger.

5) The said Edward Everett Sulsberger, died testate on the
13th day of November, 1947, leaving as his sole heirs-at-law, his
wife, the aforesaid Mamie E. Sulsberger, and his daughter, Frances
E. Batman, this Affiant. Under the terms of his Will, his mineral
interests which are the subject of this Affidavit and Notice were
left to his wife, with any unexpended residue and remainder at
her death to his daughter. Said Will was admitted to Probate in
the District Court of Woodbury County, Iowa, Estate No. 16901. A
certified copy thereof was admitted to record in the Probate
Court of Belmont County, Ohio, on November 24, 1948 and recorded
in Volume 39, Pg. 376, Belmont County Will Records, Estate No.
49072.

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TRANSFER NOT
NECESSARY

SFR 141981

TRANSFER NOT NECESSARY
By R. [Signature] 9/14/81

FRED K. BENNETT
County Engineer

H. O. HALL, AUDITOR
P. [Signature] DEPUTY

6) The said Mayme E. Sulsberger, also known as Mamie E. Sulsberger, died testate on May 15, 1952. Under the terms of her Will the subject mineral interests were left to her daughter and sole heir-at-law, Frances E. Batman, this Affiant. Her Will was admitted to Probate in the District Court of Woodbury County, Iowa, Estate No. 19001, and an authenticated copy thereof together with the order admitting same to Probate was admitted to record in the Probate Court of Belmont County, Ohio, on September 22, 1952 in Estate No. 54986, recorded in Volume 41, Pg. 498, Belmont County Will Records.

7) This Affidavit is intended to be recorded in the Deed Records of Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and of evidencing the claim of this Affiant in and to such interests as provided for in Sections 5301.47 et seq., Ohio Revised Code, the "Ohio Marketable Title Act".

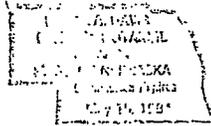
8) The various mineral interests described in the attached Abstracts and claimed by this Affiant are situated in the following Belmont County locations:

- MEAD TOWNSHIP Sections 32 & 33 of Township 2, Range 2
Sections 8, 14, 15, 26, 27, 31, 32 & 33 of Township 5, Range 3
- PEASE TOWNSHIP Section 9 of Township 6, Range 3
- VILLAGE OF POWHATAN POINT
- PULTNEY TOWNSHIP Section 36 of Township 2, Range 2
Sections 25, 31 & 32 of Township 3, Range 2
Sections 4, 10, 29 & 34 of Township 5, Range 3
Sections 8, 25, 26, 31 & 36 of Township 6, Range 3
Clark's Plat of J. E. Nelson Farm
- RICHLAND TOWNSHIP Sections 22, 29, 34, 35 & 36 of Township 5, Range 3
Sections 25, 26, 31 & 36 of Township 6, Range 3
- SMITH TOWNSHIP Sections 1, 4, 5, 7, 8, 10 & 31 of Township 6, Range 4
- WASHINGTON TOWNSHIP Sections 5, 6, 11, 12 & 36 of Township 5, Range 4
- YORK TOWNSHIP Sections 1, 2, 7 & 8 of Township 4, Range 3

FURTHER, Affiant sayeth naught.

Frances E. Batman
Frances E. Batman

Sworn to before me and subscribed in my presence, this 9th day of September, 1981.



[Signature]
NOTARY PUBLIC

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TO THE BELMONT COUNTY RECORDER:

Please record this Affidavit in Deed Records, indexing with John A. Clark, J. A. Clark, Eva M. Clark, Edward Everett Sulsberger, Mayme E. Sulsberger and Mamie E. Sulsberger as Grantors, and Eva M. Clark, Mayme E. Sulsberger, Mamie E. Sulsberger, and Frances E. Batman as Grantees. Please record this Affidavit and Notice in your Notice Index in accordance with Section 5301.52, Ohio Revised Code.

This instrument prepared by John J. Basnett, Jr., Attorney at Law, Basnett & Easterwood, St. Clairsville, Ohio 43950

BELMONT COUNTY RECORDS OF *Deeds*
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SEP 14 11 16 AM '81
REC'D SEP 15 1981
STANLEY SIMONIC
RECORDER

FILED
State of Nebraska
Dakota County
OCT 21 1981
E.C.
Acronis Co. My Judge

LAST WILL AND TESTAMENT
OF
FRANCES E. BATMAN

FILED
BELMONT COUNTY, OHIO

10-95 MAY 15 1989

G. KENNETH HENRY
PROBATE JUDGE

I, Frances E. Batman, now a resident of South Sioux City, in the County of Dakota, and State of Nebraska, hereby make and publish this as my Last Will and Testament and revoke all prior Wills and Codicils executed by me.

ARTICLE I

The expenses of my last illness, funeral, and costs of administration of my estate shall be paid by my Executor from the principal of my residuary estate.

ARTICLE II

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.

If my son does not survive me, I then in that event, make no bequest to any of my grandchildren.

ARTICLE III

In the event that my son, Nile E. Batman, does not survive me by a period of thirty (30) days, then I give and devise to The Security National Bank of Sioux City, Iowa as Trustee, all of said residue of my estate, to be managed by it, and the income and principal thereof to be distributed as follows:

A. The Trustee may, in its discretion, pay to, or use for the benefit of each of the children of Nile and Kathryn Batman, hereinafter referred to as my grandchildren, so much of the income and principal as the Trustee from time to time determines to be required in addition to their respective income from all other sources, known to the Trustee, for their reasonable support, maintenance, health and education, adding any excess income to the principal at the discretion of the Trustee. Any payment made under the authority of this paragraph shall not be equal between or among my grandchildren and may be paid to, or for the benefit of, one or more of them to the exclusion of one or more of them.

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B. After there is no living grandchild of mine under the age of 21 years, my Trustee shall distribute the principal, as then constituted, and any undistributed income to my then living grandchildren.

C. KENNETH HENNING
PROBATE JUDGE

C. No interest, under this Article, shall be transferable, assignable, or become subject to any encumbrance by any beneficiary, nor shall such interest be subject to the claims of any creditors of any beneficiary prior to the actual distribution by the Trustee to the beneficiary.

ARTICLE IV

Notwithstanding anything herein to the contrary, the Trust under this Will, and each share thereof, shall terminate not later than twenty-one (21) years after the death of the last survivor of my son, and grandchildren at the time of my death, at the end of which period the Trustee shall distribute each remaining portion of the Trust property to the beneficiary or beneficiaries of the current income thereof, at that time, and, if there is more than one beneficiary, in the proportions in which they are beneficiaries.

ARTICLE V

In the event that my son does not survive me by a period of thirty (30) days and in the event that I do not have any living grandchildren under the age of 21 years at the time of my death, but I do have grandchildren surviving me, then and in that event, I direct that all my property will pass to those persons who would have been entitled thereto had the Trust set up in Article III above been in effect and then terminated by reason of the fact that my youngest grandchild had reached the age of 21 years.

ARTICLE VI

In addition to, and not in limitation of, all common law and statutory authority, the Trustee shall have the following powers with regard to both real and personal property, with respect to each trust created under this Will:

A. To sell, convey, transfer, and assign, in whole or in part, at public or private sale, without appraisal and without approval of any Court, upon any terms which it deems advisable and without liability upon any person, dealing with the Trustee, to see to the application of any money from the property delivered to it.

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C. KENNETH WENY
PROBATE JUDGE

- B. To borrow money for any purpose, either from the banking department of Trustee or from others, with or without giving security therefor; to mortgage, to pledge, to lease, with or without option to purchase, upon any terms and for such consideration as it may deem advisable, and even though such mortgage, pledge, or lease extends beyond the terms of said Trust.
- C. To operate any business or enterprise owned by me, or in which I may have an interest at the time of my death.
- D. To retain any investments made by me, and, in its uncontrolled judgment, to purchase, acquire, invest, reinvest in, and sell any type of real and personal property, including, but not limited to, bonds, stocks, both preferred and common, shares and participation in investment companies and investment trusts, any corporate or government securities, or common trust funds of Trustee, even though any such investments, above enumerated, may be of a kind or in an amount which ordinarily would not be considered suitable for a Trust investment; to keep any or all securities or other property in the name of some other person or corporation, or nominee of the Trustee, with or without a Power of Attorney for their transfer attached, or in the name of the Trustee without disclosing its fiduciary capacity.
- E. To vote, execute proxies to vote, join in, or oppose any plans for reorganization, consolidation, merger, recapitalization, refinancing, or liquidation of any corporation, association, or other organization of which it holds shares, obligations, or other securities, and to exercise any conversions or subscription rights pertaining to any stocks, bonds, or other securities held; and to become a party to any voting Trust Agreement it may choose.
- F. To pay, compromise, or contest any claim or other matter, directly or indirectly affecting the Trust Estate.
- G. To employ counsel, or other agents, for any of the above or other purposes, particularly with regard to the making of investments, and to determine whether or not to act upon his or their advice.
- H. To make payments to, or for the benefit of, any beneficiary (specifically including any beneficiary under legal disability) in any of the following ways:
1. directly to the beneficiary;
 2. directly for the support, health, maintenance, and education of the beneficiary;
 3. to the legal or natural guardian of the beneficiary; or
 4. to anyone who, at the time, shall have custody and care of the person of the beneficiary.

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BELMONT COUNTY, OHIO

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C. KENNETH HENRY
PROBATE JUDGE

The Trustee shall not be obliged to see to the application of the funds so paid, but the receipt of the person, to whom the funds were paid, shall be full acquittance of the Trustee.

- I. To hold the assets of the several Trusts, shares, or portions of Trusts, created by this Will, as a single fund for joint investment and management, without the need for physical segregation, dividing the income proportionately among them. Segregation of the various Trusts, shares, or portions need only be made on the books of the Trustee for accounting purposes.
- J. To receive proceeds of any insurance policies on my life and to receive money or property from any other source and administer such proceeds, funds, and property the same as if they were originally a part of the Trust Estate, and to purchase and pay premiums on life insurance policies on the lives of any beneficiary of the Trusts, and to retain and pay premiums on any insurance policies on the lives of them and others, and to deal with such policies, including but not limited to changing them in regard to form, surrendering for cash, taking paid-up policies, and exercising every other right and privilege of a policy owner.
- K. To enter into any transaction, authorized by this Article, with Trustees, Executors, or Administrators of other Trusts or Estates, in which any beneficiary hereunder has any interest, even though any such Trustee or representative is also Trustee hereunder; and, in any such transaction, to purchase property, or make loans on notes secured by property, even though similar or identical property constitutes all or a large proportion of the balance of the Trust Estate, and to retain any such property or note with the same freedom as if it had been an original part of the Trust Estate.

All such judgments, decisions, and actions, made by the Trustee in carrying out the above powers, shall be conclusive on all parties in interest, unless the same be made in bad faith.

ARTICLE VII

I hereby appoint my son, Nile E. Barman, as Executor of this my last Will and Testament. In the event that my son does not survive me or for any other reason is unable to act as Executor, I then appoint The Security National Bank of Sioux City, Iowa as Executor of this my last Will and Testament. I hereby provide that my named Executors shall have all of the powers and discretions with respect to my estate during the

administration thereof, that the Trustee is given with respect to the Trust property, including but not limited to, the power to sell, convey, and lease all and any part of the real or personal property at such prices and on such terms as it may deem best, without appraisal and without the approval of any Court.

No bond shall be required of the Executor or Trustee named in this will.

IN WITNESS WHEREOF, I have signed this Last Will and Testament this 29th day of August, 1975.

Frances E. Batman
FRANCES E. BATMAN

On this 29th day of August, 1975, the foregoing instrument was, in our presence signed and executed by Frances E. Batman and by her declared to be her Last Will and Testament, and at her request, in her presence, and in the presence of each other, we have subscribed our names as witnesses hereto.

Andrea K. Sheppard of St. Louis City, Mo.
James A. Brown of St. Louis City, Mo.

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BELMONT COUNTY, OHIO

MAY 15 1989

C. KENNETH HENRY
PROBATE JUDGE