

IN THE SUPREME COURT OF THE STATE OF OHIO

MARK E. ALBANESE, EXECUTOR :
OF THE ESTATE OF JAMES :
ALBANESE, : **Case No. 2015-0120**
: :
Appellant, : :
: : **On Appeal from the Ohio Seventh**
: : **District Court of Appeals**
vs : **Case No. 14 BE 22**
: :
NILE E. BATMAN, et al : :
: :
Appellees. :

**APPELLANTS BRIEF IN RESPONSE TO THE BRIEFS OF HESS OHIO
DEVELOPMENT, HESS OHIO RESOURCES, LLC, NILE E. BATMAN AND KATHRYN
BATMAN**

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Statement of Facts

Appellant has set forth his statement of facts in the Merit Brief, as the facts of this case are not disputed, Appellant will not repeat the facts here.

Argument

The singular issue before the Court on this Appeal is whether the act of recording an out of state Will is or is not a title transaction. The Brief filed by the Appellee does not give this Court any reason to find that a recording of the Will of Frances Batman is a title transaction in this case.

Appellant has set forth the proposition in his merit brief that if done in accordance with Ohio law by taking the appropriate actions, the filing of an out of state Will which would identify real estate which the testator was bequeathing by Will could be classified as a title transaction. But the mere filing of a descendant's Will with no additional method of identifying what if any real estate the decedent owned at death cannot, standing alone, constitute a title transaction. Under the arguments set forth in Appellees' Brief, a Will such as the one filed in this case which bequeaths "all title and interest in real property," constitutes a title transaction even if the decedent owned no real property at the time of death. To affect a title in real estate, as required by ORC §5301.47, a decedent's Will must specifically identify the property to be transferred for the world to have notice of its transfer upon recording.

Appellee then quote *Heifner v. Bradford*, 4 Ohio State 3rd 49 (1983), for the proposition that under Ohio Will settled law, the filing of the Batman Will alone constituted a transfer of the real property. Appellee is misstating what this case stands for. The Heifer case, Supra, does

not stand for the proposition that the act of simply filing a Will is sufficient to transfer an interest in the real estate.

In the *Heifner* case, Supra, the Court set forth that not only was an authenticated copy of the Will Filed, but additional documentation was filed to notice the transfer.

“An authenticated copy of Elvira Sprague’s will was filed in Muskingum County in 1957. In accordance with the terms of the will, an affidavit of transfer was filed and recorded in Muskingum County evidencing the transfer of the oil and gas rights by inheritance from Elvira Sprague to her daughters.”

In the brief of Appellee it is claimed that the Appellant admitted that the filing of a Will is a title transaction. This is a misrepresentation of what the Appellants argued. Under Section A., of Appellant’s Merit Brie the Appellant set forth his argument as to why the filing of the Frances Batmen Will in this case did not constitute a title transaction. The citation of Union Sav. Bank & Trust Co. v. Baltimore & Ohio Southwestern R.R. 7 Ohio N.P. (M-S) 497 (1908) explains why the Will in this case did not meet the requirement to be a title transaction under the Marketable Title Act, of which the dormant Mineral Act is a part. Furthermore, that case established that once a Will is probated, then the transfer of the title is effective from the date of death of the Testator.

The Appellees also cites Riddell v. Layman, 5th Dist. Licking, No. 94 CA 114, 1995 Ohio App. LEXIS 6121, to support their position. However that case was criticized by Dodd v. Croskey, 7th Dist. Harrison, 2013 Ohio App. LEXIS 4475, which supports Appellants position in this case that to be considered a title transaction, a mineral interest must be the “subject of” that transaction. *Id* at 48. The 7th District found that *Riddell* did not define what constituted a title transaction, finding:

“The common definition of the word "subject" is topic of interest, primary theme or basis for action. Webster’s II New Riverside University Dictionary 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the

deed does mention the oil and gas reservations, the deed does not transfer those rights.”
Id. At 48.

Appellee argues that Batman was not required to file a Certificate of Transfer by Ohio Law. It is the position of the Appellants that it was necessary in this case as the Will was not sufficient to effectuate a transfer. If Batman’s wanted their filing to be a title transaction, that is exactly what they could have done.

The Will of Frances Batman was not drafted in a manner in which addresses the real estate as the subject of the document, in fact there is no specific reference to any parcel or mineral interest. A general statement in a will “that any property I may own at the time of my death” is not sufficient for the purposes of transferring by recording a copy of the Will in the county recorder’s office as there must be some way to identify the property. In this case, additional action was required of the executor of the Will to transfer any interest the testator owned at the time of her death. Therefore, standing alone it did not serve as notice of a claim to any interest which it is purported to affect.

Appellee argues that Appellant is raising new issues for the first time before this Court. That is simply not the case. The Appellant has consistently argued from the time of the filing of his Motion for Summary Judgment, and the Motion for Summary Judgment filed by Appellee Hess, and in his pleadings before the Court of Appeals, that the filing of the Batman Will is not a title transaction. Since this appeal does not turn on a factual issue, but rather question of law, this court has a complete and independent power of review. *First Energy Corp. v. PUC*, 95 Ohio St. 3d 401, (June 5, 2002)

Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404,

6 Ohio Op. 108, 110, 3 N.E.2d 364, 367. There are no new issues raised by Appellants in this appeal. Appellant has responded to the arguments set by Appellee at the trial court and Court of Appeals by setting forth his argument in support of Proposition of Law 2.

A Brief has also been filed in this Court by the Batman's. It should be noted that the Batman's never responded to Appellant's Motion for Summary Judgment in the Common Pleas Court nor did they file a Motion for Summary Judgment in the Common Pleas Court. Furthermore, they did not file a brief or make an appearance before the Court of Appeals. While the argument can be made that Batman Appellees waive any argument before this Court due to their failure to oppose Appellant's Summary Judgment Brief at the Trial Court, level Appellant will respond to the argument put forth by the Batman's.

First, the Batman's claim that Appellant did not raise "issues" in the trial of Appellate Court, but they don't identify the issues. None the less, as previously stated, the issues of law in this case that this Court accepted has jurisdiction are the same issues raised by the Appellant at the trial court and appellate court level. The Appellate Court made no ruling on the issue of the Will as a title transaction.

The Batman's Brief does not put forth any new arguments not already set forth in the Hess Reply Brief. In fact, the argument seems to acknowledge that, for title to pass, the Will must be probated. They argue that a Will may be filed three months after the appointment of an executor or administrator to protect against a purchase by a bona fide purchaser of property owned by the testator. This Will wasn't filed in Belmont County until seven and a half years after the death of the testator. There is no record that a fiduciary was appointed, or that an Estate was opened for Francis Batman.

The fact that this Court has not made a direct decision on this particular issue seems to be ignored as certain cases are cited which do not apply to this issue. In Ohio N. Univ. v. Ramga,

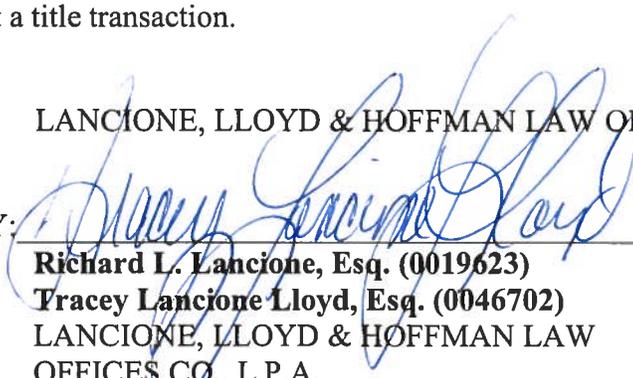
No 2-88-1, 3rd Dist. Auglaize, No. 2-88-1, 1990 Ohio App. LEXIS 2946 (July 12, 1990), the Court refers to the admission to probate of a Will, not the mere filing of the Will. The Appellant agrees that it is not necessary to file a Certificate of Transfer in all situations, it was necessary in this case as the Will made no identifying reference to the ownership of an interest in the minerals at issue in this case. Therefore in this case, if the Batman heirs want to create a title of record, then a certificate of transfer was required. There was no record of a transfer of title in this case, but had Batman identified the real estate of the testator by a Certificate of Transfer this case would not be before the Court. Without the Certificate of Transfer, there was no title transaction.

Conclusion

The Appellant restates his request that the Court determine that the recording of the out-of-state Will of Frances Batman was not a title transaction.

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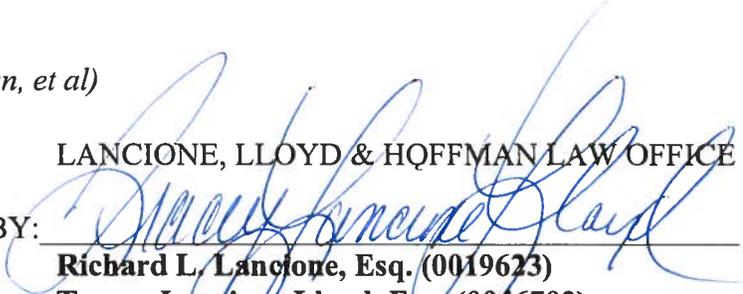
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, **RESPONSE OF MARK E. ALBANESE, EXECUTOR OF THE ESTATE OF JAMES F. ALBANESE, III**, was served by U.S. mail and electronic mail this 27th day of **October, 2015**, upon the following:

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