[Cite as *Richmond Mills, Inc. v. Ferraro*, 2019-Ohio-5249.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

RICHMOND MILLS, INC. et al.,

Plaintiffs-Appellees,

v.

MARGARET ALOE FERRARO et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0015

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 16 CV 223

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part; Reversed in part.

Atty. Matthew W. Onest, *Atty. Gregory Watts, Atty. John Burnworth,* Krugliak, Wilkins, Griffiths, & Dougherty Co., LPA., 4775 Munson Street, NW, PO Box 36963, Canton, Ohio 44718 for Plaintiffs-Appellees and

Atty. David K. Schaffner, Schaffner Law Offices, Co., LPA., 132 Fair Avenue, NW, New Philadelphia, Ohio 44663 for Defendants-Appellants.

Dated: December 9, 2019

Robb, J.

{¶1} Defendants-Appellants Margaret Aloe Ferraro et al. appeal the decision of the Jefferson County Common Pleas Court granting summary judgment for Plaintiffs-Appellees Richmond Mills, Inc. et al. The trial court found the Marketable Title Act (MTA) operated to extinguish a one-half mineral interest which was severed in 1947 and granted to four individuals (doing business as a partnership). First, Appellants argue the MTA cannot be applied to minerals due to the existence of the more specific Dormant Mineral Act (DMA). This argument fails as the MTA provides for extinguishment while the DMA provides for abandonment; these are two distinct statutory claims with different tests and do not irreconcilably conflict.

{¶2} Appellants alternatively contend their mineral interests could not be extinguished under the MTA due to the provision in R.C. 5301.51(B) because they showed continuous possession by the same record owner for 40 or more years which continued at the time marketability was being determined. We agree with this argument as applied to the two original grantees who were still alive at the time marketability was being determined. However, the two Appellants who claim ownership as successors of the other two original grantees have not demonstrated the applicability of the notice-equivalency provision in division (B) of R.C. 5301.51. They did not show the same record owner of each quarter interest in the severed one-half mineral interest had continuous possession for 40 years and continued to have possession when marketability was being determined.

{¶3} For the following reasons, the trial court's judgment is affirmed as to Linda Antonelli Nucci and Joyce DeLuca, whose mineral interests were properly declared extinguished under the MTA, and as to Gamma Land Company. The trial court's judgment is reversed as to Margaret Aloe Ferraro and Gilda Ognibene, whose mineral interests were not extinguished under the MTA due to their continuous possession for over 40 years which continued through the time marketability was being determined.

STATEMENT OF THE CASE

{¶4} In two 1947 deeds, eight grantors conveyed "an undivided one-half interest in mineral rights, oil and gas, excepting and reserving the No. 8 vein of coal" to: Mary Grace Nucci, Anna DeLuca, Margaret Aloe, and Gilda Ognibene (described as "partners in trade, doing business under the name and style of Gamma Land Company, a partnership * * *"). (Vol. 231, P. 291; tract one with 71 acres[1] and tract two with 125 acres and excepted acreage); (Vol. 231, P. 294; one tract with 202 acres). Nothing occurred in this chain of title until 2013.

{¶5} Through two quitclaim deeds recorded in 1950, those eight grantors conveyed their realty to Somerset Coal Company without mentioning the prior one-half mineral interest granted in 1947. (Vol. 264, P. 45; one tract with 202 acres); (Vol. 264, P. 47; tract one with 71 acres and tract two with 125 acres, with excepted acreage). The subsequent deeds in this chain of title also failed to mention the 1947 one-half mineral interest. For instance, Somerset Coal Company made a conveyance in 1975 to Anthony Mining Company, Inc. without reference to the 1947 mineral interest. (Vol. 532, P. 154; tract one with 71 acres and tract two with 21 acres, citing the two tracts in Vol. 264, P. 47; tract three with 189 acres, citing Vol. 264, P. 45). This property was then conveyed in 1990 to Richmond Mills, Inc. (Vol. 13, P. 991).

{¶6} On August 5, 2013, Richmond Mills, Inc. attempted to utilize the 2006 DMA to have the 1947 one-half mineral interest underlying the property it purchased in 1990 deemed abandoned by publishing notice of intent to declare a mineral interest abandoned. On October 3, 2013, notice of a claim to preserve the mineral interest was recorded by Margaret Aloe Ferraro, citing R.C. 5301.49, .51, .52. and .56. She described herself as a partner doing business as Gamma Land Company. She named the mineral interest holders as herself, Gilda Ognibene, and two successors to the other two original grantees. Gilda Ognibene recorded a similar claim to preserve on October 4, 2013.

{¶7} Under the 2006 DMA, these were timely preservation notices. *See* R.C. 5301.56 H)(1) (within 60 days). And, they preserved the rights of other holders from abandonment under the DMA. *See* R.C. 5301.56(C)(2). On October 21, 2013, the

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[1] The 1947 deed does not specify acreage for tract one, but the defendant's preservation notices say 71 acres for tract one as does the Somerset deed attached to the plaintiff's complaint. We rounded all acreage.

successors to the other two original grantees recorded claims to preserve, explaining Joyce DeLuca was the widow and heir at law of Anna DeLuca's son, while "Linda (Nucci) Antonelli" was the widow and heir at law of Mary Grace Nucci's son.

{¶8} On May 2, 2016, Richmond Mills, Inc. filed suit against the four individuals who recorded claims to preserve and Gamma Land Company.[2] The administrator of the estate of Margaret Aloe Ferraro, Francis T. Ferraro, was named as a defendant after the answer explained that Margaret died on November 18, 2014. The April 2017 amended complaint added PRC Legacy, LLC as a plaintiff after it purchased a portion of the subject property from Richmond Mills, Inc.

{¶9} The plaintiff sought declaratory judgment and quiet title, setting forth an extinguishment claim under the MTA, stating the mineral reservation was not in their 1950 root of title or any subsequent recorded documents (until the October 3, 2013 claim to preserve, which was long after the 40-year MTA period expired). Alternatively, the plaintiffs outlined an abandonment claim under the 1989 DMA, recognized the Supreme Court law holding the 1989 DMA can no longer be used after the enactment of the 2006 DMA, and set forth constitutional claims concerning rights lost under the 2006 DMA. The defendants filed a counterclaim seeking a declaratory judgment that they owned the one-half mineral interest under the MTA and the DMA and alleging tortious interference with a business relationship and frivolous conduct.

{¶10} Cross-motions for summary judgment were filed in 2018. The plaintiffs asked for summary judgment on their MTA claim stating the mineral interest was extinguished. They argued the defendants were not saved by R.C. 5301.51(B) (which acts as the equivalent of a notice of preservation for long-time owners in continuous possession) as there was no evidence of actual possession for the pertinent period.

{¶11} First, the defendants countered that they preserved the mineral interest under the DMA and the MTA cannot be applied to a mineral interest as the DMA is more specific. Alternatively, the defendants argued the mineral interest was not extinguished under the MTA due to the notice-equivalency provision in R.C. 5301.51(B). They alleged there was continuous possession by the same record owner for 40 years or more which

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[2] Four other defendants who owned part of the surface were named as defendants, and default judgment was entered against them on October 7, 2016 as Richmond Mills, Inc. reserved the minerals when it conveyed the property in 1994 (and the MTA extinguishment had already occurred).

continued until the time marketability was being determined (said to be after the plaintiffs published the 2013 notice). Specifically, they said two of the original grantees, Margaret and Gilda, were still alive at that time and Gamma Land Company was still in existence. In reply, the plaintiffs said constructive possession was not sufficient as "actual, physical possession" was required by R.C. 5301.51(B). At an oral hearing, the parties agreed the facts were not in dispute.

{¶12} On July 31, 2018, the trial court granted summary judgment in favor of the plaintiffs. The trial ruled the MTA can be applied to mineral interests and does not conflict with the DMA, stating the failed effort to reunite the surface with the minerals under the DMA did not affect the MTA claim. The trial court then concluded the MTA provision relied upon by the defendants required actual possession and found the defendants failed to show "an affirmative act or circumstance" suggesting they controlled the interest.

{¶13} The defendants filed a timely notice of appeal. Their brief originally set forth three assignments of error, but they later withdrew the third assignment of error (which claimed the trial court should have found the plaintiff's constitutional DMA claim frivolous).

ASSIGNMENT OF ERROR ONE: MTA APPLIES TO MINERALS

{¶14} Appellants' first assignment of error contends:

"The trial court erred when it held that the general provisions of the Marketable Title Act (R.C. 5301.47 through 5301.56) can be invoked by a surface owner to determine title to severed mineral interests as opposed to the specific provisions found in R.C. 5301.56."

{¶15} Appellants argue the DMA is the specific provision applicable to determining whether a mineral interest was abandoned and thus the more general MTA cannot be applied to mineral interests, citing this court's pre-*Corban* cases *Tribett* and *Swartz*. Appellees counter by pointing out the MTA and the DMA provide separate mechanisms and do not conflict, citing this court's *Blackstone* case. We recently confirmed the MTA can be applied to extinguish mineral interests, providing a full analysis of the issue. *West v. Bode*, 7th Dist. Monroe No. 18 MO 0017, 2019-Ohio-4092. We shall review the highlights of the analysis.

{¶16} When the MTA was enacted in 1961, it expressly excepted mineral interests from its application; however, a 1973 amendment eliminated the exception for mineral

interests (leaving an exception for coal). *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 18. The MTA was contained in R.C. 5301.47 to 5310.56. In 1989, the last statute in the MTA, R.C. 5301.56, was replaced with the Dormant Mineral Act, which provided that a mineral interest could be "deemed abandoned" under certain circumstances. For identification purposes, the term DMA is used to refer to abandonment under R.C. 5301.56, and the term MTA is used to refer to the provisions in R.C. 5301.47 to 5301.55.

{¶17} Pursuant to R.C. 5301.48, if a person has an unbroken chain of title of record to any interest in land for 40 or more years, he has marketable record title as defined in R.C. 5301.47, subject to the matters in R.C. 5301.49. "A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest" in the person or one of his predecessors in title with nothing appearing of record purporting to divest him of the interest. R.C. 5301.48.

{¶18} A marketable record title "operates to extinguish" all interests existing prior to the root of title, and thus, the record marketable title shall be held free and clear of all interests which depend upon events occurring prior to the effective date of the root of title. R.C. 5301.47(A), citing R.C. 5301.50 (subject to R.C 5301.49). "All such interests * * * are hereby declared to be null and void." R.C. 5301.50. An interest recorded after the root of title cannot revive an interest which has been already extinguished by operation of R.C. 5301.50. R.C. 5301.49(D). The claimed title is subject to the items in R.C. 5301.49, including a recorded notice of preservation under R.C. 5301.51 or the exceptions in R.C. 5301.53 (such for coal). After providing the right to record a preservation notice in division (A), division (B) of R.C. 5301.51 sets forth the notice-equivalency provision, which can prevent extinguishment in cases of continuous possession, as discussed in the next assignment of error.

{¶19} The DMA provides a method to have minerals "deemed abandoned" after 20 years in the absence of a savings event. As for the title transaction type of savings event, the DMA requires the qualifying title transaction to be "recorded in the office of the county recorder of the county in which the lands are located." R.C. 5301.56(B)(3)(a).

Compare R.C. 5301.47(B)-(C) (general MTA "recording" can include a filing in the probate or other court). The DMA also requires the mineral interest to be the "subject of" the title transaction. R.C. 5301.56(B)(3)(a). A mineral interest is not the "subject of" a surface deed which merely repeated a prior reservation. *See Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 49 (affirmed on other grounds). The MTA does not have the same "subject of" language, and extinguishment may be avoided under the MTA by a proper reference to a prior mineral reservation in a surface deed. *See* R.C. 5301.49(A) (if there is a specific reference to or specific identification of the interest). *See also Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132.

{¶20} The 1989 DMA did not provide for automatic, self-executing abandonment of minerals upon the passing of 20 years without a savings event; in order to have the minerals "deemed abandoned" under the 1989 DMA, a lawsuit had to be filed by the surface owner prior to the effective date of the 2006 amendment. *Corban*, 149 Ohio St.3d 512. The 2006 DMA added provisions requiring service of notice of abandonment on the mineral holder and allowing the mineral holder to respond in a timely manner to preserve the mineral interest even after the passing of 20 years without a savings event. *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147. The MTA contains no notice of extinguishment procedure, and a preserving notice under the MTA must be filed for record during the 40-year period after the root of title. R.C. 5301.51(A). *See also* R.C. 5301.49(D) (a recording after the root cannot revive an extinguished interest).

{¶21} "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." R.C. 1.51. "If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *Id.* Therefore, even conflicting statutes must be applied together unless the conflict is irreconcilable. *Dillon v. Farmers Ins. of Columbus Inc.*, 145 Ohio St.3d 133, 2015-Ohio-5407, 47 N.E.3d 794, ¶ 16-17; *State ex rel. Data Trace Info. Servs. LLC v. Cuyahoga Cty. Fiscal Offic*er, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 48. "All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application

to all such statutes unless they are irreconcilable and in hopeless conflict." *State v. Cook*, 128 Ohio St.3d 120, 2010-Ohio-6305, 942 N.E.2d 357, ¶ 45.

{¶22} When the *Corban* Court said the 2006 DMA "applies prospectively to all claims that mineral rights have been abandoned that are asserted after its effective date," the Court was specifically answering a federal certified question about abandonment under the DMA. *Corban*, 149 Ohio St.3d 512 at ¶ 1, 33. A majority of justices in *Corban* found the statutory methods of abandonment and extinguishment to be distinct. *Corban*, 149 Ohio St.3d 512 at ¶ 17-18, 21 (plurality opinion distinguishing the "shall be deemed abandoned and vested" language in the DMA from the "operates to extinguish" and "are hereby declared null and void" language of the MTA), ¶ 53, 81 (Kennedy, J., concurring in judgment only on decision that the 1989 DMA could no longer be used and also emphasizing the difference between the use of the word "abandoned" in the DMA and the word "extinguished" in the MTA).

{¶23} "Consequently, the various statements in *Corban* explaining why the 2006 DMA (not the 1989 DMA) is the applicable statute must be read in context; the holdings all relate to claims of abandonment brought under the DMA." *West*, 7th Dist. No. 18 MO 0017 at ¶ 37. "The MTA, on the other hand, deals with extinguishment." *Id.* at ¶ 36. We explained in *West* why this district's pre-*Corban* statements[3] on the DMA are not precedent on the issue of whether the MTA can be used in a claim to declare a mineral interest was extinguished. *Id.* at ¶ 38, fn. 4-5. Instead, we emphasized our post-*Corban* decision in *Blackstone*. *Id.* at ¶ 39-40. Our *Blackstone* opinion held: the MTA does not differentiate between types of interests but applies to all interests; "a royalty interest in minerals is subject to both the MTA and DMA"; there was no abandonment under the DMA due to a timely claim to preserve; and the interest was not extinguished under the MTA due to a specific reference to the mineral interest in the root of title. *Blackstone v. Moore*, 2017-Ohio-5704, 94 N.E.3d 108, ¶ 11-12, 17-18, 39-40 (7th Dist.).

{¶24} The Ohio Supreme Court affirmed that judgment and found the one-half interest in an oil and gas royalty was not extinguished under the MTA due to a specific reference to it in the landowner's root of title. *Blackstone v. Moore*, 155 Ohio St.3d 448,

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[3] *Tribett v. Shepherd*, 2014-Ohio-4320, 20 N.E.3d 365, ¶ 29, 34-36 (7th Dist.), *rev'd,* 150 Ohio St.3d 346, 2016-Ohio-5821, 81 N.E.3d 1224; *Swartz v. Householder*, 2014-Ohio-2359, 12 N.E.3d 1243, ¶ 18-20 (7th Dist.), *rev'd*, 150 Ohio St.3d 341, 2016-Ohio-5817, 81 N.E.3d 1221.

2018-Ohio-4959, 122 N.E.3d 132, ¶ 1-2, 18. In applying the MTA, the Supreme Court even contrasted MTA language with that of the DMA (when concluding the MTA does not require a recitation to the volume and page number where the interest was created). *Id.* at ¶ 17. We thereafter observed:

> Although the Supreme Court in *Blackstone* did not explicitly declare that the DMA was not the exclusive remedy, the Court specifically applied the MTA to a royalty interest to ascertain whether it was extinguished under the MTA's 40-year period. And, they did so while pointing out a difference between the MTA and the DMA, without acknowledging the statement in the concurrence, and in the context of reviewing this court's decision which held both could be used by a surface owner to obtain a mineral interest.

West v. Bode, 7th Dist. Monroe No. 18 MO 0017, 2019-Ohio-4092, ¶ 42.

{¶25} Reading *Corban* and *Blackstone* together, there is no conflict in applying both the MTA and the DMA to mineral interests:

> The MTA involves extinguishment after 40 years resulting in a null and void interest. R.C. 5301.50. *See also* R.C. 5301.49(D) (no reviver by title transaction). The DMA involves an abandonment process which can be used after a 20-year absence of certain activity with notice requirements and the ability to file a post-notice-of-abandonment claim to preserve. * * * The fact that the MTA provides a different and separate procedure for the exercise of a different statutory right or remedy does not mean it irreconcilably conflicts with the DMA. They are co-extensive alternatives whose applicability in a particular case depends on the time passed and the nature of the items existing in the pertinent records. "[E]ach applies to a particular situation independent of the other." *Cook*, 128 Ohio St.3d 120 at ¶ 46 (while finding two statutes did not irreconcilably conflict). If the claim is extinguishment under the MTA, then the 40-year provision and the tests applicable thereto apply; if the claim is abandonment under the DMA, those statutory procedures and 20-year test of R.C. 5301.56 apply.

West, 7th Dist. Monroe No. 18 MO 0017 at ¶ 46-47. We maintain this position.

{¶26} Accordingly, the trial court did not err in holding a mineral interest can be extinguished under the MTA. This assignment of error is without merit.

ASSIGNMENT OF ERROR TWO: POSSESSION

{¶27} Appellants' second assignment of error provides:

"The trial court erred when it held that R.C. 5301.51(B) requires an affirmative act or circumstance to suggest control over the minerals."

{¶28} The trial court concluded that the statutory provision relied on by Appellants to avoid extinguishment under the MTA required actual possession and found they failed to "point to an affirmative act or circumstance that would suggest any control" over the mineral interest sought to be preserved. The parties dispute whether the statutory provision saving a long-time owner from extinguishment requires actual, physical possession.

{¶29} The interpretation of the statute is a question of law to be reviewed de novo. *See State v. Pountney*, 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478. "Statutes that are plain and unambiguous must be applied as written without further interpretation." *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12. Only if a statutory provision is ambiguous (with more than one reasonable meaning) may rules of construction be employed. *Id.; State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office*, 152 Ohio St.3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 17. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42.

{¶30} Initially, division (A) of R.C. 5301.51 states: "Any person claiming an interest in land may preserve and keep effective the interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in compliance with section 5301.52 of the Revised Code." The notice-equivalency provision for continuous possession in division (B) reads:

> If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more,

> during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

R.C. 5301.51(B). *See also* R.C. 5301.49(B) ("record marketable title shall be subject to: * * * "All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 5301.51 of the Revised Code").

{¶31} Appellants claim there was continuous possession from the time of the 1947 grant through the date marketability was placed at issue (which they said was after Richmond Mills, Inc. published notice of abandonment in 2013). In support, they point to the fact that two of the original grantees in the 1947 deed were still alive in 2013 (and responded with claims to preserve which did not seek to revive an extinguished interest due to the continuous possession provision); they also claim the partnership still exists.

{¶32} Appellees point out that Appellants did not claim to be "in continuous physical and actual possession" of the mineral interest at issue. Appellees ask this court to reject a constructive possession theory, urging the statute requires "actual, physical possession of the property interest" for 40 or more continuous years. They refer to commentary by Simes and Taylor on the 1960 Model Title Standards providing an example of a person being in possession of land. Appellees say Appellants ignore the language "in possession" and their interpretation would render the entire MTA meaningless. *See State ex rel. Carna v. Teays Valley Loc. Sch. Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18-19 (accord effect to every part of the statute and avoid a construction which renders a provision meaningless or inoperative). However, this case involves severed underground minerals; the notice-equivalency provision only applies to those in continuous possession who still possess it at the pertinent time (long-term owners); and the MTA would clearly still apply in a multitude of other cases.

{¶33} Quoting from the Uniform Marketable Title Act, Appellees emphasize the language in the exception for: “(1) a restriction the existence of which is clearly observable by physical evidence in its use; (2) a use or occupancy inconsistent with the marketable record title, to the extent that the use or occupancy would have been revealed by reasonable inspection or inquiry * * *.” Appellees say the interpretation urged by Appellants is an absurd rewriting of the statute which would essentially add the phrase “or has been alive.” However, by citing to such inapplicable language for construing the word possession”, it is Appellees who asks this court to add words.

{¶34} We note that Ohio did not adopt the Uniform Marketable Title Act. The UMTA attached to Appellee’s reply in support of summary judgment does not have a provision equivalent to R.C. 5301.51(B). We also note Ohio’s MTA provides an exception for: “Any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use.” R.C. 5301.53(C). *See also* R.C. 5301.53 (D) (exception for underground easement where there is a physical facility, even if it is underground and not observable). The list of exceptions in R.C. 5301.53 (items which the MTA shall not extinguish) does not define or limit the notice-equivalency provision in R.C. 5301.51(B). *See* R.C. 5301.49(B),(E).

{¶35} To the contrary, the employment of the phrase “clearly observable by physical evidence of its use” in R.C. 5301.53(C) shows the legislatively-intended difference between that exception for easements and the continuous possession provision in R.C. 5301.51(B). The legislature did not use similar terminology or the term “actual possession” in the notice-equivalency provision at issue in this case. Notably, in listing what the title is subject to, R.C. 5301.49 cites to both R.C. 5301.51 and R.C. 5301.53. Thus, comparing and contrasting this language is part of the plain language review. Where the statutory division at issue specifically cites another statute, it is “incorporating by reference” the other statute, and the other statute must be considered in determining plain language. *See Citizens Bank, NA v. Leek*, 2018-Ohio-2813, 112 N.E.3d 471, ¶ 16 (7th Dist.), citing *General Motors Corp. v. Kosydar*, 37 Ohio St.2d 138, 146, 310 N.E.2d 154 (1974) (“use tax statute, incorporates by reference the sales tax exceptions” in a different statute).

{¶36} It has been observed that actual possession for adverse possession of minerals requires actual development of the mineral rights. *Miller v. Mellott*, 2019-Ohio-504, 130 N.E.3d 1021, ¶ 37 (7th Dist.), citing *Gill v. Fletcher*, 74 Ohio St. 295, 305, 78 N.E. 433 (1906) ("where there has been a severance of estates, neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate" and for adverse possession, the mineral owner's "title can be defeated only by acts which actually take the mineral out of his possession"). Yet, adverse possession requires proof of "exclusive possession **and open**, notorious, continuous, **and adverse use** for a period of twenty-one years." (Emphasis added.) *Grace v. Koch*, 81 Ohio St.3d 577, 692 N.E.2d 1009 (1998), syllabus. On this topic, another section of the MTA states the claimed marketable record title is subject to "[t]he rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title" in the list of exceptions including notice of preservation and the specific reference in the muniments. R.C. 5301.49(C). Adverse possession has its own elements and does not limit the word possession in other provisions.

{¶37} "Courts in Ohio have construed the requirement that the plaintiff be 'in possession of real property' to include constructive possession, i.e. the claim of superior title, in certain circumstances." *Bergholtz Coal Holding Co. v. Dunning*, 11th Dist. Lake No. 2004-L-209, 2006-Ohio-3401, ¶ 39-40. *See also Gill v. Fletcher*, 74 Ohio St. 295, 306, 78 N.E. 433 (1906) (although insufficient for adverse possession, "constructive possession of the minerals" can occur "under color of deeds"). Therefore, where neither party had actual possession of the coal as it had not been mined, the court applied constructive possession in evaluating the possession element of a quiet title action. *Bergholtz Coal Holding*, 11th Dist. No. 2004-L-209 at ¶ 39-40. Constructive possession is associated with the recorded deed. *See Haban v. Suburban Home Mtge. Co.*, 40 Ohio Law Abs. 78, 57 N.E.2d 97 (2d Dist.1943).

{¶38} Where statutes merely use the word possession, this court has not rejected constructive possession to fulfill this element. For instance, this court held possession can be actual or construction in construing a statute merely requiring possession to avoid a statute of limitations. *Miller v. Cl*oud, 2016-Ohio-5390, 76 N.E.3d 297, ¶ 52, 61-62, 66

(7th Dist.), applying R.C. 2305.22 (providing a statute of limitations exception "in the case of an action by a vendee of real property, in possession thereof, to obtain a conveyance of the real property"). Furthermore, this court has considered whether there was either actual possession or constructive possession when applying the quiet title statute. *See NBRT Properties, Inc. v. ATFH Real Property, LLC*, 7th Dist. Mahoning No. 17 MA 0136, 2018-Ohio-4724, ¶ 30, applying R.C. 5303.01 (which statute reads, "An action may be brought by a person in possession of real property * * * against any person who claims an interest therein adverse to him").

{¶39} Contrary to Appellees' contention, the plain language of R.C. 5301.51(B) does not require actual, physical possession of the minerals. Appellees admit Appellants' record ownership theory is one of constructive possession. There is no dispute that Margaret Aloe Ferraro and Gilda Ognibene continuously owned their minerals interest for more than 40 years after the 1947 deed severing the one-half mineral interest (wherein they acquired their interest) and continued to own their mineral interests through the time marketability was being determined. We conclude that under the circumstances of the case at bar, this was sufficient to show the same record owner of a possessory interest in land was in continuous and continued possession of the interest as required by R.C. 5301.51(B). The notices of preservation they filed in 2013 were therefore timely under the MTA as extinguishment of their recorded interests had not already occurred. In accordance, Appellees' marketable record title to the property at issue is subject to the one-eighth mineral interest of Gilda Ognibene and the one-eighth mineral interest attributed to Margaret Aloe Ferraro; (as set forth supra, each of the four original grantees were conveyed one-fourth of the one-half severed mineral interest in the 1947 deed).

{¶40} However, we cannot extend this rationale to the remaining two individuals claiming ownership of the portion of the mineral interest they indirectly inherited from the other two original grantees. As to the interests derived from the two mineral holders who died before marketability was being determined, statutory elements are missing. The notice-equivalency provision assists only "the same record owner" in possession "continuously for a period of forty years of more" if the "possession continues to the time when marketability is being determined" (i.e. qualifying ownership). Linda Antonelli Nucci and Joyce DeLuca do not claim to be the record owner of the subject mineral interest,

and they do not claim they owned the mineral interest for more than forty years when marketability was being determined. Nor do they state how long the mineral interest was owned by their husbands from whom they inherited. In any event, the statute contains no indication that a form of tacking is permitted among successor owners. Rather, it specifically provides the beneficiary of R.C. 5301.51(B) must be the "same record owner" continuously in possession. If the record owner was not alive during the pertinent time spans, then the same record owner was not in continued possession merely because they still appear to be the record owner (as there were no title transactions transferring legal title from the deceased record owner's name).

{¶41} Linda Antonelli Nucci and Joyce DeLuca do not dispute that the record owner from whom they received their interest died before marketability was being determined. Contrary to their suggestion, the fact that two other grantees remained in possession so as to satisfy R.C. 5301.51(B) is not dispositive as to the portion of the one-half mineral interest they inherited from the heirs of the original Nucci and DeLuca grantees. Each of the four original grantees were conveyed one-quarter of the one-half mineral interest in the 1947 deed. *See Huls v. Huls*, 98 Ohio App. 509, 511, 130 N.E.2d 412 (1st Dist.1954) ("The rule is well established that where two or more persons take as tenants in common under an instrument which is silent in regard to their respective shares, there is a presumption that their shares are equal").

{¶42} The fact that the one-half mineral interest was undivided and four grantees received the interest as tenants in common in the same deed does not mean a deceased owner's heirs can use the qualifying ownership of one of the other owners to satisfy division (B) of R.C. 5301.51. A tenancy in common merely means two or more people hold an interest undivided without entitlement to an exclusive part but with entitlement to occupy the whole in common with the others, and upon death, a co-tenant's interest passes to her heirs and not to the surviving co-tenants. *See generally Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558, 565, 42 N.E. 546 (1895). In fact, the grantees were tenants in common with the original grantors to the extent the grantors retained a one-half mineral interest. *See, e.g., Gill v. Fletcher*, 74 Ohio St. 295, 306, 78 N.E. 433 (1906) (with the exception and severance of title in the mineral by the deed, the grantor and the grantee became tenants in common in the mineral, each owning one-half).

{¶43} R.C. 5301.51(B) only allows the same record owner (in continuous and continued possession) a preservation path by making that particular possession akin to a timely preservation notice for that record owner. An untimely preservation notice by an heir of a former owner is not similarly protected. There is no provision in R.C. 5301.51 or 5301.52 (which defines the preservation notice) stating that the continuous possession by one record mineral owner will save the heirs or assigns of a deceased, former owner. *Compare* R.C. 5301.56(C)(2) of the DMA (a timely claim to preserve by one holder will preserve for other holders).

{¶44} Appellants' brief notation that the partnership was still in existence does not alter this conclusion. The mineral interest was conveyed in 1947 to four individuals (doing business as a partnership). Linda Antonelli Nucci and Joyce DeLuca claim to have received their mineral interest as an inheritance from the sons of the two of the original grantees, not through the partnership. Under the law applicable before more recent statutes were enacted: "A partnership is an aggregate of individuals and does not constitute a separate legal entity." *Arpadi v. First MSP Corp.*, 68 Ohio St.3d 453, 628 N.E.2d 1335 (1994). *See also Weddle v. Hayes*, 7th Dist. Belmont No. 96-BA-44, 1997 WL 567964, *8 (Sep. 5, 1997) (concluding the partners were insured under the policy individuals even where it was issued in name of the partnership).[4]

{¶45} For the foregoing reasons, the trial court's judgment is affirmed as to Linda Antonelli Nucci and Joyce DeLuca, whose mineral interests were extinguished under the MTA, and as to Gamma Land Company. The trial court's judgment is reversed as to Margaret Aloe Ferraro and Gilda Ognibene, whose mineral interests were not extinguished under the MTA due to their continuous possession for over 40 years which continued through the time marketability was being determined.

Donofrio, J., concurs.

D'Apolito, J., dissents with dissenting opinion.

[4] We also note that Appellants attached a document to their summary judgment filing which claimed the partnership was formed in 1944 and existed in the present so as to suggest it continuously existed; yet, attached to their answer was an inventory from the estate of Mary Grace Nucci which claimed the Gamma Land Company was defunct, thereby suggesting a period during which the company was admittedly no longer existing or functioning.

D'Apolito, J., dissenting opinion.

{¶46} For the following reasons, I respectfully dissent. While I agree that the record establishes that only Margaret Aloe Ferraro and Gilda Ognibene have fulfilled the statutory requirements in R.C. 5301.51(B), I would find nonetheless that their continuous possession preserved the entire undivided one-half interest in the mineral rights for all four of the appellants. I predicate this conclusion on the rationale underpinning R.C. 5301.56(C)(1)(b), which states that a preservation notice filed by one holder preserves the rights of all holders of a mineral interest in the same lands.

{¶47} The majority recognizes that "tenancy in common" means that two or more people hold an interest undivided without entitlement to an exclusive part, but with entitlement to occupy the whole in common with the others. To the extent that Ferraro and Ognibene constructively possessed the one-half mineral interest for the statutorily-defined time period, undivided with entitlement to occupy the whole in common, first with the other two original grantees, then with their sons, and finally with their son's wives, I would hold that the entire one-half mineral interest was preserved by operation of R.C. 5301.51(B), reverse the judgment of the trial court on the MTA claim, and enter judgment in favor of all four of the appellants.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed in part; and reversed in part. Costs to be taxed equally against the Appellees and Appellants.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.