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Gary Holland

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ONE J

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*Gary Holland**

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* Gary Holland is a Member in the Charleston, West Virginia office of Steptoe & Johnson PLLC. Special thanks to Virginia Sullivan, J.D., Professional Staff in the Charleston, West Virginia office of Steptoe & Johnson PLLC.

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Introduction of Oil and Gas Development

This article provides an update concerning notable oil and gas law developments in the Commonwealth of Kentucky from August 01, 2020, through July 31, 2021, and focuses on major legislative and regulatory enactments, as well as relevant developments in Kentucky common law.

I. Legislative and Regulatory Developments

The Kentucky General Assembly's regular session began on January 5, 2021, and was scheduled to conclude on March 30, 2021. The following discusses the notable legislation relating to oil and gas laws passed during the regular session.

A. House Bill 207

1. "Energy Source Availability."

House Bill 207 ("HB 207") adds an entirely new section to Kentucky Revised Statute Chapter 65 to safeguard consumers' choices in energy preference. Except as stated in Subsection (2), no law, ordinance, policy resolution, code, or other forms of executive, administrative, or legislative action shall be enacted, adopted, or enforced that has the purpose or effect of prohibiting, discriminating against, restricting, limiting, or impairing a consumers' ability to use (a) utility services described in KRS 278.010(3)(a), (b), or (c) and that are approved by Public Service Commission under Chapter 278 and 279 or (b) liquified petroleum gas.¹ Nothing shall be interpreted or construed to prohibit or alter powers and authority of the Public Service Commission under Chapter 278 or the ability of a local government to act under laws of Commonwealth in all matters other than those in Subsection (1), including but not limited to the power to act through: (a) KRS Chapter 100; (b) Sections 163 and 164 of the Kentucky Constitution; and (c) local governments or its utilities.² The Governor of Kentucky signed HB 207 into law on March 25, 2021.

1. H.B. 207, 2021 Gen. Assemb., 2021 Reg. Sess. (Ky. 2021).

2. *Id.*

B. House Bill 230

1. "Taxation of Commercial Mining of Cryptocurrency."

House Bill 230 ("HB 230") adds a new section to Kentucky Revised Statute Chapter 139 regarding Commercial Mining of Cryptocurrency taxation. The section defines cryptocurrency as virtual currency that utilizes blockchain technology that (1) can be digitally traded between users or (2) can be converted or exchanged for legal tender.³ Commercial mining of cryptocurrency is how blockchain technology is used to mine cryptocurrency at colocation facilities.⁴ Taxes imposed by KRS 139.200 or 139.310 will not apply to the sale or purchase of electricity used or consumed in the mining of cryptocurrency.⁵ An application for each mining location must be filed on or after July 1, 2021, and on or before June 30, 2025.⁶ Upon approval of an application, a certificate of exemption is awarded, and applicants must report the tax exemption amount each fiscal year. The tax department shall report the total tax exemptions claimed in a fiscal year and the total cumulative amount of exemptions claimed to the Interim Joint Committee on Appropriates and Revenue.⁷ The Governor of Kentucky signed HB 230 into law on March 25, 2021.

C. Senate Bill 255

1. "Incentives for Energy-Related Business."

Senate Bill 255 ("SB 255") amends Kentucky Revised Statute Chapter 154.27–010 to define additional crypto-terms, including "Commercial mining of cryptocurrency" as the process through which blockchain technology is used to mine cryptocurrency at a cryptocurrency facility, and includes the process through which blockchain transactions are verified and accepted by adding the transaction to a blockchain ledger, which involves solving complex mathematical cryptographic problems associated with a block containing transaction data. "Cryptocurrency" is defined as a type of virtual currency that utilizes blockchain technology that (a) can be digitally traded between users or (b) can be converted or exchanged for legal tender. "Cryptocurrency facility" is defined as an industrial facility located in the Commonwealth that is utilized in the commercial mining of cryptocurrency

3. *Id.*

4. *Id.*

5. H.B. 230, 2021 Gen. Assemb., 2021 Reg. Sess. (Ky, 2021).

6. *Id.*

7. *Id.*

or in hosting persons engaged in the commercial mining of cryptocurrency through the utilization of the facility's infrastructure, including servers and network hardware powered by internet bandwidth, electricity, and other services generally required for such mining operations.⁸ Also, it adds cryptocurrency facilities to the "Eligible project" category if they meet the investment requirements of Section 2 of the Act.⁹ SB 255 amends Kentucky Revised Statute Chapter 154.27–020 to rename the program to "Incentives for Energy-Related Business" from "Incentives for Energy Independence Act." To qualify for the various incentives provided in the subchapter, a cryptocurrency facility must have a minimum capital investment of one million dollars (\$1,000,000).¹⁰ The Governor of Kentucky signed SB 255 on March 25, 2021.

II. Judicial Developments

A. *Hogg v. Hogg*

Lisa Hogg v. Dorothy Ann Hogg and the Estate of Jeffrey Hogg is a published decision from the Court of Appeals of Kentucky.¹¹ Accordingly, it is binding in the Commonwealth of Kentucky unless overruled by the Kentucky Supreme Court. On appeal, Lisa Hogg argued that the circuit court erred as to the following: (1) adopting the Ingram survey (defined below) as the correct depiction of land; (2) the easement in question was void *ab initio* as Blackburn was not a signatory; and (3) if she did not obtain the property depicted by the Gadbury survey, then she acquired the land by adverse possession.

Blackburn Hogg ("Blackburn") and his wife owned property in fee simple. Blackburn conveyed the property to his son, Christopher Hogg ("Christopher"), who granted Blackburn a life estate in the property with the remainder interest in Jeffrey and Dorothy Hogg (individually and collectively, "Jeffrey"). Jeffrey conveyed the remainder interest in a small portion of the property back to Christopher in July 1996. The deed excepted a 12-foot right-of-way running east to west across a portion of the property. One year later, Christopher conveyed the remainder interest to David and Lisa Hogg, and Blackburn conveyed his life estate in the same tract to David and Lisa, merging the life estate and remainder interest. The smaller

8. S.B. 255, 2021 Gen. Assemb., 2021 Reg. Sess. (Ky, 2021).

9. *Id.*

10. *Id.*

11. *Lisa Hogg v. Dorothy Ann Hogg and the Estate of Jeffrey Hogg*, 619 S.W.3d 921 (Ky. Ct. App. 2020).

tract was surveyed by Jerry Ingram ("Ingram Survey"), depicting a tract of 0.4 acres and the location of the 12-foot right of way. In 2016, Jeffrey filed a quiet title action asserting that Lisa's claims of owning more property were unfounded and that she had interfered with the use and enjoyment of the property and obstructed use of the easement across her property. Lisa counterclaimed that she was granted an acre of land, and a survey performed in 1997 by Rick Gabury ("Gabury Survey") depicted the tract of land as containing 1.13 acres instead of 0.4 acres. Lisa claimed she had been in control of the property since August 1997 and the easement over her property had been abandoned. In 2019, the court agreed with Jeffrey that Lisa's property was correctly depicted in the Ingram Survey as 0.4 acres and a 12-foot right of way encumbered such property.

The appropriate standard of review pertaining to property title issues is whether the trial court was erroneous or abused its discretion. The appellate court should not substitute its opinion for that of the trial court absent clear error.¹²

As to Lisa's first argument, the court erred in finding the Ingram Survey was the proper depiction of her land, not the Gabury Survey. Each survey was based on the metes and bound description below:

BEGINNING on a point in the center of Big Bottom Branch, approximately 125 feet, East of Big Bottom Branch's intersection with Kings Creek; thence up the hill some Southerly course to an iron pin; thence some easterly course around the hill to an iron pin; thence down the hill some Northerly course to a point in the center of Big Bottom Branch; thence down said Branch as its meanders to the BEGINNING; containing one acre, more or less.¹³

In the Ingram Survey, Jerry located roof bolts on all four corners of the property, while the Gabury Survey found only three roof bolts.¹⁴ The trial court's decision was based on the third and fourth calls of the description, finding Jerry Ingram's testimony more credible as the Gabury lines did not go "around the hill" but in a straight line to a point besides Big Bottom Branch and at the third roof bolt, there was no meandering down the hill in a northerly course as the description stated.¹⁵ Lisa brought no challenge.

12. *Id.* at 925 (citing *Cole v. Gilvin*, 59 S.W.3d 468, 472-73 (Ky. App. 2002)).

13. *Id.* at 925.

14. *Id.*

15. *Id.*

Therefore, the findings were supported by substantial evidence and are neither erroneous nor an abuse of the trial court's discretion.

As to Lisa's second argument, the easement was *void ab initio* because Blackburn was not a signatory to its creation. An "easement" is "an interest that encumbers the land of another."¹⁶ Easements are created by express written grant, implication, prescription, or estoppel. An express easement is created by a written grant with the formalities of a deed.¹⁷ Jeffrey conveyed the remainder interest in the small tract of land to Christopher, excepting out of the conveyance a right-of-way, or an express easement, without Blackburn. Lisa further argued that an express easement could not be created without the consent of Blackburn, as the life estate holder was the holder of the present possession and ownership interest. The court found this an issue of first impression for the Commonwealth and looked to established principals from neighboring jurisdictions. It is well-settled that "[a] remainderman generally can sell or convey her remainder interest in realty even though the date of full possession and enjoyment is not due, but a remainderman cannot convey the life tenant's interest."¹⁸ It may be inferred from case law within [the] Commonwealth and from sister jurisdictions that remainderman not only have the right to transfer their interest in the property but also have the right to encumber their interest. "The principle that a remainderman may encumber their interest with a mortgage, or a lease is analogous to their ability to encumber their interest with an easement."¹⁹ Jeffrey owned the remainder interest in the property and was free to transfer the interest and free to encumber the interest in the property with an easement without Blackburn's consent and signature; however, the encumbrance only became effective upon the expiration of the life estate. When Lisa was granted the life estate and remainder interests in the property, the interests merged and made the easement enforceable. Therefore, the easement was not void.

As to Lisa's third argument, if she did not obtain the 1.13 acres depicted by the Gadbury Survey by deed, she acquired the land by adverse possession. The elements of adverse possession are "actual possession; open and notorious possession; exclusive possession; [and] hostile possession" for a period of a lease of 15 years.²⁰ All of these elements must be met for the entirety of the required 15-year period. "Failure to prove

16. *Id.* at 926 (citing 25 AM. JUR. 2d Easements and Licenses § 1 (Nov. 2020 update)).

17. *Id.* at 926 (citing *Loid v. Kell*, 844 S. W.2d 428, 429 (Ky. App. 1992)).

18. *Id.* at 927 (citing C.J.S. Estates § 104 (Sept. 2020 update)).

19. *Id.* at 928.

20. *Id.* at 929 (citing *Cowhead v. Brooks*, 456 S. W. 3d 827, 830 (Ky. 1970)).

even one of the elements is fatal to an adverse possession claim."²¹ The only evidence of hostile possession provided by Lisa was the parking of her car on the property and construction of fences after 2016, which did interfere with the use of the easement; however, these did not add up to substantial evidence of hostile possession required for a successful claim. Therefore, the elements of adverse possession were not met.

For the aforementioned reasons, the Court of Appeals found no error in the circuit court's ruling and affirmed the circuit court's decision.

B. Stillwell v. Deitweiller

Scott Stillwell and Nancy Stillwell, Appellants v. Sam C. Deitweiller, Mary Lou Deitweiller, Ralph J. Thompson, and Reva Ridgon Thompson, Appellees, Ralph J. Thompson and Reva Ridgon Thompson and Reva Ridgon Thompson, Cross-Appellants v. Scott Stillwell, Nancy Stillwell, Sam C. Deitweiller, and Mary Lou Deitweiller, Cross-Appellees, is an unpublished opinion from the Court of Appeals of Kentucky.²² On appeal and cross-appeal, Scott Stillwell and Nancy Stillwell and Ralph J. Thompson and Reva Ridgon Thompson argued (1) the trial court erred in finding that Sam C. Deitweiller and Mary Lou Deitweiller had ownership of Greenacre by adverse possession and (2) each had a superior claim of adverse possession than the Deitweiller's (defined below) claim.

This case involves a dispute over the ownership of a tract of land referred to as Greenacre. Scott Stillwell and his mother, Nancy Stillwell (individually and collectively, "Stillwell"), Sam C. Deitweiller and Mary Sue Miller Deitweiller (individually and collectively, "Deitweiller"), and Ralph J. Thompson and Reva Ridgon Thompson (individually and collectively, "Thompson") all owned property adjoining Greenacre. Thompson acquired their property by deed dated June 1, 1975; Stillwell acquired their property by deed dated July 1, 1998; and Deitweiller acquired their property by deed dated April 11, 2007.²³ It was acknowledged there is no established record of ownership of Greenacre, as early property records were destroyed by fire at the Hart County Courthouse.

21. *Id.* at 929.

22. *Scott Stillwell and Nancy Stillwell, Appellants v. Sam C. Deitweiller, Mary Lou Deitweiller, Ralph J. Thompson, and Reva Ridgon Thompson, Appellees, Ralph J. Thompson and Reva Ridgon Thompson and Reva Ridgon Thomson, Cross-Appellants v. Scott Stillwell, Nancy Stillwell, Sam C. Deitweiller, and Mary Lou Deitweiller, Cross-Appellees*, No. 2020-CA-0283-MR, 2021 WL 2272831 (Ky Ct. App. June 4, 2021).

23. *Id.* at 1.

With respect to the adverse possession claim, Thompson presented no evidence of adverse possession at the trial court level. Stillwell, however, presented evidence that they created four-wheeler trails around the perimeter of Greenacre, hunted on it, removed rocks, posted no trespassing signs and cut firewood. However, they never excluded Deitweiller from Greenacre. Deitweiller testified by 2009, they were using Greenacre as rightful owners by erecting fences, including an area to pastured horses and cattle; cleared portions of the property with a bulldozer; cut trees for timber; and employed a surveyor to locate the boundaries of the property.²⁴ They relied on the description provided by Edith Moody (predecessor in title) and her son that the property deeded included the disputed tract. The trial court ruled Deitweiller had the superior claim and ordered title to Greenacre quieted to reflect Deitweiller as rightful and lawful owners and enjoined Stillwell and Thompson from trespassing on the property.

When reviewing a judgment following a bench trial, the trial court's finding of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."²⁵ A factual finding is not clearly erroneous if it is supported by substantial evidence, defined as evidence in which sufficient probative cause exists to induce conviction in the mind of a reasonable person.²⁶

To make a successful claim of adverse possession, five elements must be met: "1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) must be continuous, and 5) it must be open and notorious."²⁷ Under Kentucky Revised Statute (KRS) 413.010, these elements "must all be maintained for the statutory period of fifteen years, and it is the claimant's burden to prove them by clear and convincing evidence."²⁸ In such a case, the plaintiff seeking to establish title must sustain his or her claim either by record title or adverse possession; he or she must recover on the strength of his or her title and not upon the weakness of his adversary's title or the fact that his opponent had no title.²⁹

Deitweiller testified he had acquired Greenacre by adverse possession, as

24. *Id.*

25. *Id.* at 2. (*citing* Kentucky Rules of Civil Procedure (CR) 52.01).

26. *Id.* at 2. (*citing* *Gosney v. Glenn*, 163 S.W. 3d 894, 898 (Ky. App. 2005)).

27. *Id.* at 2. (*citing* *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992)).

28. *Id.* at 2. (*citing* *Moore v. Stills*, 307 S.W.3d 71, 7778 (Ky. 2020)).

29. *Id.* at 2. (*citing* *Gabbard v. Lunsford*, 308 Ky. 836, 838, 215 S.W.2d 985, 986, (1948)).

he first visited Greenacre in 2007 when Mrs. Moody's son took him there to show him the property. Deitweiller purchased the property in 2009 and had relied on the description provided by the Moody's and Property Valuation Administrate (PVA) Map, which showed Greenacre as part of the property purchased.³⁰ Also, in 2009 Deitweiller purchased an adjoining farm retained by Ashton McPherson, assuming the two properties would form one big farm and encompass all of Greenacre. Deitweiller further testified that Mrs. Moody told him Greenacre was his property and indicated on a plat of the property that there is an old roadway, which came up from the Moody farm through Greenacre.³¹ Further, Mrs. Moody told him that she told Stillwell he could not use the road because it was "her road".³²

Stillwell and Thompson further argued that there was insufficient evidence to support the trial court's findings that Deitweiller met the 15 years for adverse possession. The trial court found Deitweiller met the 15 years by tacking his time on that of his predecessor in title, Edith Vernice Moody. "The adverse possession of a grantee may be tacked on to that of his grantor to complete the statutory period."³³ No other arguments were made regarding tacking.

Thompson also argued there was no evidence that Deitweiller occupied or used Greenacre in any way between 2007 and 2009, which meant his possession was not continuous. The character of the property, its physical nature, and the use to which it has been put determine the character of the acts necessary to put the true owner on notice of the hostile claim.³⁴ By the testimony of various owners, the character of Greenacre did not lend itself to daily, regular usage. Stillwell had stated that the area was heavily wooded and difficult to get through and wasn't suitable for growing crops or keeping livestock.³⁵ Therefore, Deitweiller had no reason to be on notice.

Deitweiller was found to have a claim for adverse possession of Greenacre, as all elements were met within the statutory time.

As to who had the superior claim of adverse possession, Stillwell claimed title through adverse possession of his predecessors. They contended that the Lawlers adversely possessed the disputed property from 1930 to 1979 and that each subsequent conveyance included Greenacre.³⁶

30. *Id.* at 3.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 3. (*citing* *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky. App 2001)).

34. *Id.* at 4. (*citing* *Appalachian Regional Healthcare*, 824 S.W2d at 880).

35. *Id.* at 4.

36. *Id.* at 5.

During that period, Lawler, Tharpe, and the Lawler heirs built a perimeter fence around the property, including Greenacre; granted oil well leases on the disputed property from 1935 to 1960; and granted a publicly recorded transmission line easement.³⁷ Thompson claimed title through the constructive adverse possession of Mary Douglas and Earl Crouch. A deed dating from 1950 showed that the Crouch's granted oil and gas leases on 60 acres of their property and receive royalties from eleven produced oil wells scattered over Greenacre.³⁸ The court found the claims of Stillwell and Thompson were not sufficiently compelling to overturn the trial court's conclusion of Deitweiller having a superior claim of adverse possession.

For the foregoing reasons, the court affirmed the findings of fact, conclusions of law, and judgment of the Circuit Court.

37. *Id.*

38. *Id.*