TIME FOR A WORKOVER:
OIL & GAS IN ESTATE PLANNING (AND PROBATE), OR DEALING WITH WHAT COMES OUT OF THE GROUND BEFORE (AND AFTER) THEY GO IN

R. Shaun Rainey

Cotton, Bledsoe, Tighe & Dawson, PC
Midland, Texas

srainey@cbtd.com
(432) 254-2203

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TIME FOR A WORKOVER: OIL & GAS IN ESTATE PLANNING (AND PROBATE), OR DEALING WITH WHAT COMES OUT OF THE GROUND BEFORE (AND AFTER) THEY GO IN[1]

I. INTRODUCTION

> Come and listen to a story about a man named Ted, a poor dirt farmer, barely kept his family fed, and then one day he was shootin at some food, and up through the ground came a bubblin crude. Oil that is, black gold, Texas tea.[2]

While the exploration and discovery of oil in Texas was through the hard work of entrepreneurial wildcatters and risk tolerant investors, often it was those hardy ranchers and dry dirt farmers who settled on the edge of the Chihuahuan dessert who reaped the greatest and most unexpected reward of owning minerals in what would become one of the most prolific oil fields in the world, the Permian Basin. When coupled with the gas plays in north and south Texas, the old fields in east Texas and the salt domes of the Gulf Coast, it is no wonder that oil ownership is almost ubiquitous to Texans and their now remote descendants. Whether it is a small family heirloom royalty interest or hundreds of leasehold interests, mineral ownership provides a unique opportunity for planning but can be fraught with traps for the unwary both in planning and in the administration of a decedent's estate.

The purpose of this Article is to provide a roadmap for counsel to provide advice to and assist the client with estate planning for mineral interests as well as how to advise a personal representative handling these assets during the administration of an estate. Section II will provide some basic principles of the ownership of mineral interests and classification of property. Section III will discuss estate planning techniques commonly recommended. Section IV will discuss the management of mineral interests in the administration of an estate. Section V will outline proper conveyancing and perfecting title on transfer. Section VI will outline some ethical considerations for the attorney handling oil and gas interest in estate planning and probate for first, fiftieth, or five hundredth time.

II. CLASSIFICATION OF LAND, INTERESTS IN LAND AND CONVEYANCING INSTRUMENTS

Before someone can convey their property, or certain interests therein, or establish a detailed estate plan devising certain interests in their property, they have to know and understand what they actually own and any limits to their interests. In this section, we will discuss, generally, the classification system for Texas lands, the interests in lands (other than the surface estate), and the various instruments used to convey an interest in land.

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[1] Originally written by R. Shaun Rainey, Garrett S. Melchiorre, Greg Friesenhahn, and Joseph Rodriguez for the Intermediate Estate Planning Course 2021 from TexasBarCLE, State Bar of Texas, webcast, June 8, 2021; updated by R. Shaun Rainey in 2024.

[2] Texas-fied adaptation of "The Ballad of Jed Clampett" by Flatt and Scruggs, written by Paul Henning, Columbia Records, 1962.

A. Classification of Land

i. *Classifications*

All land sold in Texas is classified by the Commissioner of the General Land Office (the "GLO").[3] Texas land will be classified as agricultural, grazing, timber or minerals. The State of Texas owns no interest in lands classified as agricultural, grazing, timber or unclassified. Mineral classifications result in the State of Texas owning title to the minerals and will be discussed in more detail below with the Relinquishment Act.

Generally, the classification of land cannot be accurately ascertained by reviewing the county records where the land is located. Therefore, it is recommend that an attorney contact the GLO for the specific classification of the particular land. In recent years, the GLO has also identified land classifications on its interactive map via the GLO website.[4] Knowing the classification of land is vital if the land is mineral classified, as discussed below.

ii. *Relinquishment Act*

The Relinquishment Act can be most succinctly be defined as the reservation of all minerals to the State of Texas in those certain lands sold by the State with a mineral classification between September 1, 1895 and June 29, 1931.[5]

Under the Relinquishment Act, the owner of the soil (the surface owner) acts as the agent for the State of Texas in negotiating and executing oil and gas leases on Relinquishment Act land. In lieu of surface damage payments from the State of Texas, the State surrenders to the surface owner one-half (1/2) of any bonus, delay rental, and royalty.

It should be pointed out that if the surface owner of Relinquishment Act land either conveys a royalty interest or conveys the surface of the land and reserves a royalty interest, this royalty interest is only valid under the existing Relinquishment Act Lease.[6] For example, assume that there is a current Relinquishment Act Lease in full force and effect and that an individual has effectively acquired a royalty interest in this lease. Upon termination of this lease, the royalty interest also terminates; said royalty interest will not apply to future oil and gas leases. The GLO publishes a number of rules and regulations dealing with oil and gas leases, including a GLO lease form.[7]

[3] Tex. Nat. Res. Code § 51.013(a).

[4] The Texas General Land Office GIS Maps & Data can be accessed at https://www.glo.texas.gov/land/land-management/gis/index.html.

[5] For a thorough discussion on the Relinquishment Act, see A. W. Walker, Jr., *The Texas Relinquishment Act*, 1st Inst. on Oil & Gas Law and Taxation, SW Legal Fdn. (1949).

[6] *See Lewis v. Oates*, 145 Tex. 777, 195 S.W.2d 123, 133 (1946).

[7] For more information on the GLO lease form and the rules pertaining to same, see the GLO's website at www.glo.texas.gov.

B. Interests in Land[8]

i. *Fee Simple from the Sovereign and Severance*

All title of ownership in real property in the present State of Texas can be traced back to an original grant from the sovereign (i.e. Mexico, the Republic of Texas or the State of Texas).[9] These original grants of real property from the sovereign included all right, title and interest from the surface up to the heavens and down to the center of the earth. (*Cuius est solum, eius est usque ad coelum et ad inferos*.[10]) In Texas, the fee simple owner owns the surface, the air above, such as wind and solar rights, and all subsurface substances, including minerals and groundwater.

(a) Severance

Some of these resources can be severed from the fee simple estate.[11] Texas law has always recognized that a landowner may sever the mineral and surface estates and convey them separately.[12] In Texas, the mineral estate may be severed from the surface estate by a grant of the minerals in a deed or lease, or by reservation in a conveyance.[13] Effectively, a conveyance which acts as a severance (whether by a reservation from a grant or an affirmative grant) of one estate from another creates a fork in the chain of title. Thereafter, the title of severed estate and the surface estate will continue to diverge. However, if a landowner owns the land in fee simple, the mere execution of an oil and gas lease does not operate as a severance of the other rights of a mineral interest holder, discussed in Section II.B.3 below, absent some express language to that effect.

(b) Dominant Estate

In Texas, the mineral estate is considered the dominant estate.[14] As such, the owner of the mineral estate, and by extension as a lessee of the owner of the mineral estate, has an implied grant, absent an express agreement, of free use of so much of the surface as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate.[15]

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[8] For a more thorough and in depth discussion of oil, gas and mineral interests, see Ernest E. Smith and Jacqueline Lang Weaver, Texas Law of Oil and Gas (LexisNexis Matthew Bender 2015).

[9] For an in depth discussion of Texas land history from the sovereign, see Mark K. Leaverton, *The Genesis of Title: Land Grants, Patents & State Owned Minerals*, Oil, Gas and Mineral Title Examination Course, State Bar of Texas, June 5-6, 2014.

[10] Latin property law maxim that translates to "whoever owns land, it is theirs up to the heavens and down to hell".

[11] Although long suspected to be the case by practitioners a recent case has ruled that 'wind rights' are also a severable estate from the surface. *See Ridge Renewables, LLC v. Hale Cnty. Wind Farm, LLC*, No. A43616- 2012 (64th Dist. Ct., Hale County, Tex. May 11, 2023) (final judgment ordering damages for trespass against a severed wind property interest).

[12] *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016).

[13] *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984); *see Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923).

[14] *See Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *see also Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362 (1957); *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (1961).

[15] *See Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967)

ii. *Surface Interest – Damages and the Accommodation Doctrine*

The owner of the surface estate holds the right to use and develop the surface subject to the rights and interest of the owner of the mineral estate.

(a) Right to Damages

These rights incude the right to payment for damages, either under a surface use agreement between a lessee and the surface owner of the estate or under common law. A surface owner who seeks to recover for damages to the surface without an agreement has the burden of alleging and proving either specific acts of negligence, or that more of the land was used than was reasonably necessary.[16]

(b) The Accommodation Doctrine

Further, the owner of the surface estate is protected by the accommodation doctrine. Under the accommodation doctrine, a mineral lessee must accommodate the existing use of the surface so long as there is a reasonable alternative for the lessee.[17] In order to obtain relief under the accommodation doctrine, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued.[18] If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.[19]

iii. *Mineral Interest*

A mineral interest is an interest in oil, gas and other minerals, and is a possessory interest.[20] The owners of a mineral interest owns the minerals in place, meaning the actual physical oil, gas, or other minerals where they exist within the earth.[21] The mineral estate is comprised of five severable rights: (1) the right to develop, (2) the right to lease (also known as the executive right), (3) the right to receive bonus, (4) the right to receive delay rentals and (5) the right to receive royalty payments.[22]

If a mineral interest owner executes an oil and gas lease, said lease effectively conveys the mineral estate as a determinable fee, with the mineral interest owner retaining a possibility of reverter as a future interest.[23] As noted above, if a landowner owns the land in fee simple, the

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[16] *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 650 (Tex. Civ. App.—Eastland 1953, no writ).
[17] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 628 (Tex. 1971).
[18] *Id.*; *see also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967); *Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 424 (Tex. App.—Amarillo 2004, no pet.).
[19] *Tarrant Cty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911-912 (Tex. 1993).
[20] *See Nat. Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003).
[21] *See generally Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 487 (Tex. 2011).
[22] *Hysaw v. Dawkins*, 483 S.W.3d 1, 8-9 (Tex. 2016); *see also Altman v. Blake*, 712 S.W.2d 117, 118 (Tex.1986).
[23] *Luckel v. White*, 819 S.W2d 459, 464 (Tex. 1991).

execution of an oil and gas lease does not operate as a severance of the other rights of the mineral estate from the owner surface estate absent some express conveyancing language. Upon termination of the oil and gas lease, the fee simple determinable estate in the lessee automatically expires and fee simple title to the mineral estate reverts back to the landowner.

ii. *Royalty Interest*

A royalty interest derives from the mineral interest and is a nonpossessory interest that may be alienated.[24] A royalty interest is a right to receive a share of gross production of the minerals produced, or the proceeds of production, free of the costs of production.[25]

iii. *Distinction between Mineral and Royalty Interests*

Based on the above definitions of a mineral and royalty interest, a few distinctions must be noted. While theses distinctions may be obvious from the definitions supplied above, they have a tremendous impact as to the rights, duties and limitations of the respective interest owners.

First, is the amount of production (and subsequent monetary value) that a mineral or royalty owner is allowed to receive. For example, an owner of a 1/8 of 8/8 royalty interest is entitled to receive 1 out of every 8 barrels of oil produced, free of the costs of production. Conversely, an owner of a 1/8 mineral interest is entitled to receive 1/8 of the oil and gas lease benefits including 1/8 of the royalty provided for in the oil and gas lease.

Second, both a mineral and royalty owner will share in the royalty under an oil and gas lease, but only a mineral owner will receive the lease bonus and delay rentals, unless the instrument creating the applicable mineral interest provides otherwise.[26]

Third, only the mineral interest owner has the right to enter upon (the right of ingress and egress) the surface estate and develop the mineral estate for the production of oil and/or gas.[27]

iv. *Lease Bonus and Delay Rentals*

A lease bonus is a payment made in addition to royalties that acts as an incentive for a lessor to execute an oil and gas lease.[28] A lease bonus can be any consideration given for a lease over and beyond the usual royalty, whether such additional consideration be paid or payable and whether it be paid in cash or payable out of production. [29]

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[24] *Hysaw.* 483 S.W.3d at 9.
[25] *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 114 (Tex.App.—El Paso 2018, no pet.); *Graham v. Prochaska*, 429 S.W.3d 650, 656 (Tex.App.—San Antonio 2013, pet. denied).
[26] *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 798 (Tex. 1995)("A grant of a royalty interest, without any further grant, does not convey an interest to the grantee in delay or other rentals, or in bonus payments, nor would it convey executive rights.").
[27] *Id.*
[28] *In re Slaughter*, 305 S.W.3d 804, 811 (Tex.App.—Texarkana 2010, no pet.)
[29] *Parmelee v. Nueces Royalty Co.*, 361 S.W.2d 585, 587 (Tex.Civ.App.—Eastland 1962, writ ref'd n.r.e.).

Delay rentals, on the other hand, are payments made by the lessee during the primary term to perpetuate an oil and gas lease when the lessee is not actively drilling or developing the leasehold.[30] Today, it is more common for modern leases (i.e. leases within the last 10-15 years) to be paid-up leases. A paid-up lease is a lease where all of the delay rentals bargained for are paid in advance, and this single payment (i.e. the bonus) maintains the lease during the primary term.[31]

v. *Working Interest*

A working interest is an operating interest under an oil and gas lease, which provides the owner with the exclusive right to drill, produce and exploit the minerals.[32] A working interest bears all of the costs of production and is held subject to the payment of royalties.[33] The lessee's share of production due to the working interest after satisfaction of all burdens, such as royalties and overriding royalties, have been deducted from the working interest is the net revenue interest.[34]

vi. *Net Profit Interest*

A net profit interest is a retention by the landowner in the execution of an oil and gas lease, which provides for the royalty to be in the form of a percentage of net profits derived from production.[35]

vii. *Overriding Royalty Interest*

An overriding royalty interest is a fraction of gross production that does not affect mineral owners because it is carved out of the working interest.[36] Said overriding royalty interest is free of any expense for exploration, drilling, development, operating, marketing and other costs incident to the production and sale of oil and gas produced from the lease.[37]

viii. *Carried Interest Arrangements*

A carried interest arrangement occurs where a working interest owner (commonly referred to as the "carried party") engages a third party (the "carrying party") to develop the minerals, and carried party agrees that it will not be entitled to any proceeds from production until the carrying party is reimbursed from production for expenditures made on the carried party's behalf.[38]

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[30] *Id.*
[31] *ConocoPhillips Company v. Koopman*, 547 S.W.3d 858, 874, (Tex. 2018).
[32] *H. G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 599 n.3 (Tex.App.—Austin 2002, pet. denied).
[33] *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 714 n.9 (Tex. 2016).
[34] *Id.*
[35] *See San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000)("Promissory notes, net-profit agreements, and cash are personal property, not real property.")
[36] *Id.*
[37] *H. G. Sledge*, 36 S.W.3d at 599 n.2.
[38] *Nova Mud, Inc. v. Staley*, 583 S.W.3d 728, 731 (Tex. App.—El Paso 2019, pet. denied)("A carried working interest in an oil and gas lease is an executive 'fractional interest that is free of some or all costs of exploring, drilling, and completing the well.'"); *citing Reeder v. Wood County Energy, L.L.C.*, 320 S.W.3d 433, 445 (Tex. App.—Tyler 2010), *rev'd*, 395 S.W.3d 789 (Tex. 2012).

ix. *Production Payment*

A production payment is a share of production, free of the costs of production, terminating when a given production volume has been paid or when a specified sum from its sale has been realized.[39]

C. Conveyancing Instruments

Now that the interests associated with the mineral estate have been discussed and defined, below are the mechanisms that can be utilized to effectively transfer said interests.

i. *Implied Warranties*

At common law, a deed contained six implied covenants:

(1) the covenant of seisen (meaning that the grantor is the owner of the property being conveyed),
(2) the covenant against encumbrances (this is a promise that the property being conveyed is free and clear of any liens),
(3) the covenant of the right to convey (meaning that the grantor has the right to convey the property without the joinder of others),
(4) the covenant of quiet enjoyment (this is an assurance by the grantor that the grantee's title will not be disturbed by third-party claims to the property),
5) the covenant of warranty (this obligates the grantor to defend title to the property), and
(6) the covenant of further assurances (this is a promise that the grantor will take such other and necessary further actions in the future as may be necessary to vest title to the property in the grantee).

ii. *Statutory Covenants*

The property code, which does not specifically exclude the existence of the above-noted implied common law covenants, provides for the following two implied covenants in deeds:

> "Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:
> (1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and
> (2) that at the time of the execution of the conveyance the estate is free from encumbrances."[40]

[39] *Apache Deepwater, LLC v. McDaniel Partners, Ltd.*, 485 S.W. 3d 900, 905 (Tex. 2016).
[40] Tex. Prop. Code § 5.023(a); *see also Tolbert v. Kartye*, No. 12-18-00169-CV, 2019 WL 1272687, at *3 (Tex. App.—Tyler Mar. 20, 2019, pet. denied); citing *Fannin Inv. & Dev. Co. v. Neuhaus*, 427 S.W.2d 82, 88 (Tex. Civ. App.−Houston [14th Dist.] 1968, no writ).

iii. *General Warranty Deed*

A grantor in a general warranty deed expressly agrees to (1) defend against title defects that the grantor or any prior title holder created,[41] and (2) indemnify the grantee and the grantee's heirs, successors and assigns against any loss or injury cause by a defect in the grantor's title.[42] In effect, a grantor in a general warranty deed is warranting that no defects in the title to the property have arisen since the property belonged to the sovereign. A general warranty deed offers the most extensive warranty because it warrants absolute title. Section 5.022 of the Property Code contains a statutorily approved general warranty deed form. The following is an example of a general warranty:

> Grantor hereby binds Grantor and Grantor's successors to warrant and forever defend all and singular the Property to Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

iv. *Special Warranty Deed*

A grantor in a special warranty deed does not warrant the entire chain of title to the sovereign as in a general warranty deed. A special warranty binds the grantor to defend title only against the claims and demands of the grantor and all persons claiming by, through, and under the grantor, but not otherwise.[43] The following is an example of a special warranty:

> Grantors hereby bind themselves, their heirs, personal representatives, successors and assigns, to warrant and forever defend all and singular the rights, title and interests herein conveyed to the Grantee, its successors and assigns, against any person whomsoever lawfully claiming or to claim the same or any part thereof, by, through, and under the Grantors but not otherwise.

If the warranty clause does not contain "by, through, and under the Grantors but not otherwise," then the deed will be construed as a general warranty deed and will not offer the grantor the protection of a special warranty deed.

v. *Deed Without Warranty*

A deed without warranty conveys the property without warranties, wither express or implied, as to any matters whatsoever. A warranty is not required for a deed to be valid in Texas.[44]The following are examples of a no warranty clause:

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[41] *Munawar v. Cadle Co.*, 2 S.W.3d 12, 16 (Tex.App.—Corpus Christi 1999, no pet.); *Dyer v. Cotton*, 333 S.W.3d 703, 712 n.2

[42] *See Gibson v. Turner*, 294 S.W.2d 781, 787 (Tex. 1956).

[43] *Munawar*, 2 S.W.3d at 16.

[44] Tex. Prop. Code § 5.022(b); *see generally Young v. Rudd*, 226 S.W.2d 469 (Tex.Civ.App.—Texarkana 1950, writ ref'd n.r.e.).

> To have and to hold unto Grantee and Grantee's heirs, executors, administrators, successors or assigns forever, without express or implied warranty; and all warranties that might arise by common law and the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded.
>
> To have and to hold unto said Grantees, their heirs and assigns forever and this Deed is executed without warranty, either express or implied.

vi. *Quitclaim Deed*

A quitclaim deed is an instrument that purports to transfer only the right, title and interest that the grantor has in the land, if any, as distinguished from the land itself.[45] The covenant of seisen (that the grantor is the owner of the property being conveyed), is not read into or implied in a quitclaim deed.[46] Quitclaim deeds are commonly used to convey interests of an unknown extent or claims having a dubious basis.

There has been a myriad of litigation and disputes as to whether an instrument is actually a deed or a quitclaim deed and in some circumstances it is difficult to determine. However, if the instrument, taken as a whole, discloses a purpose to convey the property itself, as distinguished from the mere right, title or interest of the grantor, then the instrument is not a quitclaim deed.[47] The following in an example of language that can be construed to be the requisite granting language in a quitclaim deed:

> Grantor conveys, relinquishes and quitclaims to Grantee and Grantee's heirs and assigns, all of Grantor's right, title and interest, if any, in the following lands.

vii. *Assignment*

The above-referenced conveyancing instruments are mainly used to convey mineral and royalty interests, while "assignments" are more frequently used to assign working interests and overriding royalty interests. An assignment is an act by which one person transfers to another, or causes to vest in another, his property, or an interest therein.[48] There is no specific form or language required for an assignment, however, the following is sufficient to constitute a valid assignment of a working interest:

> This Assignment is made and entered into this the January 1, 2021, by and between John Doe, hereinafter referred to as "Assignor" and Big Oil, Inc., hereinafter referred to as "Assignee."

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[45] *Chicago Title Ins. Co. v. Cochran Investments, Inc.*, 602 S.W.3d 895, 900 (Tex. 2020).
[46] *Id.*
[47] *Geodyne Energy Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 487 (Tex. 2005); for a broader discussion of quitclaim deeds, *see* G. Roland Love, *Quitclaims – Texas and Beyond*, Advanced Real Estate Drafting Course, State Bar of Texas, March 10-11, 2016; and H. Martin Gibson and George A. Snell, III, *The Perils of Quitclaims*, North Houston Association of Petroleum Landmen, November 10, 2016.
[48] *See Harlow v. Hudgins*, 84 Tex. 107, 19 S.W. 364 (Tex. 1892).

> Assignor, in consideration of $10.00 and other good and valuable consideration, to Assignor in hand paid by Assignee, the receipt and sufficiency of which is hereby acknowledged, hereby assigns to Assignee 100% of the working interest in the lands and leases described on Exhibit "A" attached hereto and made a part hereof for all purposes.
>
> Assignor covenants with the Assignee, and Assignee's heirs, successors, legal representatives, or assigns that the Assignor is the lawful owner of and has good title to the interest herein assigned in and to said lease, estate, rights, and property, free and clear from all liens, encumbrances, or adverse claims.

D. Community Property vs. Separate Property

When a party acquires or sells property in Texas, community property considerations will always arise.[49] Because of this, a brief overview of community and separate property and discussion of certain implications arising therefrom is useful.

i. *Community Property*

Community property consists of the property, other than separate property, acquired by either spouse during marriage.[50] Property possessed by either spouse during or on the dissolution of marriage is presumed to be community property, unless one spouse can prove the separate property characterization of the asset.[51] Under Texas law, the characterization of property as community or separate is generally determined by its character at inception.[52] This is referred to as the inception of title rule. The language of the conveyancing instrument is of great importance to the determination of marital property characterization. Therefore, in examining title to land based upon the real property records, a title examiner will presume that all real property acquired during marriage is community property absent some clear indication otherwise, whether acquired in the name of one or both spouses in light of the community presumption of assets acquired during marriage.[53]

During marriage, each spouse has the sole management, control and disposition of the community property that the spouse would have owned if single.[54] For example, if one spouse is the only grantee in a mineral or royalty deed, the presumption, absent clear language, would by the interest conveyed is the grantee's sole-management community property.

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[49] For an in depth discussion of fights of married persons in Texas lands, see Aloysius A. Leopold, *Land Title and Examination* § 20.1 et seq. (3d ed., Texas Practice Series 2005).
[50] Tex. Family Code § 3.002.
[51] *Id.* at § 3.003(a).
[52] *See Viera v. Viera*, 331 S.W.3d 195, 206 (Tex. App.—El Paso 2011, no pet.).
[53] Tex. Prop. Code. T.2 App., Standard 14.10.
[54] Tex. Prop. Code § 3.102.

ii. *Separate Property*

Separate property is constitutionally defined as property owned or claimed by a spouse before marriage and property acquired by a spouse during marriage by gift, devise or descent.[55] Any spouse seeking to overcome the community property presumption must prove its separate character by clear and convincing evidence, ordinarily by tracing the purchase of the property to funds from the spouse's separate estate.[56]

Texas law recognizes the law of the "matrimonial domicile" at the time the property is acquired as governing the rights of the spouses when non-residents acquire property in Texas.[57] Logically this follows with the legal concept of inception of title. Therefore, in a situation where real property is purchased in a community property state with funds earned in a common law state then the ownership be characterized as separate because the out-of-state earnings are not community property.[58] Texas courts have concluded it is "unreasonable" to apply the community-property presumption when the spouse who acquired the property at issue never resided in Texas or another community property state, or there is no evidence the spouse drew income while domiciled in Texas or any other community property state.[59]

iii. *Required Signatories to a Conveyance*

While one spouse alone may alienate separate property or sole management community property, it takes the signature of both to convey or encumber joint management community property unless the spouses have otherwise agreed.[60] The exception to this is if the property is homestead, then both spouses must execute the conveyance (this is the rule even if only a mineral or royalty interest is being conveyed in homestead property). Property that has been designated as a homestead will only lose its homestead character through abandonment, death, or alienation.[61]

It is extremely useful to the title examination attorney for the drafter of any conveyance to include language identifying the marital status of the signatory(ies) and the marital property nature of the property, such as "a married man, dealing in his sole management community property," or "a married woman, dealing in her sole and separate property." Also, if only one spouse executes a conveyance when it is necessary for both spouses to execute, then you can either get a correction instrument from both spouses or the non-executing spouse can ratify the conveyance by the other spouse.

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[55] Art. 16, Sec. 15, Texas Constitution ("All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; . . . "); *see also* Tex. Prop. Code § 3.001(a) and (b).

[56] *Stillwell v. Stevenson*, 668 S.W.3d 844, 853–54 (Tex. App.—El Paso 2023, pet. denied).

[57] *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (1987) (in the context of a will).

[58] *Stillwell*, 668 S.W.3d at 854; *citing cases Bauer v. White*, No. 13-16-00054-CV, 2016 WL 3136608, at *3 (Tex. App.—Corpus Christi June 2, 2016, pet. denied) (mem. op.)*; see also Orr v. Pope*, 400 S.W.2d 614, 616–17 (Tex. App.—Amarillo 1966, no writ) (collecting cases) ("[I]t is the law of this state that where a husband acquired real property situated in Texas while he resides in a common law state, the real property is the separate property of the husband.").

[59] *Id.*

[60] *Vallone v. Miller*, 663 S.W.2d 97, 99 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

[61] *See Florey v. Estate of McConnell*, 212 S.W.3d 439, 443–44 (Tex.App.-Austin 2006, pet. denied); *Wilcox v. Marriott*, 103 S.W.3d 469, 472 (Tex.App.-San Antonio 2003, pet. denied).

III. ESTATE PLANNING WITH OIL & GAS

In planning with mineral interests, several commonly used techniques are available and used to accomplish client objectives and several of the most common discussed generally below. However, there are two preliminary considerations for planning with minerals in certain types of estate planning.

First, like most commodities markets the price of crude is subject to wide fluctuation due to circumstances far beyond the control on any client. This presents opportunities and pitfalls. Timing of the transaction or gift can be extremely important. A well-timed gift or sale transaction can give great benefit such as a low valuation of a gift when the prices for oil and gas are low. However, it can be of concern if a transaction is consummated when prices are high, but are followed by a low making the economics of the transaction unworkable. Additionally, any planning technique where the assets need growth to outperform the interest rate may not be the best technique without some research on the potential growth. This is best measured by new drilling or workovers that may lead to additional production, or an analysis of proven unproduced reserves, as opposed to relying upon the market.

Second, it is important to remember that a leasehold interest is a fee simple determinable has the possibility of reverter. While many leases are extremely old and have been held with continuous production in paying quantities for more than half a century, the oil business is always carries a level of risk unpalatable to many. As such, planning with leasehold interests carry a risk that a gift or transaction may become worthless due to forces beyond the control of the client such as the cessation of a lease.

A. Outright Ownership

The option of outright ownership of oil exists as with any other asset, and this may be a preferable situation for a client who is a domiciliary of Texas with small royalty interest in limited counties. Outright mineral ownership provides ease of administration and income tax accounting is reflected solely on the individual 1040 which can be a cost saving reason to continue to just deposit the “mailbox money” and keep on living their best lives.

As the interest of ownership changes or the extent of ownership moves to greater properties in more diverse locations then additional estate planning techniques should be discussed with the client.

B. Revocable Trusts

As estate planners, we are familiar with revocable trust planning, whether or not the trust has more significant tax planning. The benefits of revocable trusts as it relates specifically to oil and gas, even with the ease of probate procedures in Texas, include, but are not limited to, (i) tax planning within the trust for minimization of estate and generation skipping taxes; (ii) providing a non-guardianship plan of asset management for assets that may be well beyond the expertise and even baseline knowledge of a guardian of the estate; (iii) allowing for a more private transfer of assets; (iv) decreased fractionalization of oil and gas assets; and, avoidance of perfecting title in a

large number of Texas counties; as well as (vi) avoidance of ancillary probate for ownership interests held outside Texas.[62] Aside from the well-known estate tax planning uses for revocable trust, the other listen reasons are often the most important factors for a client to choose revocable trust planning and warrant more discussion.

First, ensuring a component individual to manage oil and gas assets during the period of incapacity of the settlor and the opportunity for the settlor to choose the manager of the assets is best done with a revocable trust. Even the most financial involved of spouses will often continue to cede oil and gas decisions to the spouse in the industry. Additionally, children often find different career paths and passions leaving the most often-appointed guardians of the estate (or agents under a durable power of attorney) with little to no experience or knowledge on the management of these peculiar assets. This might be of a smaller concern with a small royalty interest and corresponding "mailbox money," but even then accounting and income tax considerations exist such that a baseline knowledge of the trustee to deal with accountants and other advisors. A trust allows the settlor to choose a trusted business partner or a well-respected bank to assist in the oil and gas management even if a spouse or child remains in control of distributions from the trust.

Second, given present political climate in some parts of the country, some clients are opting for a revocable trust to make ownership in fossil fuels less directly linked to their individual name. A generic trust name like the J. Smith Trust can create reasonable explanations or vagueness on beneficial ownership.

Third, trust planning can minimize fractionalization, which can become an administrative burden that can outpace the income derived therefrom. A small ownership can quickly splinter to a point where the burden of accounting the income outweighs the income. As an example, many in the older homes in the City of Midland actually own a portion of the royalty underneath their residential lots. Many homes retained their mineral estate given that technology made them practically impossible to exploit; however, these are now open to production thanks to horizontal drilling and hydraulic fracturing technology. The owner of a one-quarter (1/4) royalty under a quarter acre lot with four kids who take equally upon final distribution of his estate and the net mineral acre is already quite small with only one generation of division.

Fourth, as is discussed in detail in Section V. below, a properly funded revocable trust can avoid the expense of filing the probate transcript in dozens of counties.

Lastly, and as is often the single reason for revocable trust planning, is out of state interest. As part of the accepted compensation structure in many historic oil and gas deals, those involved in finding a play are not those with the pockets to develop the minerals. Often a geologist, an engineer, a landman, and potentially others, identify a potential reservoir, determine if the minerals are already leased, and if there is potential begin to shop the play to operators with the financial wherewithal to actually develop the play. In compensation, these original individuals are often

[62] For a more in-depth discussion see R. Shaun Rainey, *Will v. Trust: Decisions on the Front End*, Handling Your First (or Next) Trust, Chapter 1, TexasBarCLE, State Bar of Texas, April 16, 2021, Austin, Texas.

given, at least in part, an overriding royalty interest in the lease. A geologist who has been in the industry for decades will quickly amass various interests some of which may be out of state.[63]

While New Mexico procedure for ancillary probate is very simple and relatively inexpensive when there is an open probate of the decedent's estate in her domiciliary jurisdiction, other oil and gas producing states are not as easily handled. (Oklahoma comes to mind). The use of a properly funded revocable trust can minimize the expense and delay of ancillary probate in multiple jurisdictions.

It is necessary to prepare conveyances of the interest into the name of the Trustee (or Co-Trustees) of the Revocable Trust in addition to recording a Certification of Trust in each county of ownership. The conveyance (deeds or assignments as appropriate) should contain good recitals, which will allow the title examiner to clearly follow the chain. Additionally, letters in lieu of division order with a W-9 should be sent to all operators to ensure that the land department does not place the interest into suspense. Though letters in division order and a new W-9 are recommended, the interests will still be taxed under the social security number of the taxpayer which is one benefit of revocable trust planning with minerals.

C. Irrevocable Trusts

While a revocable trust accomplishes several estate planning goals such as incapacity planning and probate avoidance; however, the ownership of assets within a revocable trust are fully includable in the gross estate of the decedent upon the federal estate tax return (Form 706) on death. Therefore, many clients opt for irrevocable trusts. Similar to any other asset, a gift (or a sale) to an irrevocable trust removes the asset from the estate of the giftor and depending on the structure used can still be available for some benefit to the settlor. Other general benefits of an irrevocable trust can include continued control of the assets under the Trustee structure of the Trust, creditor protection for the beneficiaries, including upon divorce; and, minimization of fractionalization.

Any transfer to an irrevocable trust requires a conveyance to the trustee and a letter in lieu and W-9 which will reflect the EIN of the trust.[64]

i. *Intentionally Defective Grantor Trust*

Intentionally defective grantor trusts are still a popular tool used to benefit the next generation in the most tax advantageous manner possible. While the gift is complete for estate and gift tax purposes, it is incomplete for income tax purposes due to a power enumerated in Sections 670-697 of the Internal Revenue Code. The tax liability belongs to the grantor, not the trust. These are intentionally defective for the purpose of shifting the income tax burden so that (1) the corpus of the trust can grow (2) the payment of income taxes operate as the equivalent of a

[63] The geology of the Permian Basin does not respect the political borders between Texas and New Mexico and there is significant development in the southeastern three counties of Chaves, Eddy, and Lea Counties, New Mexico.

[64] For a case study on the use of intentionally defective grantor trusts, see Michael Bourland, Jeremy R. Pruett, and Dustin Willey, *Estate Planning for Mineral Interest*, 35th Annual Estate Planning and Probate Couse, Chapter 19, TexasBarCLE, State Bar of Texas, June 8-10, 2011, Fort Worth, Texas.

tax free gift; and, (3) to allow income taxation at individual tax brackets rather than the highly compressed trust brackets. Such powers could be retained by the settlor or can be given to a beneficiary of the trust of course means that the settlor's grantor status cause income tax to be paid by the settlor which. Proper drafting can also provide for a toggle that can be used to remove the grantor status of the trust if the income tax outpaces the settlors available cash flow.

The properly drafted intentionally defective grantor trust will make the grantor (either the settlor or beneficiary) liable for the income tax generated from the income of the trust. However, it is possible to give the certain trustees[65] of the intentionally defective trust, the sole and absolute discretion to make distributions to the Internal Revenue Service (or similar state agency) in order to satisfy any federal or state income tax liability incurred by the grantor which is attributable to income of the intentionally defective grantor trust.[66]

ii. *Annual Demand Trust*

An annual demand trust is an irrevocable asset trust that is designed to receive gifts that are excluded from gift tax under annual exclusion contained in Section 2503(b) of the Internal Revenue Code. If the terms of the trust properly drafted, and the gift to the trust is documented correctly, then the gift to the trust will not be a taxable gift. In order to qualify as an annual exclusion gift under Section 2503(b) the beneficiary must have a right to withdraw the gift made to a trust for a certain time period. If the gift is not withdrawn, the right lapses as to the gift and the gift becomes part of the trust corpus.

iii. *Spousal Lifetime Access Trust*

Spousal lifetime access trusts may be used to benefit a spouse during their lifetime which again allows the settlor to use lifetime exemption amount (particularly prior to any potential tax law changes including presently filed legislation which may pass or the automatic sunset provision of the Tax Cuts and Jobs Act in 2026). In the creation of a spousal lifetime access trust, one spouse (the "Donor Spouse") creates an irrevocable lifetime trust for the primary benefit of the other spouse (the "Donee Spouse"). Spousal lifetime access trusts are often drafted to be similar in overall structure and effect to a traditional "bypass trust" (or "credit shelter trust"), except a spousal lifetime access trust is created while both spouses are living rather than upon the death of the first spouse.[67]

iv. *Grantor Retained (Income or Annuity) Trust*

A grantor retained trust (either income or annuity) can be used to remove the value of the irrevocable gift from the settlors gross estate while also providing for continuing cash flow to the settlor for a limited period of time, this can be in the form of an annuity or income for a period of

[65] Such trustee may not be related or subordinate to the grantor as defined in Section 672.
[66] See Revenue Ruling 2004-64; PLR 200120021.
[67] For a deep discussion on spousal lifetime access trusts, *see* Matt G. Lueders, *All that Glitters is Not Gold: Ten Common Issues to Consider for SLAT Planning*, Chapter 12, 34th Annual Estate Planning & Probate Drafting, TexasBarCLE, State Bar of Texas, October 12-13, 2023, Houston, Texas.

years.[68] This option is preferred for those younger settlors or those whose life style will require the cash flow, but there is a desire to remove the growth and a portion of current value from the gross estate for estate tax purposes.

D. Entity Planning

Forming and funding an entity with oil and gas assets interests allows the transferor to establish a system for managing and maintaining the interest during and after the transferor's lifetime.

i. *Reasons for Entity Planning*

First, entity planning allows for continued management of mineral interests even as a portion of the entity may be sold or gratuitously transferred. This is often a primary purpose for the use of entities with many clients. Not surprisingly it is often the generation of individuals that obtained the mineral interest who have the best understanding of the market and the marketplace for transactions and are best positioned to manage the assets for growth, but have a need or desire to minimize their ownership. In these instances entities can be the best way to allow for transfers from the generation with an estate tax concern while allowing them continued management of the assets for the best potential of growth.

Second, entities allow for the continued holding of oil and gas assets for generations without fractionalization, which can make the assets uneconomical to manage, as well as allowing for continuation of the oil and gas investment strategies that created the wealth. The terms of the partnership agreement can be modified to limit who can receive an interest in the entity. Specifically, the agreement can include appropriate buy/sell terms in the operating agreement cthat prevent anyone outside the transferor's family (or included individuals) from ownership in the entity.

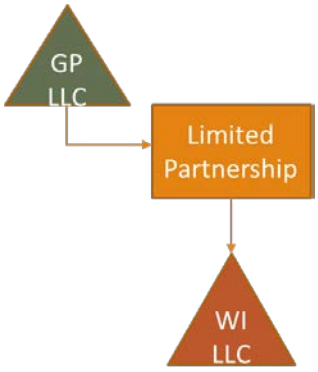
Third, good estate planning often involves discussion on good asset protection planning. It is a well-known maxim in asset protection that one should separate assets from liabilities. This means two things with regard to oil and gas interests. First, each of us in our daily lives creates the potential for liability, we transact ordinary household business, we drive our cars, and our professions may carry a layer of personal liability. In doing so, we of course accept a measure of acceptable risk, minimized with insurance, however, oil and gas assets are generally outside the list of protected assets in a suit for wrongful death following a car accident or a claim of malpractice. It is prudent then to take minerals and place them in an entity to minimize risk. Additionally, it is recommended to segregate the non-cost bearing and cost-bearing interests. Keeping royalty and overriding royalty in a distinct entity from the working interests is a better protection mechanism and ensuring cash flow. It is also a better estate planning tool as the value of a working interest is less than a royalty and planning can concentrate on compressing the value of the asset or suspending growth within the estate of the giftor.

[68] See Christine S. Wakeman, *Trust Alphabet Soup*, Handling Your First (or Next) Trust, Chapter 3, TexasBarCLE, State Bar of Texas, April 16, 2021, Austin, Texas.

ii. *Income Tax Implications of Oil & Gas Partnerships*

A limited liability company or a limited partnership are often the best option for entity planning with minerals. Each provides for asset protection by segregating assets, both minerals from other general potential liabilities as well as cost bearing and non-cost bearing interests, and provides for income tax advantages as compared to other ownership. Having the partnership tax treatment, as can be elected for an LLC allows for the income to flow through to owners without a level of corporate income taxation which would occur with a C-Corporation while not being subject to the restrictions on owners (particularly related to ownership in trust) with an S-Corporation. A combination approach can provide the best of each options.

As an example a LLC, Management LLC, can be created to serve as the general partner of a LP, which will hold non-cost bearing mineral interests. While no longer a legal requirement, providing the LLC with a small ownership interest of 1-3% (depending on income from the royalty) ensures that the LLC will have sufficient assets for expenses of management and operation upon a distribution from the LP, which should always be made pro rata among all partners.[69] Management LLC can also take a small interest in, or merely enter into a contractual relationship with Working Interest, LLC that is created to hold the cost bearing mineral interests.



Oil and gas entities which are taxed as partnerships are unique in several ways under the internal revenue code, and they hold oil and gas property in a unique manner for tax purposes. Given this fact, having an advisor that is comfortable with the taxation of oil and gas partnerships will be important in assisting your clients with their planning needs as these complexities exist even in the simplest plans when a tax partnership is utilized.[70]

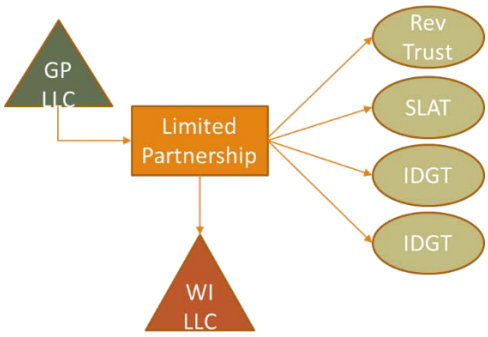
E. Using Entities and Trusts

While these common tools can be used in combination to most effectively and efficiently accomplish the client's objectives. However, from my own practice, once the ownership of mineral interest reaches a tipping point, whether that's number of net mineral acres, in various

[69] Though thorough discussion on the topic is beyond the scope off this article, making a non pro rata distribution from a partnership requires changes to the internal capital accounts. For purposes of estate planning capital account adjustments can adversely affect the valuation of partnership interests for reporting a transaction, gift, or at death, as well as can be treated as an unintended gift for the purposes of the gift tax.

[70] For a more in depth discussion, see *What Every Estate Planner Need to Know About Mineral Interests*, supra.

locations, or a combination of non-cost bearing and cost bearing interest, my recommendation is to rely on entities and thereafter ownership of the entity could be transferred into a revocable trust or used in common estate planning transactions with trusts. The flexibility of the entity ownership, which could be dissolved and distributed to its owners if ever advantageous to do so, allows to asset protection coupled with other estate planning objectives.



Additionally, it is well worth exploring common estate planning methods after an entity has been created and in funding transfers to minimize the taxable estate including sales to intentionally defective grantor trusts for a combination of the estate tax benefit setting the price of the asset in the taxable estate of the seller coupled with the income tax benefit of the seller paying the income tax of the trust due to its grantor status. Other techniques like a spousal lifetime access trust from one spouse to another or a grantor retained trust to maintain cash flow for your clients for life or a term of years better fit the client's objectives may be more appropriate to the clients wishes. The benefit of the entity interest being the transferred asset is that the entity need not make a distribution to its owners above that prudent (necessary) to fulfill obligations of the owners to beneficiaries.

As you can see once entities are properly funded a combination of entities and trusts can accomplish many of the same estate planning goals as marketable securities, though the potential volatility of the commodities market does make it a less desirable asset for certain transactions or gifting relying heavily upon future performance to ensure a positive outcome.

F. Trust Funding

If the goal of planning with minerals is to minimize the estate tax burden, then it is necessary to remove the assets from the gross estate. This can be accomplished through outright gifting of the assets, or outright gifting of interest in entities, which may be created. In an outright gift, conveyancing documents are necessary and the recipient should provide a letter in lieu of division order and W-9.

i. *Annual Exclusion Gifts*

If the gift is being made to an annual demand trust, then an annual exclusion gift[71] allows a donor to make a gift each year to individuals that, if not over a certain amount, will not be a taxable gift. This gift can be given each year. However, a gift of family limited partnership interest

[71] Defined in Section 2503(b) of the IRC.

has failed to qualify for the gift tax annual exclusion, as there was no immediate enjoyment of the donated property, because the donees had no ability to withdraw from their capital accounts and because the partners could not sell their interest without written consent of all other parties.[72]

ii. *Taxable Gifts*

A client may decide to make a "taxable gift" to a trust, or simply a gift in excess of the annual exclusion amount. The federal estate and gift taxation regimes are simply a tax on the right to transfer property to another in life (inter vivos) or at death. Each tax is assessed based upon the value at the date of the gift of the property given. However, a unified tax credit against both the federal estate tax and gift tax is provided.[73]

iii. *Defined Value Gifts*

A client could also use a formula gift using a "defined value clause" to an irrevocable trust. Here, the taxpayer determines how much gift tax the taxpayer wants to pay or how much unified credit the taxpayer wants to use and makes a "defined value" gift of property (minerals or interest in a mineral entity) in the amount of $X to the irrevocable trust.

iv. *Sale*

A client, not wishing to use their unified credit amount or in need of cash flow from the asset to be gifted, may s instead choose to sell the desired asset to an irrevocable trust in a sale transaction in exchange some appropriate form of consideration, including on a note. In this technique, the client is able to transfer the future appreciation of the asset without income or gift tax consequences.

VII. MANAGEMENT OF OIL & GAS DURING ADMINISTRATION OF AN ESTATE

In the administration of an estate a personal representative as not only the right, but an obligation, to take possession of property belonging to the estate.[74] While in many estates with oil and gas interests, this may involve little more than a review of division orders and receipt, accounting, and taxation of royalty payments, if an estate includes properties that are actively producing or undergoing development, the personal representative may be required to undertake the active management of the properties, from the review and payment of joint interest billings (JIBs) to taking an active role in daily aspects of working operations.

While this section will discuss the matters arising in a probate administration, the same principles apply when the minerals are held by a trust, or even a smaller entity without internal

[72] *See* Stephen R. Akers, Case Summaries, *Price v. Commissioner*, T.C. Memo. 2010-2, accessed at https://www.bessemertrust.com/insights/price-v-commissioner-tc-memo-2010-2

[73] See Section 2505, IRC.

[74] Tex. Estates Code § 101.003; *see also Jones v. Lee*, 22 S.W. 1092 (Tex. 1893); *Atlantic Ins. Co. v. Fulfs*, 417 S.W.2d 302-(Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Bloom v. Bear*, 706 S.W.2d 146 (Tex. App.—Houston 1986, no writ).

employees to manage the assets such as the single member or member managed limited liability company.

A. Management Authority Related to Oil & Gas

A personal representative is entitled to manage assets including real property, including any oil and gas, interests as provided in the code as supplemented or limited by the will.[75] A personal representative has the duty to preserve estate property, caring for it with the same care as a prudent person would take with his or her own property.[76]

i. *Collection of Revenue and Payment of Expenses*

The right of a personal representative to possession of the probate estate includes the proceeds from the production of oil and gas.[77] Once letters have been granted and issued, those responsible for payment of production proceeds may be expected to begin payment to the personal representation upon receipt of documentation of the personal representative's authority, generally a copy of letters testamentary and will or letters of administration with an order determining the heirs of a decedent as well as a letter in lieu of division order discussed in Section IV.D. below and a W-9. A personal representative may, without an order specifically authorizing the action, execute division orders, transfer orders, and similar instruments of an administrative nature.[78]

As it relates to ordinary expenses such as lease operating, repair, workover, and other expenses that routinely arise in operating and maintaining working interest properties, the personal representative shall pay necessary and reasonable expenses incurred in the preservation, safekeeping, and management of the estate.[79] Therefore, a personal representative may pay this expenses without the necessity of further court order.[80]

However, the authority of a personal representative to undertake more expensive projects with greater risk involved such as the participation in drilling operations is less clear. Expensive operations may be essential to the development or retention of a property, but with the potential risk it may be questionable whether the prudent investor would undertake the expense. A well-drafted will may remove doubt about the right of the personal representative to proceed with an action, such as:

> "**Mineral and Alternative Energy Properties**
> The [Fiduciary] may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate. The [Fiduciary] may pool or unitize any or all of the lands, mineral leaseholds or

[75] Tex. Estates Code § 351.101.
[76] *Id*.
[77] *See Oldham v. Keaton*, 597 S.W.2d 938 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).
[78] Tex. Estates Code § 358.201.
[79] Tex. Estates Code § 352.051; for discussion on 'necessary and reasonable' see *Morton's Estate v. Ferguson*, 45 S.W.2d 419 (Tex. Civ. App.—Eastland 1932, writ ref'd).
[80] Though a declaratory judgment pursuant to Tex. Civ. Prac. & Rem. Code § 37.005 may still be advisable for the protection of the personal representative.

mineral interests of its estate with others for the purpose of developing and producing oil, gas or other minerals, and make leases or assignments containing the right to pool or unitize. The [Fiduciary] may enter into contracts and agreements relating to the installation or operation of absorption, repressuring and other processing plants, drill or contract for the drilling of wells for oil, gas or other minerals, enter into, renew and extend operating agreements and exploration contracts, engage in secondary and tertiary recovery operations, make "bottom hole" or "dry hole" contributions, and deal otherwise with respect to mineral properties as an individual owner might deal with his or her own properties. The [Fiduciary] may enter into contracts, conveyances and other agreements or transfers deemed necessary or desirable to carry out these powers, including division orders, oil, gas or other hydrocarbon sales contracts, processing agreements, and other contracts relating to the processing, handling, treating, transporting and marketing of oil, gas or other mineral production. The term "mineral" means minerals of whatever kind and wherever located, whether surface or subsurface deposits, including (without limitation) coal, lignite and other hydrocarbons, iron ore, and uranium. The [Fiduciary] may acquire, maintain, manage, or sell rights and interests relating to alternative energy resources, and make leases for the purpose of exploring for, generating, harnessing or transmitting alternative energy on any lands forming a part of its estate, including leases for periods extending beyond the duration of its estate. The [Fiduciary] may cooperate with others for the purpose of developing, harnessing or transmitting alternative energy. The [Fidcuiary] may enter into contracts and agreements relating to the installation or operation of alternative energy equipment such as data gathering equipment, wind turbines or solar arrays, or contract for the harnessing or transmission of alternative energy. The [Fiduciary] may enter into, renew and extend operating agreements and exploration contracts, and deal otherwise with respect to such alternative energy endeavors as an individual owner might deal with his or her own properties. The [Fidcuiary] may enter into contracts, conveyances, leases and other agreements and execute all instruments deemed necessary or desirable to carry out these powers for the exploration, construction, maintenance, generation, harnessing, processing, handling, transmission and marketing of alternative energy as well as the replacement or removal of data gathering equipment, wind turbines, solar arrays, monitoring facilities, gathering facilities, transmission facilities or other similar facilities and equipment. The term "alternative energy resources" means all energy resources other than minerals, including (without limitation) wind, solar and geothermal energy resources."[81]

If there is any doubt about the personal representative's authority to act or a concern that the beneficiaries may not find the allowed action advisable, the personal representative is well advised to seek the express written consent of the estate's beneficiaries who will be directly affected by the action[82] or seek declaratory judgment as to the action to be taken.[83]

[81] Language taken from Cotton, Bledsoe, Tighe & Dawson, PC form language.
[82] Family settlement agreements are favored under public policy. *See Stringfellow v. Early*, 40 S.W. 871 (Tex. Civ. App. 1897, writ dism'd).
[83] Tex. Civ. Prac. & Rem. Code § 37.005.

ii. *Power of Personal Representative to Enter into a Sale or Lease*

During the administration of an estate it may be necessary to sell or mortgage property of the estate to generate funds for the payment of debts or taxes or for specific bequests, or a sale may be advisable for any number of reasons which are permissible under the Estates Code or the will.[84] Many wills expressly grant an executor to authority to sell estate property, and in such circumstances the power to undertake a sale or a lease is unlikely to be questioned. [85] The advisability of the transaction is always open to interpretation and a prudent personal representative will likely seek the advice and consent of beneficiaries or even approval by the court through declaratory judgment in contentious matters.

When a power to sell is granted in the will, sales or mortgages may be made only as provided by statute, unless otherwise specifically authorized in the will.[86] In addition to the sale for payment of debts, expenses and costs, estate property may be sold or mortgaged to pay representative may sell when a sale is deemed to be in a best interest of the estate.[87] A personal representative without power of sale by the express language of a will, or by the agreement of the parties, may still validly convey (as against other claimants) estate property, including interests in natural resources, without a court order,[88] and the propriety of such a sale will be presumed upon examination if it can be shown that any debt against the estate existed at the time of the sale.[89] Otherwise, an order of the probate court authorizing sales or mortgages must be sought.[90] However, reliance upon this line of cases from an administration standpoint is ill advised.

If an opportunity is presented to lease previously unleased minerals, in most circumstances this would be favorable to take advantage of what might be a limited time opportunity; however, great care should be taken in negotiating the terms of the lease for the benefit of all beneficiaries.

A personal representative with the power of sale may execute an oil and gas lease on estate property without court approval.[91] However, a personal representative who is without the power of sale may only lease after applying to the probate court for authority to do so.[92] The probate court may be expected to grant the personal representative authority to lease routinely, but the statutory procedure for obtaining the court's order should be carefully followed.

If a personal representative has the opportunity to execute an oil and gas lease or other lease of natural resources during administration of the estate, he or she should of course be careful, in keeping with fiduciary responsibility, to negotiate as favorable a lease as reasonably possible.

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[84] Tex. Estates Code § 356.251.
[85] Tex. Estates Code § 356.002.
[86] Tex. Estates Code § 356.001.
[87] Tex. Estates Code § 356.251(2).
[88] *Carlton v. Goebler*, 58 S.W. 829 (Tex. 1901); *Buckner Orphans Home v. Maben*, 252 S.W.2d 726 (Tex. Civ. App.—Eastland 1952, no writ).
[89] *Blanton v. Mayes*, 19 S.W. 452 (Tex. 1889). A purchase from an independent executor or administrator is protected against claims that a power of sale was improperly exercised by obtaining the personal representative's affidavit that the sale was necessary or advisable for the purposes for which a court could order sale. Tex. Estates Code § 402.053(a)(3); see also § 356.251.
[90] Tex. Estates Code § 356.001(a).
[91] *Lowrance v. Whitfield*, 752 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1988, writ denied).
[92] *See* Tex. Estates Code §§ 358.051-.102.

Key elements of a lease, such as the amount of leasing bonus, royalty rate, and length of primary term, are typically negotiable, at least to an extent, and a lessee's first offer is seldom the best one it is willing to make. A lease form submitted by a prospective lessee is usually also capable of modification to improve it in the lessor's favor. For example, lessors should very often try to incorporate provisions, not often in a lessee's preferred lease form, that will allow the lease to be perpetuated beyond its primary term or after a period of development only as to land and subsurface depths that have been drilled and developed, not as to acreage that remains undeveloped. If the personal representative and his or her counsel are not knowledgeable about leasing and negotiation in the context of natural resources, they should seek guidance from those who are as a matter of fiduciary duty and professional competence, respectively.

As a practical matter, where it is clear that there are no unpaid debts of the estate and no need to sell assets to provide for pecuniary bequests, the need for an order authorizing the sale or lease of property may be avoided by having the heirs or devisees who are entitled to the property join in the transaction. They are the owners immediately upon the decedent's death, and their sale or lease is fully effective,[93] unless the property must be sold to satisfy creditors.[94] Additionally, the ownership interest at death in the beneficiaries is transferable by beneficiaries which will be charged with the share of debts or unpaid expenses.[95]

B. Valuation of Mineral Interests

As with any other types of property, the cornerstone in valuation of mineral interests is the amount a willing buyer would pay a willing seller for the property, both parties having reasonably complete knowledge of the relevant facts.[96] Unlike the sale of a home where comparable sales in a relevant time period may be easy to find for a valuation, the sales price of mineral interests is not generally readily available public information, or may be of such size that the overall price is does not provide a reasonable basis to determine the value of a small interest within the overall sale, or the specific terms may be so wildly variable as to make comparison difficult.

While a less formal valuation can be appropriate for use in the probate inventory of a non-taxable estate, particularly when beneficiaries will take an undivided equal distribution in kind, when the interest is truly so small as to warrant little attention, or the beneficiaries agree to some other mechanism of valuation.

However, there are instances when a formal valuation will be necessary such as the filing of the federal tax return (Form 706 for a decedent's estate or a Form 709 for a lifetime gift by the transferor), the will requires it, it is necessary for the sale of some of the interests for payment of debts or expenses, or it is demanded by beneficiaries. Engineers and other professionals experienced in gathering and analyzing well and reservoir data may be engaged to project a property's expected performance over time as a prospective buyer would and arrive at an appraisal

[93] *Littlefield v. Ungren*, 206 S.W.2d 152 (Tex. Civ. App.—Eastland 1947; writ ref'd n.r.e.).
[94] *See Clemmons v. McDowell*, 12 S.W.2d 955 (Tex. Comm'n App. 1929, judgm't adopted).
[95] *See Littlefield v. Ungren*, 206 S.W.2d 152 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.).
[96] *See Montrose Cemetery Co. v. Commissioner*, 105 F.2d 238, 242 (7th Cir. 1939), aff'd, 309 U.S. 622 (1940); *see also* Rhett G. Campbell, *Valuing Oil and Gas Reserves in Court*, 23 State Bar of Tex. Advanced Oil, Gas & Energy Res. L. Course Ch. 14 (2005).

of its value. Such a professional appraisal, though costly, should ordinarily avoid serious challenges when establishing market value is especially important. Therefore, whether or not to obtain a formal qualified appraisal of mineral interests depends greatly on the situation.

i. *Probate Inventory and Less Formal Determination of Value*

It is a statutory requirement that a personal representative of an estate prepare an inventory of probate assets with their value.[97] Of course the value on the inventory is determined in good faith upon relevant information by the personal representative[98] in the absence of court ordered appraisers.[99]

Though not a qualified appraisal, a general accepted reasonable calculation of value of a mineral interest that can be used for informal purposes would be 36 to 60 months net proceeds. This is particularly useful for an inventory in a non-taxable estate and for information purposes to beneficiaries receiving and undivided equal interest. If records are readily available for that period of time then simple addition will suffice; however, it is also acceptable to take the number of months readily available in records and then reduce that to an average monthly payment multiplied by the 36 to 60 month multiplier. As to the decision between using 36 (or 48) or 60 months, several factors can be used: (i) the relative stability of production over the period; (ii) nature of the interest (cost bearing and non-cost bearing); (iii) potential future operations on the property; (iv) a little research through the Railroad Commission website may provide information on permitted wells in a field or other activity which may guide the decision. For example, an old vertical field which has little likelihood of horizontal production or hydraulic fracturing workover would warrant only 36 month multiplier, but a field ripe with new horizontal wells permitted and in progress should ere on the side of 60 month multiplier.

While the above calculation works with producing properties, non-producing properties present a challenge, namely that data from which income expectations might be constructed may be unavailable. There are those who proposed an alternate rule of thumb that a mineral property owned in fee simple has a value of two to three times the amount of the recent bonuses paid for leasing in the area. However, this proves difficult to determine unless counsel or the client has some knowledge, which may be confidential or privileged, about the transactions in the area. Further, lease bonuses are often highly variable even in a short period of time or a relatively close geographic area. If the area is not subject to present leasing, the value of the interest is likely negligible, but generally never worthless.

ii. *Qualified Appraisals*

In valuation of mineral interest there times when a formal, qualified appraisal is both warranted and required. To ensure full and adequate disclosure on the federal estate tax (Form 706 or Form 709), the filing individual must report the value of the property transferred, including a detailed description of the method used in determining the fair market value of the property

[97] Tex. Estates Code § 309.051(b).
[98] Tex. Estates Code § 309.051; *see also Brown v. Fleming*, 212 S.W. 483, 485 (Tex. Comm'n App. 1919).
[99] The probate court may appoint appraisers but does so only for good cause on the court's own motion or that of an interested party. See Tex. Estates Code § 309.001(a).

transferred, noting any financial data used (e.g., balance sheets and income statements with explanations of any adjustments) in valuing the property transferred and specific details regarding the use of any valuation discounts or adjustments.[100] Given the complexity related to minerals, a valuation from a qualified appraiser is necessary.

The relevant Treasury Regulations to oil and gas valuations state, "Fair market value of a property is that amount which would induce a willing seller to sell and a willing buyer to purchase."[101] If the fair market value must be ascertained as of a certain date, analytical appraisal methods will not be used if: (1) the value of a property can be determined upon the basis of cost or comparative values and replacement value of equipment; or (2) the fair market value can reasonably be determined by any other method.[102]

As such, valuation of mineral interests is much more often based upon various characteristics of the property that would be relevant in a hypothetical sale, which include the amount of the oil and gas capable of being produced, the expected rate of production, the cost of future development, if any, and of operation for interests that bear costs.[103] Therefore, in the valuation of mineral interests is normally highly reliant upon on the anticipated future net cash flow from the interest on an annual basis.[104] Additionally, the future revenue stream from the interest is tied to current as well as future commodities market prices, with all the volatility involved, make the valuation of mineral interests particularly challenging.

To minimize the risk of audit, a qualified appraiser with experience in mineral valuation should be hired. The appraiser should meet the following professional requirements: (i) hold themselves out to the public as an appraiser who performs appraisals regularly, (ii) in light of the appraiser's qualifications that are detailed in the report (including background, experience, education, and professional memberships and associations, and it therefore qualified to make an appraisal of the type of property being reported; and (iii) the appraiser is not the donor, beneficiary, or member of the family of either or any person employed by the donor, beneficiary, or member of the family of either.[105]

The report itself must include the following information: (1) the date of the valuation (date of the gift, date of death, or the alternate valuation date), the date on which the transferred property was appraised, and the purpose of the appraisal; (2) a description of the property; (3) a description of the appraisal process employed; (4) a description of the assumptions, hypothetical conditions, and any limiting conditions and restrictions on the transferred property that affect the analyses, opinions, and conclusions; and (5) the information considered in determining the appraised value, including data that was used in determining the value of the interest so that another person could replicate the appraisal process (in the case of business interests).[106] Further, the appraisal must

[100] Treas. Reg. §§ 301.6501(c)-1(f)(2)(i)-(iv).
[101] Treas. Reg. § 1.611- 1(d)(2).
[102] Treas. Reg. § 1.611-2(d)((2); *see also Green v. United States*, 460 F.2d 412 (5th Cir. 1972).
[103] Treas. Reg. § 1.611-2(e)(4).
[104] *See* Oil & Gas Audit Technique Guide, Publication 5652 (2-2023), Department of the Treasury, Internal Revenue Service, Revision Date: 2/24/2023.
[105] Treas. Reg. § 301.6501-1(f)(3)(i)
[106] Treas. Reg. § 301.6501(c)-1.

follow the procedures outlined in the report and the reasoning must supports the valuation given.[107] Lastly, the report must include the valuation method used (e.g., comparable sales or transactions or sales of similar interests) and the rationale for using such method.[108]

V. PERFECTING AND TRANSFERRING TITLE AND PREVENTING TITLE DEFECTS

A. Definition of Perfecting Title

Perfecting title out of the decedent's estate occurs when certain instruments (e.g., affidavits of heirship, certified copies of domestic/Texas probate proceedings, or exemplified copies of foreign/out of state probate proceedings) are recorded in every county in which the decedent owned real property. Perfecting title allows a title examiner to ascertain the identity of the new owners, ascertain the nature of their ownership, and in the case of executors, administrators or community survivors, determine that the respective party has the authority to convey the decedent's real property without court approval and free and clear of any claims of creditors and taxing authorities. Each method of perfecting title (e.g., affidavits of heirship, certified copies of domestic/Texas probate proceedings, or exemplified copies of foreign/out of state probate proceedings) is discussed below.

B. Perfecting Title to Real Property

The proper recording of an affidavit of heirship, or domestic/Texas or foreign/out of state probate proceedings, which include the decedent's will, is only the first step in determining passage of title upon the death of the owner of the property. Unless these recorded instruments provide the answers to several questions, additional work and/or title requirements by a title examiner may be required in order to perfect title in the heirs or devisees of the decedent.

Upon the death of the owner of record title to real property, whether the owner dies testate or intestate, the most common inquiries by a title examiner concern the following:

1. The date of death of a decedent;
2. Whether the property is separate or community property;
3. Whether the property is homestead or non-homestead property;
4. Whether there are probate or administration proceedings on the decedent's estate;
5. The identity of the heirs or devisees of the decedent, and those heirs and devisees who have survived the decedent;
6. Whether any of the heirs or devisees are minors;
7. In the case of oil, gas and other minerals, whether the property was producing on the date of decedent's death (Open Mine doctrine); and
8. Whether there are any debts, inheritance taxes or federal estate taxes owing on the estate of the decedent.

Complete information concerning each of the above inquiries is necessary in order to perfect title to the decedent's real property in the heirs or devisees. To the extent that affidavits of

[107] *Id*.
[108] *Id*.

heirship, probate proceedings or other instruments recorded in the county records do not disclose this information, title examiners will typically make title requirements to obtain the necessary information in order to form an opinion concerning the ownership of the decedent's property.

i. *Affidavits of Heirship*

While the Texas Estates Code provides for judicial proceedings to determine heirship when the owner of record title dies without a will and there has been no administration, or where property owned by a decedent is not disposed of by the will, this procedure may not be used at times for various reasons, even though it offers protections against claims by unknown heirs and creditors.[109] It is not uncommon for some use an affidavit of heirship to determine and identify the heirs of the decedent, particularly when attempting to transfer title to oil and gas. Title examiners in determining ownership of oil, gas and other minerals, regularly rely on said affidavits and credit the ownership based upon such affidavits of heirship, in the absence of information to the contrary.

If an affidavit of heirship will be obtained, it is desirable for the affiant to be related to the decedent but not interested in the decedent's estate (someone that will not inherit from the decedent). However, it may be that an interest heir must be the affiant. If this is the case, however, then a supporting affidavit should also be obtained from a non-interested party.

As provided in Texas Estates Code, the prompt recording of said affidavits in the counties where the real property owned by the decedent is located or in the county in which decedent had his residence at the time of death, will, after five (5) years, constitute prima facie evidence of the facts stated.[110] If an affidavit of heirship will be used to determine the ownership of the decedent's estate, said affidavit should be in the form provided for in the Texas Estates Code[111], or at least contain the same information as necessitated therein.

ii. *Texas Domiciliary Probate*

The most common method of perfecting title to a decedent's real property is by recording a certified copy of the probate proceedings in the counties in which the decedent owned real property. Ideally, in the view of the title examiner, a certified copy of the decedent's complete probate proceedings would be recorded in each county in which the decedent owned real property. However, at a minimum, a title examiner will want to look at the following:

1. Application for probate of will;
2. Decedent's will;
3. Citation and return of service;*
4. Order admitting will to probate;
5. Letters testamentary; and,
6. Any disclaimer by a devisee.

[109] Tex. Estates Code § 202.001 - § 204.153.
[110] Tex. Estates Code § 203.001.
[111] Tex. Estates Code § 203.002.

These documents are generally referred to as the "probate transcript." The above-described instruments are sufficient to vest title to the real property of the decedent in the devisees under the will, subject, however, to the possessory right of the personal representative, to debts and to the homestead exemption.[112] If the Order admitting will to probate is more than four (4) years old, title examiners routinely will rely on the recitations contained in the order concerning citation and return of service rather than requiring that citation and return of service be included with the probate proceedings examined. The application for probate of will, while not technically required in order to perfect title of the devisees, should be the source of the same kinds of information as are contained in an affidavit of heirship. It is beneficial for the probate practitioner to include the same information, which is discussed in Section 203.002 of the Estates Code, in the application for probate of will or file a separate affidavit in the proceedings. This may help to eliminate any assumptions and title requirements by the title examiner.

If neither the application nor the decedent's will itself contain sufficient information to determine the character of the property as separate or community or the identity and capacity of the devisees, then a personal representatives distribution deed may be necessary.

iii. *Ancillary Probate*

The Texas Estates Code provides a summary ancillary probate procedure if the will has been admitted in the recording of an exemplified copy of a will admitted to probate in another jurisdiction, together with the probate transcript.[113] Such recording shall have the same effect as a deed of the property covered by the will.[114] The most common error in the recording of foreign wills is recording a merely certified copy (as in a domestic/Texas probate proceeding) rather than an exemplified copy of said proceedings. Without a proper exemplification, a copy of foreign probate proceedings are not entitled to be recorded in the county records and recording without proper exemplification will not be notice to purchasers for value or to creditors, and a title examiner will make a title requirement regarding obtaining a proper exemplified copy of said proceedings. Probate practitioners should always examine the attestation and authentication of foreign probate proceedings before they are filed of record and ensure that evidence concerning the payment of debts and taxes are included, when available. Also, it should be noted that if the foreign will recorded in the county records gives the executor or personal representative a power of sale, then said power of sale can be exercised in Texas without first obtaining a court order. In this instance, title examiners will rely on the sale and will credit title accordingly.

iv. *Muniment of Title*

There are times that a copy of a decedent's will is filed in counties where the decedent owned real estate, even though the will has not been admitted to probate in any jurisdiction. The Texas Estates Code provides that a will is not effective to prove title to decedent's real property until the will is admitted to probate. As such, even though there is a recorded will, a title examiner

[112] Tex. Estates Code § 102.001-102.006.
[113] Tex. Estates Code §§ 501.001, 503.001.
[114] Tex. Estates Code §§ 503.051, 503.052.

will show title to the real property as being owned by the decedent's heirs via the rules of descent and distribution.[115]

The Texas Estates Code provides a procedure by which wills can be admitted to probate as a muniment of title[116], upon a finding that there are no unpaid debts owing by the decedent, except those secured by liens on real estate, and that there is no necessity for administration of the estate.[117] The Texas Estates Code further provides:

> "A person who is entitled to property under the provisions of a will admitted to probate as a muniment of title is entitled to deal with and treat the property in the same manner as if the record of title to the property was vested in the person's name."[118]

C. Confirming Record Title Following Administration

i. *Ownership v. Record Title During Administration*

Under Texas law, all of the decedent's property immediately vests in his or her devisees or heirs at law upon the decedent's death.[119] The property passes subject to the payment of the debts of the decedent, except where it is exempted by law.[120]

ii. *Personal Representative's Distribution Deed*

When a personal representative of the decedent's estate has qualified according to law, the personal representative has the right and duty to take possession of the estate as it existed at the time of the decedent's death, subject to any debts.[121] The personal representative has a duty to take possession of all property, either real or personal, owned or claimed by the decedent.

The personal representative can convey property of the decedent without court order if the sale is authorized by the will.[122] In reviewing title, a title examiner may come across a personal representative's distribution deed. Before accepting said deed, the title examiner must verify that the personal representative had the requisite authority to execute said deed. This comes full circle to recording the certified copies of domestic/Texas probate proceedings and exemplified copies of foreign/out of state probate proceedings in the county in which the decedent owned real property.

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[115] Tex. Estates Code § 256.001.

[116] Muniment means the evidence (such as documents) that enables one to defend the title to an estate or a claim to rights and privileges. "Muniment." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/muniment. Accessed 4 Nov. 2024. From Medieval Latin *munimentum*, from Latin, defense, safeguard, from *munire* to fortify. *Id.*

[117] Tex. Estates Code § 573.001.

[118] Tex. Estates Code § 257.102.

[119] Tex. Estates Code § 101.001.

[120] Tex. Estates Code § 101.051.

[121] Tex. Estates Code §§ 101.003, 351.102 & 351.151; *In re Cokinos, Boisien & Young*, 523 S.W.3d 901, 902 (Tex.App.—Dallas 2017, orig. proceeding).

[122] Tex. Estates Code § 356.002.

The examiner will be able to review said proceedings and verify the authority of the personal representative.

(a) Necessity of a Distribution Deed

One may think that just because the decedent's will devises certain real property to a devisee(s), that a distribution deed is not necessary. It is good practice to always record a distribution deed in the county where the property is located, even if the will devises all of the decedent's estate to a single person or entity. Runsheets or abstracts of title utilized by title examiners are more frequently prepared via online records. Depending on the date of the decedent's death, the probate proceedings may not be covered by the court's online records. The recorded distribution deed may be the only evidence of the decedent's death and possible passage of title, reviewed by the title examiner.

Over the last few decades, the unlimited marital deduction available under the Economic Recovery Tax Act of 1981 has made the use of pecuniary bequests very common in Texas. Such bequests are often expressed in wills by rather complex formulas, and the executor is commonly empowered to satisfy the bequest in cash or in kind and to select assets, well along in administration, to distribute in satisfaction of the pecuniary bequest.[123] When a title examiner is reviewing this provision, the final devisee or beneficiary is not readily ascertainable from the will and a title requirement is more than likely to be made. In this case, an executor's distribution deed is proper to convey the applicable real property to the final devisee or beneficiary, which will avoid any complications in title to the decedent's estate.

Finally, a will may have been poorly drafted and questions may arise as to the disposition of the decedent's estate. In this case, a distribution deed can answer the question of who takes what under the decedent's will and will aid the title examiner in crediting the ownership of the decedent's estate.

(b) Authority of Executor

Among title examiners there is some indecision concerning the authority of the independent executor to execute conveyances and oil, gas and mineral leases affecting decedent's real property. While The Texas Estates Code vests title in the devisees under the will at the time of death, the independent executor has authority, even without express authority in the will, to sell property of the decedent to pay debts of the estate.[124]. Some title examiners cite the case of *Dallas Services for Visually Impaired Children, Inc. v. Broadmoor* for the proposition that as long as the estate has not been closed pursuant to the Texas Estates Code the independent executor may execute conveyances and oil and gas leases, regardless of the existence of debts owing on the estate.[125] Rather than attempt to resolve any uncertainties concerning the power of the independent

[123] Thomas M. Featherson, Jr., *The Flood of Formula Marital Deduction Gifts After the Economic Recovery Tax Act of 1981*, 27 So. Tex. L. Rev. 99 (1985).
[124] Texas Estates Code § 101.001; *Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943).
[125] *Dallas Services for Visually Impaired Children, Inc. v. Broadmoor II*, 635 S.W.2d 572, (Tex. App. - Dallas, 1982, writ ref'd n.r.e.); Tex. Estates Code § 405.001-405.012 (2019).

executor to convey real property, title examiners routinely require that the independent executor and devisees together join in the execution of conveyances and oil, gas and mineral leases.

(c) Successor Executor

An executor may not accept the duty or may die or resign during the pendency of the probate proceedings. Such matters as resignations the appointment of a successor upon the death, incapacity or resignation are covered by statute and, generally speaking, require judicial action.[126] Probate attorneys should have this documentation included in the probate proceedings so that the authority of a successor executor can be verified.

iii. *Administrator's Distribution Deed*

The authority of the personal representative to take possession of the decedent's estate was addressed in Section IV.C.2. above. An administration will arise when the decedent dies intestate, and administration proceedings are of interest to a title examiner if and when the administrator sells the property. Property sold by an administrator must be sold in accordance with a court order. As such, a title examiner may require all or some the following instruments be recorded:

1. Application for sale of real estate[127];
2. Citation and return of service[128];
3. Order of sale[129];
4. Report of sale[130];
5. Order confirming sale[131]; and
6. Deed which refers to and identifies the decree of the court confirming the sale.[132]

As a practical matter, certified or exemplified administration proceedings should also be recorded in the county where the real property is located, which can perfect title the same as certified or exemplified probate proceedings.

iv. *Deed from the Community Survivor*

When the deceased spouse dies intestate, or where the deceased spouse left a will but named no executor in it or the executor has not qualified or is unable or unwilling to qualify, the surviving spouse may administer the community estate, as no formal administration of the community property is necessary.[133] In this case, the community survivor can convey community property made for the purpose of paying community debts. Title examiner's regularly rely on these deeds and transfer ownership accordingly.

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[126] *See* Tex. Estates Code §§ 361.001-361.106; Tex. Trust Code §§ 113.081, 113.082, 113.083, 113.085 (2019).
[127] Tex. Estates Code §§ 356.251, 356.252.
[128] Tex. Estates Code § 356.253.
[129] Tex. Estates Code § 356.256.
[130] Tex. Estates Code § 356.551.
[131] Tex. Estates Code § 356.556.
[132] Tex. Estates Code § 356.557.
[133] Tex. Estates Code §§ 453.002, 453.003, 453.009.

D. Notice to Producers

After the recording of a conveyancing instrument, in order to get the new owner into pay status, it is incumbent upon the parties to the transaction to provide notice of the new ownership to the oil and gas producer. This includes a recording conveyancing instrument, a signed W-9 for the new owner, as well as a Letter in Lieu of Division Order, including:

1. Operators information,
2. Known well information,
3. Prior ownership (including owner number if known),
4. Reason for transfer of ownership, and
5. Name and Contact for new owners.

E. Conclusion

Title can be perfected in a number of ways, but it will depend on whether the decedent died testate or intestate. Once title is perfected, it is a wise practice to transfer title out of the estate (especially if the decedent died testate). This is the case whether or not there was a single devisee, the establishment of a marital deduction trust, or questions arise as to the disposition and ownership of the decedent's estate due to poor draftsmanship of the decedent's will. The ultimate goal of a document transferring title out of the decedent's estate is to establish final ownership of the real property and to aid the title examiner in crediting said ownership of the estate's real property.

VIII. ETHICAL CONSIDERATIONS

Given our location in Midland, Texas, both the oil and gas attorneys, but also the estate planning attorney, handles matters of oil and gas on a daily basis; however, for those with less experience in these matters, competent representation may be an ethical consideration. Texas Disciplinary Rule of Professional Conduct 1.01 states that "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (i) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (ii) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances."[134] Competence is defined as possession of the legal knowledge, skill, and training reasonably necessary for the representation and contemplates appropriate application by the lawyer of that legal knowledge, skill, and training.[135]

However, when making the determination whether a matter is beyond a lawyer's competence, relevant factors include:

1. the relative complexity and specialized nature of the matter;
2. the lawyer's general experience in the field in question;
3. the preparation and study the lawyer will be able to give the matter; and,

[134] Tex. Disc. R. of Prof'l Conduct 1.01.
[135] Cmt. 1, Rule 1.01.

4. whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question.[136]

As noted previously, the required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.[137]

"A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar."[138] Therefore, an attorney possessing the a standard level of skill and training reasonably necessary for the representation of a client in an area of law is not subject to discipline for accepting employment in a matter in which, even when that attorney must become more competent in the area of the law by additional research and investigation.[139] However, if the additional time will result in unusual delay or expense to the client, the lawyer should not accept employment without the client's informed consent.[140] There is also the option of associating with a more experienced lawyer who is competent with the client's informed consent.[141] However, a lawyer is permitted to give advice or assistance in an emergency in a matter even though the lawyer does not have the skill ordinarily required if referral to or consultation with another lawyer would be impractical and if the assistance is limited to that which is reasonably necessary in the circumstances.[142]

"Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including continuing study and education in order to maintain the requisite knowledge and skill of a competent practitioner.[143]

VII. CONCLUSION

Though mineral ownership may be common for many Texans, the complexity in estate planning and probate with mineral interests can be a minefield of potential pitfalls for the unwary practitioner. Hopefully, the basics in ownership and conveyancing will be helpful in assisting your client's estate planning needs as well as assisting the personal representative in probate.

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[136] Cmt. 2, Rule 1.01.
[137] *Id*.
[138] Cmt. 3, Rule 1.01.
[139] Cmt. 4, Rule 1.01.
[140] *Id*.
[141] Cmt. 5, Rule 1.01.
[142] *Id*.
[143] Cmt. 8, Rule 1.01.