OKLAHOMA OIL AND GAS TITLE LAW – A REVIEW OF COMMON PROBLEMS

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FIFTY – ONE COMMON TITLE ISSUES

When discussing title issues in Oklahoma, it is difficult to quantify the number of potential problems an attorney or landman might encounter. However, fifty-one is a good number to cover some of the most common, yet most important, title issues.

Some of the issues dealt with would require a lengthy paper to present all the questions and answers. However, in an attempt at brevity and to prevent complete boredom, the subjects are being presented in only a generalized form.

1. Acknowledgments.

With respect to instruments relating to interests in real estate, the validity of such instruments as between the parties is not dependent upon acknowledgments. 16 O.S. §15. However, as against subsequent purchasers for value, in the absence of other notice to such purchasers, such instruments are not valid and do not serve as constructive notice unless properly acknowledged and recorded. If an instrument which has not been acknowledged, or which contains a defective acknowledgment, has been recorded for a period of five years, the instrument shall be considered to be valid notwithstanding such omission or defect, and shall not be deemed to impair marketability. 16 O.S. §§27a & 39a.

The use of the appropriate "short-form" acknowledgment authorized by the Uniform Law on Notarial Acts within an instrument appearing of record is not a title defect.

The Oklahoma short form acknowledgment for an individual, which can also be used for more than one person is as follows:

STATE OF OKLAHOMA)
) ss
COUNTY OF _____)

This instrument was acknowledged before me on (date) by (name or names of person or persons acknowledging).

_____
Notary Public

(SEAL)

My Commission Expires: _____

2. Acreage discrepancy.

A discrepancy in acreage quantity in a description, without anything more, does not rise to the level of a title problem. The phrase "more or less" when used following a description of a certain quantity of land does not render the description ambiguous. The words "more or less" are words of caution and, where other circumstances so indicate, show that a quantity of acreage is not exact. *Dwelle v. Greenshields*, 1956 OK 323, 305 P.2d 1038.

However, where the described acreage and the purported quantity of acres vary greatly, the description may be ambiguous and indicates a mistake was made when describing the property. *Birmingham v. McCoy,* 358 P.2d 824 (Okla. 1960). In such an event, an inquiry of the parties and a corrected deed may be necessary.

STATUTE?

3. Affidavits.

acknowledgment must

Many times affidavits are filed of record. Affidavits may be used for the following matters: Age, sex, birth, death, relationship, family history, heirship, names and identity of parties, whether individual, corporate, partnership or trust; identity of officers of corporations; membership of partnerships, joint ventures and other unincorporated

associations; identity of trustees of trusts, and their respective terms of service; history of the organization of corporations, partnerships, joint ventures and trusts; marital status; possession; residence; service in the Armed Forces; and conflicts and ambiguities in descriptions of land in recorded instruments.

Often the estate of an individual will not be probated due to cost or the apparent lack of value. In such an instance, the land professional may have no choice but to rely upon an Affidavit of Death and Heirship.

When preparing affidavits, the affidavits should only state facts, not conclusions of law. When reviewing affidavits, the affidavits should be relied upon only for facts as to dates of death and identity of the surviving heirs. The value of an affidavit or recital is not reduced if the maker is interested in the title. 16 O.S. §53.

Despite the statutory recitation that affidavits can relate to "heirships," the Oklahoma Bar Association Title Standards recite that affidavits cannot be used as a substitute for a probate of a will. 16 O.S. Ch. 1, App. 3.2. However, 16 O.S. § 67 recites, effective after November 1, 2000, that a purchaser of a severed mineral interest from a party who claims the interest, immediately or remotely, through a recorded affidavit of death and heirship or recital of death and heirship in a recorded transaction of record for ten years, acquires marketable title as against any person claiming adversely to the recorded affidavit or recital. The recorded affidavit or recital must recite:

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A. The decedent died without a will;

B. The names of the decedent's heirs and their relationship to the decedent; and,

C. That the maker is related to the decedent or otherwise has personal knowledge of the facts stated therein.

Further, it is required that no instrument inconsistent with the heirship alleged in the affidavit or recital has been filed in the office of the County Clerk in the county in which the real property is located.

4. Affidavits of Possession.

A title examiner routinely requires an Affidavit of Possession. The Affidavit of Possession is necessary so as to assure that the person who executes a lease is still the owner of the property and the property is not being occupied by a stranger to title who could claim ownership by adverse possession. If an owner secures title by adverse possession, the time of ownership relates back to the date the stranger first took possession of the property.

Adverse possession of the surface is not effective as to severed minerals, but is effective as to unsevered minerals. *Fadem v. Kimball*, 612 P.2d 287 (Okla. Ct. App. 1979).

Oklahoma courts have determined that the record owner's execution of oil and gas leases is not sufficient to bar a claim of adverse possession where the claimant used the surface for cattle. *Krosmico v. Pettit*, 1998 OK 90, 968 P.2d 345.

5. Attorney-In-Fact.

A Power of Attorney is a document authorizing an agent or Attorney-In-Fact to perform certain acts on behalf of the principal. An Attorney-In-Fact may execute a lease or deed as the agent for a principal. The Power of Attorney for the conveyance of real

estate must be filed in the office of the County Clerk where the property is located. 16 O.S. §20.

Powers of Attorney are to be strictly construed. *Matter of Rolater's Estate,* 542 P.2d 219 (Okla. Ct. App. 1975). An Attorney-In-Fact may execute an oil and gas lease if the Power of Attorney expressly grants the authority to execute said lease. If the Power of Attorney authorizes the agent to sell the land, but the instrument is silent as to leasing, the general consensus is that the general power is not sufficient authority to lease.

A universal Power of Attorney, which gives the Attorney-In-Fact broad powers, usually stating that the Attorney-In-Fact has all authority that the principal would have, but does not expressly authorize executing an oil and gas lease, is usually given effect.

A person purporting to act as an Attorney-In-Fact pursuant to a recorded Power of Attorney is presumed to hold the position he purported to hold and is presumed to act within the scope of his authority. It is also presumed that the principal was alive, not incompetent, nor a minor. 16 O.S. §53A(6). After five years, an instrument executed by an attorney-in-fact is presumed to be valid when the power of attorney is not filed of record. 16 O.S. Ch. 1, App. 6.7.

6. Bankruptcies.

The subject of how bankruptcy affects title can be an exhaustive study. When examining title, the land professional should determine whether the debtor filed for bankruptcy under Chapter 7, 11, 12 or 13.

The most common form of bankruptcy is Chapter 7. In a Chapter 7 bankruptcy, the debtor's property is either 1) retained by the debtor because it is exempt under state law; 2) retained by the debtor because the bankruptcy trustee abandons the property; or 3) the property is sold under the supervision of the court. 11 U.S.C. §§363, 522 and 554.

If a debtor is an individual, he may claim his homestead as exempt. If the debtor claims the real property as exempt, parties have a limited time to object to the exemption. If no objection to the claim of exemption is filed, the property is deemed to be exempt and the debtor retains the property, subject to pre-petition liens.

If a bankruptcy proceeding was commenced after October 1, 1979, the land professional should investigate the bankruptcy of the debtor who holds title to real property at the time of filing bankruptcy.

If the property is scheduled and claimed by the debtor as exempt, and no objection to such claim of exemption has been sustained by the bankruptcy court, the examiner should examine the following:

A. Petition and order for relief;

B. The Schedule of Real Property (Schedule "A") and the Schedule of Exempt Property (Schedule "C") for cases filed on or after August 1, 1991, showing the property was claimed as exempt by the debtor; and

C. The docket sheet showing satisfactory evidence that no objection to such claim of exemption has been filed or if an objection was filed, an order by the bankruptcy court overruling or otherwise resolving such objection.

If the property is affirmatively abandoned, the examiner should secure:

A. The Petition and Order for relief;

B. The Schedule of Real Property (Schedule "D") showing that the debtor's interest in the property was disclosed;

C. The notice of intention to abandon the property given by the trustee and satisfactory evidence that no objections to such abandonment have been filed; or

D. If the abandonment is pursuant to a request of a party in interest, the order by the bankruptcy court authorizing or directing such abandonment.

If the property is sold through the bankruptcy, the examiner should note if the property was sold in the ordinary course of business, or if the property was sold free and clear of any liens. After the securing of the appropriate information, additional guidance may be required.

7. Cemeteries.

The owner of a lot in a cemetery, regardless of the wording of the deed, does not own fee simple title. The owner's title is analogous to a perpetual easement or license. *Heiligman v. Chambers,* 338 P.2d 144 (Okla. 1959).

Ownership of the mineral rights underlying a cemetery depends upon how title to the tract was acquired by the cemetery operator and what has been done subsequently. If the land was acquired by condemnation, the proceedings should be examined to determine who owns the fee. If the land in question had been devoted to cemetery use by a common-law dedication, only the dedicator need execute an oil and gas lease. *Langston City v. Gustin,* 191 Okla. 39, 127 P.2d 197 (1942). If the land was "donated" or "granted" by statutory dedication by plat, the public owns a fee interest, and a lease must be secured from the appropriate public entity. If the cemetery operator acquired a

fee by conveyance or the commencement of burial, the operator owns the minerals. If any reversionary interest has been retained by the grantor, he should also execute or ratify the lease. Summers, *The Law of Oil and Gas* §221.

There is some question in Oklahoma as to the status of title after abandonment of a cemetery. The safest alternative, whenever possible, is to secure an oil and gas lease from the last person to hold fee title prior to a statutory dedication. See *McClain v. Oklahoma City,* 192 Okla. 4, 133 P.2d 198 (1943). It is generally agreed that the surface of a cemetery may not be used for oil and gas operations. *Boggs v. McCasland,* 117 Okla. 54, 244 P. 768 (1926).

8. Cessation of Production.

The habendum clause in an oil and gas lease typically provides that the lease will remain in effect for a certain time (the primary term) and as long thereafter as oil and gas (or either of them) is produced from the leasehold.

Under a strict interpretation of this clause, any interruption in production (in the paying quantities sense of the term), however slight or short, would put an end to the lease. However, courts have rejected such a literal approach. *Stewart v. Amerada Hess Corp.,* 604 P.2d 854 (Okla. 1979).

In examining title, many times the land professional will need to determine whether the "HBP" leases are still valid. Courts have allowed temporary periods of cessation of production. In deciding whether a cessation of production is "temporary," courts have considered the duration of the cessation, circumstances which caused production to cease and the time which would reasonably be required to remedy the

situation. Courts have also considered the diligence or lack of diligence in the resumption of the production." *Stewart v. Amerada Hess Corp.*, 604 P.2d 854 (Okla. 1979). The common law doctrine of temporary cessation essentially provides that after the expiration of the primary term, a lease may continue in force even if there has been a cessation of production, if the period of cessation, in light of all the circumstances, is not for an unreasonable time. *Hunter v. Clarkson*, 428 P.2d 210 (Okla. 1967).

The Oklahoma case of *Barby v. Singer,* 1982 OK 49, 648 P.2d 14, sums up the doctrine of temporary cessation of production as follows:

> In short, the lease continues in existence so long as interruption of production in paying quantities does not extend for a period longer than reasonable or justifiable in light of all of the circumstances involved. But under no circumstances will cessation of production in paying quantities *ipso facto* deprive the lessee of his extended-term estate. . . . . .
>
> (T)he appropriate time period is not measured in days, weeks or months, but by a time appropriate under all of the facts and circumstances of each case.

The Oklahoma Supreme Court reaffirmed its ruling that a court may order cancellation of the lease only where the record shows the absence of production in paying quantities *and* an absence of equitable considerations to justify the continued production from the unprofitable well operations.

One circumstance which justifies noncancellation is where, if prior to exhaustion of the producing formation, production is interrupted for purposes which are mutually advantageous to the lessor and lessee. Such cessation should qualify as a temporary cessation. For example, if production is interrupted in a bona fide attempt to increase or reinstate production from an existing well or wells. See *Brown v. Shafer,* 325 P.2d 743

(Okla. 1958).

Another category of allowable period of cessation involves mechanical breakdown. When production ceases due to a mechanical breakdown or operational difficulty, the lessee is given reasonable time under the circumstances to restore production by diligently commencing reworking, drilling operations, or other appropriate operations directed to overcome the difficulty. As it became clear that a lease that failed to produce for a reasonable time would cease, oil and gas lessees, in an effort to determine what constitutes a "reasonable time", started inserting cessation of production clauses in their leases during the 1960's. A representative clause provides:

> If after the discovery of oil or gas the production thereof should cease from any cause, this lease shall not be terminated thereby if lessee commences drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date (if any) next ensuing after thirty (30) days following the cessation of production.

Another example provides:

> If production thereof should cease from any cause, this lease shall not terminate if lessee commences operations for drilling or reworking within sixty days . . .

The cessation of production clause essentially requires the lessee to engage in further operations within the specific time period, usually sixty or ninety days.

The paramount case on cessation of production clauses is *Hoyt v. Continental Oil Co.*, 1980 OK 1, 606 P.2d 560. In *Hoyt,* gas from the well, by which the lease was held following expiration of the primary term, had not been marketed profitably for a period of twelve months prior to the filing of the suit, and no drilling operations had been

commenced during that period. The lessor contended that the lease had terminated under its own terms by the combined operations of the habendum and cessation of production clauses.

The Supreme Court affirmed the judgment for the lessor canceling the oil and gas lease. The court determined that since paying quantities had not been obtained from the well for a period in excess of the period stated in the cessation of production clause (*i.e.*, sixty days), the lease had terminated. The court ruled that the agreed upon cessation of production clause controls over the common law doctrine of temporary cessation.

The Supreme Court also held that the effect of a cessation of production clause is to modify the habendum clause which requires production in paying quantities. The court said that the sixty day provision is the time period bargained for and, therefore, will result in cancellation of the lease if production in paying quantities was not obtained for a period in excess of the sixty day period.

In *Pack v. Santa Fe Minerals,* 1994 OK 23, 869 P.2d 323, the court held that a lease does not terminate under the terms of a habendum clause when the well was at all times capable of producing in paying quantities. The court explained that a sixty-day cessation of production clause requires the well to be capable of producing in paying quantities, and that a lease capable of producing in paying quantities will not terminate under that clause for failure to market gas for a sixty-day period. Rather, it is the failure to comply with the implied covenant to market which could result in cancellation of the lease.

9. Churches.

In Oklahoma, property conveyed to a church can be held by the Trustees of the association. A lease should be secured from the Trustees of that organization or, if no Trustee has been appointed, the court can appoint a Trustee to administer the property. *Matter of Anderson's Estate,* 571 P.2d 880 (Okla. Ct. App. 1977).

All grants from individuals or legislative acts transferring real estate to any bishop, dean, deacon, minister, etc., *in trust* for use of such society, of which they are a member, shall vest in their successor in office, all the legal or other title to the same extent and in all respects the same as trustee of such trust. 18 O.S. §563.

10. City or County Ownership.

Oklahoma Statutes Titles 64, §405 recites the following:

> "Any county, township, school district, or town that now owns or may hereafter acquire any land under control of the Board of County Commissioners, Board of Town Trustees, Directors of School Districts, Boards of Education or the governing body of any city acting by and through its duly constituted officers is hereby authorized and empowered to enter, from time to time, into valid oil and gas mining lease or leases of such land to any person, firm, association, or corporation for oil and gas development for a primary term not to exceed ten (10) years and as long thereafter as oil or gas is or can be produced, and any such oil and gas lease may provide that the lessee therein shall have the right and power to consolidate the land covered by said lease with other adjoining land for the purpose of joint development and operation of the entire consolidated premises as a unit. . ."

The lease shall be executed only after notice by publication for two weeks in a newspaper of general circulation in the county in which the land is situated and a public sale thereof to the highest bidder.

after "1976" Producing Formation

11. COLO Minerals.

Certain lands are owned by the State of Oklahoma. Such lands are administered by the Commissioners of the Land Office. Examiners have been advised by the COLO that their records constitute constructive notice. However, the COLO no longer updates their tract indices. Therefore, it is difficult to rely on these records.

When the COLO leases minerals, the leases usually contains a delay rental provision. The COLO records should be examined to assure that the annual payments have been made.

All COLO leases issued after March 1976 contain a very broad Pugh clause. The lease contains a provision that the secondary term will be extended only "as to the producing formation or formations." At one point, the COLO interpreted "formation" to be less than the full Oklahoma Corporation Commission established common source of supply. However, it appears that following the issuance of the decision in *Apache Corp. v. State, ex rel. Com'rs*, 845 P.2d 1201 (Okla. App. 1992), the COLO, as a matter of policy, now deems such language to include the entire common source of supply.

12. Corporations.

An Oklahoma corporation has the power to purchase, lease or own oil, gas and other minerals and oil and gas leases.

Recorded instruments of a corporation must be executed by a president, vice president, chairman or vice chairman of the board of directors. 16 O.S. Ch. 1, App. 12.2. It is no longer necessary for the secretary or assistant secretary to attest a conveyance and affix the corporate seal. Any corporate conveyance affecting real

property which has been of record for five years or more can be considered marketable, even if it is defective because of:

(1) the failure of the proper corporate officer to sign the instrument;

(2) the lack of an acknowledgment;

(3) the corporate representative is not authorized to execute the instruments; or

(4) any defect in the execution, acknowledgment, recording or certificate of recording the same.

16 O.S. §27a.

Alternatively, a corporation can appoint an Attorney-in-Fact to execute specified documents affecting real property. 16 O.S. §91. The Power of Attorney needs to be recorded in the county where the real property is located.

13. Corrected, Altered or Rerecorded Instruments.

If a document is recorded and then it is discovered that it needs to be corrected, frequently the grantor will correct the original and refile the same.

The law indicates that if the correction is minor, then the rerecorded instrument may be sufficient. But to give effect to a material alteration of a previously recorded document affecting title to real property, the instrument must be re-executed, re-acknowledged, re-delivered and re-recorded. A grantor cannot unilaterally derogate from a previous grant. A material alteration to an instrument is defined as an alteration which changes the legal effect of the instrument or the rights and liabilities of the parties to the original instrument. 16 O.S. Ch. 1, App. 3.4

If the conveyance is a correction, a grantor who has conveyed by an effective, unambiguous instrument cannot, by executing another instrument, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise derogate from the first grant, even though the latter instrument purports to correct or modify the former. The grantee must join in such a correction or execute a cross-conveyance. However, marketability dependent upon the effect of the first instrument is not impaired by the second instrument. 16 O.S. Ch. 1, App. 3.4.

14. Delay Rentals.

There are two types of delay rental clauses that are being used. The most common is the "unless" clause and the least common is the "or" clause.

The customary "unless" lease provides for payment of delay rentals should a well not be promptly commenced on the lease. *Wilds v. Universal Resources Corp.*, 1983 OK 35, 662 P.2d 303. Under this form there is no obligation on the lessee to pay the delay rental, but non-payment will result in termination of the lease. *Magnolia Petroleum Co. v. Vaughn*, 195 Okla. 662, 161 P.2d 762 (1945).

In practically all modern leases, the delay rental clause is not inserted. Instead of paying delay rentals yearly, the lessee includes payments with the bonus consideration at the outset. These leases are called "paid-up" leases.

As to leases that are "HBP," the payment of delay rentals should be examined if the well has not been producing for at least six years.

15. Depth Limitation.

If the minerals or leasehold are owned in different depths, an examiner should note whether the dividing depth is in terms of feet, the base of a specific formation or the stratigraphic equivalent of a formation in a specified well.

16. Descriptions.

In order that a conveyance be operative, it is essential that the premises granted and intended to be conveyed be described with sufficient definitiveness and certainty to located and distinguish it from other lands of the same kind. *Arbuckle Realty Trust v. Southern Rock Asphalt Co.,* 189 Okla. 304, 116 P. 2d 912 (1941). If the land intended to be conveyed is not identifiable from the words of the deed, aided by extrinsic evidence explanatory of the terms used, or by reference to another instrument, the deed is inoperative. *Ehlers v. Delhi-Taylor Oil Corp.*, 350 S.W. 2d 912 (Okla. 1941).

In the event the description is incorrect by reason of a wrong call, township or range, or if description is not sufficient, a corrected deed or lease should be obtained.

In an oil and gas context, most oil and gas title examiners would not consider a conveyance of "2 net mineral acres" in a section tract (or smaller) to be void for uncertainty. This is considered to be a conveyance of an undivided interest in the larger tracts. *Grider v. Wood*, 178 F. 908 (8th Cir. 1910) (applying Kansas law); *Williams v. Kirby Lumber Corp.*, 355 S.W. 2d 761 (Tex. App. 1962).

Oil and gas examiners frequently encounter conveyances that give no definite description, but which specify that the grantor conveys all his interest in a described county or district, such as "all my interest in Washington County." Decisions in cases in other states deciding the legal effectiveness of such conveyances are mixed, depending on the specificity of the description. *Patton and Palomar* state that such conveyances are generally held to be effective, if the deed contains sufficient information so that by reference to some document or instrument referred in the deed, a true and accurate description can be ascertain. 1 Patton and Palomar, *supra*, note 3, § 125 at 391; *contra* Turrentine v. Thompson, 99 S.W. 2d 585 (Ark. 1936). These conveyances would, in all likelihood, be considered to be valid between the parties. *Luthi v. Evans*, 576 P.2d 1064 (Kan. 1978). There has been no decision in Oklahoma on this question.

A warranty deed conveying a tract of land, less an easement, railroad, highway or right-of-way, conveys the tract, including the mineral interest, subject to the right-of-way estate. *Jennings v. Amerada Petroleum Corporation,* 179 Okla. 561, 66 P.2d 1069 (1937). As a general rule, a conveyance of land bounded by a street or highway carries the fee to the center thereof. If the grantor intends to reserve the minerals under a street or highway, that intention must clearly be expressed. *Askins v. British-American Oil Producing Co.*, 203 P.2d 877 (Okla. 1949). However, a mineral deed which clearly excepts a small right-of-way tract was held not to have conveyed the minerals underlying the right-of-way tract. *Continental Oil Co. v. Patchell,* 198 Okla. 614, 180 P.2d 825 (1947).

17. Divorce.

If an attorney or land professional encounters a divorce proceeding, you should determine who was awarded the specific property being examined. A judgment in a divorce proceeding that awards real property is effective to pass title to such real property. 16 O.S. Ch. 1, App. 23.3. After January 1, 1991, generally, an order for payment of alimony will be a lien against the real property of the person against whom the property division is awarded, and shall be constructive notice to subsequent purchasers, if:

A. the order states the amount of alimony as a definite sum;

B. the divorce decree expressly provides for a lien on the debtor spouse's real property; and

C. the court's order is recorded in the office of the county clerk or the debtor's spouse acquires some or all of the interest in the real property that is subject to the lien in the divorce decree.

18. Duhig Rule.

One rule of construction of conveyances is the *Duhig* rule established in the Texas case of *Duhig v. Peavy-Moore Lumber Co., Inc.*, 135 Tex. 503, 144 S.W. 2d 878 (1940) which has been followed in Oklahoma in *Birmingham v. McCoy,* 358 P.2d 824 (Okla. 1960), and in *Bryan v. Everett,* 365 P.2d 146 (Okla. 1961). The *Duhig* rule is applied to conveyances by warranty deed in which the owner of a fractional mineral interest reserves a share of the mineral estate without referencing the outstanding mineral interests. The effect of the rule is to estop the grantor, by his warranty, from claiming the total fractional share of the mineral estate he reserved in the deed. In *Duhig*, the grantor in a recorded conveyance to Duhig reserved one-half of the minerals.

Duhig subsequently, by warranty deed, conveyed the tract to the predecessor in title of Peavy-Moore. After the habendum clause and a general warranty clause, it was stated:

> "But it is expressly agreed and stipulated that the grantor herein (Duhig) retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land."

The granting clause merely described the tract being conveyed, *i.e.,* as if all surface and minerals were being conveyed. Duhig's heirs later asserted ownership to the one-half minerals reserved. Peavey-Moore took the position that the attempted reservation merely excepted from the warranty the one-half mineral interest previously reserved by Duhig's grantor. The Court pointed out that the description of the tract in the granting clause covered all surface and minerals and that the clause of general warranty referred to "said premises" meaning the land described in the granting clause. If it had not been for the reservation of one-half of the minerals which followed the warranty clause, Duhig would have warranted title to the surface and all of the minerals. As written the general warranty extended to the full fee simple title to the land except an undivided one-half interest in the minerals.

The court applied the after-acquired title doctrine and said that the covenant of warranty operates to estop the grantor and those claiming under him from claiming the one-half mineral interest so reserved.

The *Duhig* rule does not say the reservation is not effective, but says the grantor is estopped to assert it by his warranty. The court ruled that the grantor reserved no interest and the one-half interest passed to the grantor.

The Oklahoma Supreme Court in *Birmingham v. McCoy,* 358 P.2d 824 (Okla. 1960) cites *Duhig* and also cites *Murphy v. Athans,* 265 P.2d 461 (Okla. 1954), as

standing for the same proposition as *Duhig*.

The *Duhig* rule is in addition to the other rules of construction. In other words, for a reservation to be valid it must appear from the instrument that 1) the grantor intended to and by appropriate words expressly reserved an interest unto himself, and 2) the grantee must receive the amount grantor is warranting. For example, assume that A owns all the surface and three-fourths of the minerals under SW/4. A's predecessor in title retained a 1/4 mineral interest. A conveys a tract to B by warranty deed containing the following language in the habendum clause:

> "To have and to hold unto grantee. . . free and clear of all . . . encumbrances of whatsoever nature; except reserving unto grantor his heirs and assigns a one-half interest in the minerals thereunder."

It is submitted that this passes the first part of the test for a valid reservation because even though the reservation is in the habendum clause the grantor expressly reserves one-half of the minerals to himself. However, because the grantor does not except the minerals previously conveyed, *i.e.*, "other mineral conveyances of record," he has warranted that the grantee is receiving one-half of the minerals and he is estopped from claiming any more than the amount which leaves one-half of the minerals for the grantee. In this case A had a three-fourths mineral interest, he warrants a one-half mineral interest to B, therefore, A conveys a one-half mineral interest to B, and A is left with a one-fourth mineral interest.

This is a frequent situation and results in A's heirs or assigns claiming one-half, B's heirs or assigns claiming one-half and A's predecessor in title claiming one-fourth. A Stipulation of Interest and Cross-Conveyance should be required to correct the situation.

The Oklahoma Court of Appeals held that the *Duhig* rule does not apply to conveyances by quitclaim deed. *Young v. Vermillion,* 1999 OK CIV APP 114, 992 P. 2d 917.

See, generally, *Hemingway,* The Law of Oil and Gas, §§9.1-9.5.

19. Easements.

An easement is the right of one person to go onto the land of another and make a limited use there. *Head v. McCracken*, 102 P.3d 670 (Okla. 2004).

When examining conveyances described as "easements" or "rights-of-way," an examiner should examine the words of grant to determine whether the conveyance is an easement or a fee interest.

The Oklahoma Supreme Court has set forth what has become known as the "object of the verb" rule in distinguishing deeds from easements. See *St. Louis - San Francisco Railway Co. v. Humphrey*, 446 P.2d 271 (Okla. 1968). As such, if the object of the granting language is a tract of land instead of an easement, the document may pass fee title to the tract even if the document states that it is for a purpose consistent with an easement. However, the courts are likely to try to allow extraneous evidence as to the intent of the parties. See *Kansas, Oklahoma & Gulf Ry. Co. v. Doneghy*, 249 P.2d 719 (Okla. 1952). In a situation where this problem exists, the intent of the parties should be determined by either agreement between the parties and subsequent confirming documentation (*i.e.*, Quitclaim Deeds) or by title adjudication by a court of competent jurisdiction.

20. Estate of Nonresident Decedent.

Where Oklahoma minerals are owned by an out-of-state resident, the estate of the decedent will need to go through the probate process in order for the heirs or devisees to obtain clear and marketable title. This process is termed an "ancillary probate." Failure to conduct an ancillary probate will result in a cloud on the title to the minerals, difficulty in selling such minerals, and possible problems with regard to leasing or the distribution of monies from productive wells on the property.

The law of Oklahoma governs intestate succession as to real property located in Oklahoma. *White House Lumber Co. v. Howard*, 142 Okla. 163, 286 P. 327 (1930).

Effective November 1, 1998, Oklahoma has adopted a summary probate proceedings. Summary probate proceedings may be used if:

(1) the estate is $175,000 or less;

(2) the decedent has been dead for at least five years; or

(3) the decedent lived in another state at the time of death, but owns property in Oklahoma. 58 O.S. §245.

Under the summary probate proceedings, a personal representative is not typically appointed, an inventory is not prepared and there is only one publication of the proceedings.

21. Estate of Resident Decedent.

The applicable rules of descent and distribution in Oklahoma are summarized as follows:

For a death prior to July 1, 1985:

a. Intestate and no issue--one-half (½) to surviving spouse and one-half (½) to decedent's parents;

b. Intestate and one issue -- one-half (½) to surviving spouse and one-half (½) to child;

c. Intestate and more than one issue--one-third (1/3) to surviving spouse and remainder in equal shares to children.

For a death after July 1, 1985:

a. Intestate and no issue--the spouse inherits all property acquired by "joint industry" of husband and wife, plus one-third (1/3) of all property; the remaining two-thirds (2/3) of the other property is inherited by the decedent's parents, or other surviving heirs.

b. Intestate and issue, who are also issue of the surviving spouse--the spouse inherits one-half (½) of all property, whether acquired by "joint industry" or not; the remaining one-half (½) passes to the surviving children and issue of any deceased child by right of representation.

c. Intestate and surviving issue, when one or more are not also issue of the surviving spouse--the spouse inherits one-half (½) of the property acquired by "joint industry" during marriage, plus an equal share in the remainder of the estate with all issue. 84 O.S. §213.

The provision regarding "joint industry" of husband and wife is a rule of descent and distribution and is not a rule of property. It does not vest the nontitleholding spouse with any interest in the property except upon the death of the titleholding spouse. *Essex v. Washington,* 198 Okla. 145, 176 P.2d 476 (1947).

Court approval is needed to obtain a lease from any estate in Oklahoma. Notice must be published in the county where the land is located and the lease must be sold to the highest bidder in an auction. 58 O.S. §925. If the bonus value of the lease is less

than $500.00, then approval by a judge having jurisdiction over the estate is sufficient without notice or a court proceeding. 58 O.S. §928.1. This approval can be evidenced by a court order or simply by the judge's handwritten approval upon the lease. The lease should contain a recitation that the consideration was less than $500.00.

However, if the will of the decedent empowers the personal representative to execute an oil and gas lease, the personal representative may execute an oil and gas lease and make a return of sale, which must be approved by the court. 58 O.S. §§426, 462, and 924.

Alternatively, practitioners will force pool the potential heirs. See 52 O.S. §87.1. Whether the leasing statute is the exclusive means of acquiring a lease from an estate in Oklahoma or whether the Corporation Commission can force the heirs to lease has not been adjudicated. It is necessary that the Corporation Commission make inquiry into the sufficiency of the search for the whereabouts of any heirs for the pooling to be valid as to unknown heirs. *James Energy Co. v. HCG Energy Corp.,* 1992 OK 117, 847 P.2d 333.

The determination of heirs and devisees of the decedent is confirmed in an order issued by the probate court frequently called a Final Decree or Order Determining Heirship. 58 O.S. §§631-32. The determination of heirship is conclusive as to the rights of all heirs, legatees or devisees, subject to being reversed, set aside, or modified upon appeal. 58 O.S. §632.

22. Executive Rights.

Each element of the mineral estate can be owned, conveyed, reserved or inherited separately from the other elements. The leasing (or executive) right, however, has been held to be a personal right, not a real property right, and thus not inheritable when it was reserved by the grantor. *Howard v. Dillard*, 198 Okla. 116, 176 P.2d 500 (1947). However, the executive right will descend to the heirs if it is reserved by the "grantor, his heirs, executors, administrators and assigns." *Stone v. Texoma Production Co.*, 336 P.2d 1099 (Okla. 1959) (holding that under the particular facts, the executive right was a vested right).

23. Federal Leases.

If the property is owned by the USA, special laws and regulations apply. These include BLM form leases. The property cannot be included in an Oklahoma Corporation Commission drilling and spacing unit. A communitization agreement must be executed by the BLM so as to include the acreage into a unit.

Examination of title will need to be by examination of a federal abstract prepared by an abstract company located in Santa Fe, New Mexico.

24. Fractional/Acreage Designation.

One problem encountered is when a grantor conveys or reserves a fractional interest followed by a designation of a specified number of mineral acres. An example is where the grantor reserves "an undivided 5/32 interest, amounting to an undivided 5 acres interest" in a tract which by accretion or being a correction section, would allow a 5/32 interest to be greater than 5 acres.

Each deed is interpreted on its own facts and recitations in the deed.

In *Wade v. Roberts*, 346 P.2d 727, 11 O&GR 529 (Okla. 1959), the court construed a deed to a riparian tract which reserved . . . "an undivided 5/32 interest amounting to an undivided five (5) acre interest in mineral rights. . ." The court gave credence to the recitation of five acres, even though 5/32 of tract amounted to more than seven acres. Such deeds are ambiguous, should be noted and corrected by a Stipulation of Interest and Cross-Conveyance. See *Matter of Wallace's Estate*, 648 P.2d 828 (Okla. 1982).

25. Homestead.

Oklahoma allows for homestead rights. The homestead is the domicile of the family. Homestead rights attach to property which is actually occupied as a home, or property which the owners intend to occupy as their homestead.

Neither spouse may convey or encumber the homestead without the joinder of the other spouse. 16 O.S. §4. There is no question that a conveyance, mortgage or lease relating to the homestead is voidable unless subscribed by both husband and wife. It is also well settled in Oklahoma that a husband and wife must execute the same instrument. Separately executed separated instruments would both be voidable. *Grenard v. McMahan,* OK 80, 441 P.2d 950. Therefore, it is mandatory that an oil and gas lease executed by a married individual must also be executed by the spouse on the same document.

If the individual is single, the lease should make that recitation. Because it is not possible to determine from the records whether the property is homestead or not, the

husband and wife should execute the same lease or conveyance of real property, and recite that they are husband and wife.

Homestead rights do not apply to severed minerals. If severed minerals are only owned by one spouse, the joinder of the spouse is not necessary for leasing, as severed minerals cannot be impressed with the homestead character. 16 O.S. Ch. 1, App. 7.1.

If no action has been taken for ten years after a conveyance has been recorded, marketability of title is not impaired. 16 O.S. Ch. 1, App. 7.1.

26. Inurement.

A cotenant may not secure for his own benefit, either by direct purchase or otherwise, a title adverse to his cotenants. A cotenant who purchases property at a tax sale (because of the surface owner's failure to pay taxes), or a Sheriff's Sale (for failing to pay a mortgage that is superior to a severed mineral owner's interest), may not enhance his own interest in the land by eliminating his fellow cotenant.

Several Oklahoma cases recite that cotenants have a fiduciary relationship to each other. They have stated "cotenant owners of an estate in lands stand in relation to each other in mutual trust and confidence and neither will be permitted to act in hostility to the other in reference to the joint estate; and a distinct title acquired by one will ordinarily inure to the benefit of all." The doctrine of inurement protects the severed mineral owner from a defaulting tax owner or a mortgagor and at the same time creates problems for the title examiner. Protection is given almost without qualification where the land is sold at a tax sale and thereafter acquired by the party who had the duty to

pay the taxes. The courts have held that where one party had the duty to pay the taxes, he cannot acquire title to the property through a tax deed adverse to his fellow cotenants or severed mineral interest owners.

If there is no duty to pay the taxes, there is no prohibition against a cotenant buying the property for his own exclusive benefit. Mineral owners have no duty to pay ad valorem taxes, and therefore, can purchase the property free of the claims of other cotenants, whether by direct purchase at the original sale, or through his agent. In connection with this section, see No. 47- Tax Deeds, below.

27. Joint Tenancy - Nonspecific Language.

Occasionally, a deed will be executed to "A or B" as grantees. In such an event, in a case involving an automobile, it has been held that the parties hold title as joint tenants. The use of the word "or" allowed either party to convey or dispose of the property without the joinder of the other party. *Gilles v. Norman Plumbing Sup. Co.,* 1975 OK CIV. APP. 62, 549 P.2d 1351. Without additional case law, the author is leery of relying upon this case as to real property. Of course, if the property was the couple's homestead, the property could not be conveyed without the joinder of the other spouse.

An Oklahoma decision has held that the word "joint" following the names of grantees did not create a joint tenancy. *Matter of Estate of Ingram,* 1994 OK 51, 874 P.2d 1282. The court indicated that any of the following words, such as "with right of survivorship," or "or survivor" or even "JTWRS" would create a joint tenancy.

28. Judgment Liens.

A judgment lien on real property is created by the presentation of a Statement of Judgment with the County Clerk. 12 O.S. §706(A). Prior to 1993, various methods for perfecting a judgment lien were required. See 16 O.S. Ch. 1, App. 23.1

The filed judgment becomes a lien on the real estate of the judgment debtor within the county in which the Statement of Judgment is filed with the County Clerk. 12 O.S. §706.

It is the general rule that valid liens, including judgment liens, survive a bankruptcy, absent specific avoidance under 11 U.S. C. § 522(f) in bankruptcy, even if the underlying debt obligation that was the basis for the lien is discharged. *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991); *In re: Williams,* 37 B.R. 224 (N.D. Okla. 1984).

Judgment liens perfected and after November 1, 1997, attach to homestead property and constitute a lien against such property. 12 O.S. § 706.

When securing an oil and gas lease from a judgment lien debtor, a subordination of the judgment should be secured.

A properly filed judgment lien is valid for five years from the date the judgment is rendered. 12 O.S. §735. The lien can be extended for an additional five years by an execution garnishment and an extension of judgment filed in the county clerk's records. If no execution, garnishment or extension of judgment has been recorded, then the judgment no longer constitutes a lien on the record property in the county where it is not recorded.

29. Judgment Liens - Federal.

A judgment lien by a federal agency or as part of a federal program will be valid as a lien for twenty years, with the possibility of extension of an additional twenty years. 28 U.S.C. §3201; see 16 O.S. Ch. 1, App. 23.1.B.

30. Judgment Liens - Oil and Gas Leases.

Judgment liens do not attach to leasehold estates of an oil and gas lessee. *Hinds v Phillips Petroleum Co.,* 591 P.2d 697 (Okla. 1979).

While judgment liens do not constitute a cloud on the title of the leases, they cannot be totally ignored, because prior to a conveyance or transfer of such leasehold interest, the judgment creditor could execute and levy on the lessee's interest.

31. Life Tenants/Remainderman.

The life tenant of a life estate has the right to possession of the property with the remainderman obtaining possession upon the death of the life tenant. Neither the life tenant nor the remainderman can execute an effective oil and gas lease without the joinder of the other. *Nutter v. Stockton,* 626 P.2d 861, 69 O&GR 497 (Okla. 1981). The bonus, delay rental, and interest on the royalty, all being considered income, are paid to the life tenant. *Franklin v. Margay Oil Corp.,* 194 Okla. 519, 153 P.2d 486 (1944).

The "Open Mine Doctrine" states that if a lease was in effect or if a well was producing at the time the life estate was created, the life tenant can use the land for that purpose and is thus entitled to receive all royalty himself. The theory is that the person creating the life estate must have intended that the life tenant benefit from the activities being conducted at the time the life estate was created. A lease alone will open the

mine. *Nutter v. Stockton, supra; In re Shailer's Estate,* 266 P.2d 613 (Okla. 1954).

The termination of the interest of a deceased life tenant may be conclusively established by one of the following methods:

a. By a proceeding in the district court as provided in 58 O.S. §911;
b. By a valid judicial finding of the death of the joint tenant or life tenant in any action brought in a court of record; or

c. By filing documents that satisfy 58 O.S. §912C.

16 O.S. Ch. 1, App. 8.1.

The termination of the interest of a deceased life tenant may be established on a prima facie basis by recording the following:

a. Certified copies of letters testamentary or letters of administration for the estate of the deceased joint tenant or life tenant; or

b. Filing an affidavit from a person, which:

i. has a certified copy of the decedent's death certificate attached;

ii. reflects that the affiant has personal knowledge of the matters set forth therein;

iii. includes a legal description of the property; and

iv. states that the person named in the death certificate is one and the same person as the deceased joint tenant or life tenant named in a previously recorded instrument which created or purported to create the joint tenancy or life tenancy in such property, and identifying such instrument by book and page where

recorded.

A waiver or release of the Oklahoma estate tax lien for a life tenant must be obtained unless a) district court has ruled that there is no estate tax liability; b) the life tenant has been dead more than ten years; or c) the sole surviving remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant.

Oklahoma Statutes Title 60 §§71 and 72 provide the procedure for appointing a Trustee to execute an oil and gas lease on behalf of contingent remaindermen.

32. Limited Liability Companies.

Oklahoma has a Limited Liability Company Act. A limited liability company is capable of holding title to real property in Oklahoma. 18 O.S. §§2001, 2005 and 2006. A manager is the person who may execute conveyances or oil and gas leases on behalf of a limited liability company. 18 O.S. §§2001, 2005 and 2006.

33. Lis Pendens or Notice of Pending Suit.

Strictly speaking, *lis pendens* is the doctrine that so long as an action pertaining to a tract is pending, the court has control over the property until final judgment is entered and the property is bound by that final judgment, regardless of any transaction in the interim. From a title examiner's viewpoint, the term refers to the notice that must be taken of the fact that the property is under the court's control and that no interest can be acquired by third persons in the property that is the subject of the action. Once notice of a pending lawsuit has been filed, both subsequent purchasers and all other who acquire interest in or liens upon the premises during the pendency of the lawsuit will be bound by constructive notice of the claims of the parties to the suit. They are

further bound by any judgment rendered in the action against the party from whom they acquired their lien or interest. 3 Patton and Palomar, § 583, at 173-177.

As to title involving leases that are held by production, an examiner should be concerned with any lis pendens notice regarding the leasehold. For example, an examiner should note if the records reflect a suit filed by a lessor against a lessee seeking cancellation of a lease because the well has not been producing in paying quantities. The examiner should examine the court file. Even if the case is dismissed, that may not end the title problem. Even if no suit is pending, if the well is not producing in paying quantities, it may still be subject to the leases being terminated in the future.

34. Mechanics' and Materialman's Lien.

A Mechanics' and Materialman's Lien is a charge unpaid upon specific property, by which it is made security for the performance of an act. Mechanics' and materialmen's liens provide a means of enforcing the valid claims of suppliers of materials and labor.

The lien does not attach to royalty interests or previously reserved bona fide interests payable out of the working interests.

It is important to note that the statute of limitations for foreclosure of a Mechanics and Materialman's Lien is one year from the date of the filing of the lien with the county clerk. There may be no lien release shown, but the absence of a suit to foreclose the lien acts as a discharge of the lien.

35. Mineral Interests v. Royalty Interests.

The legal distinction between a mineral interest and a royalty interest is quite clear, although the distinction between what creates a mineral interest and royalty interest is not quite clear. The problems involving the quality of interest granted or reserved generally involve a determination of what the parties intended to do.

In checking records, particularly old records, it may be found that parties did not always make a distinction between a royalty deed and a mineral deed. Hundreds of recorded instruments are labeled "Royalty Deed." However, the conveyances are of mineral interests.

A mineral interest possesses all of the instances of mineral ownership, including:

a. The right to explore;

b. The rights of ingress and egress (go on and off the land);

c. The right to lease (the so-called "executive right");

d. The right to the bonus or consideration, the delay rentals, and the royalty;

e. The right of ownership of oil and gas in place (the language used may say "all minerals in and under" or "all minerals in, on, and under" the land); and

f. The right to extract those minerals.

Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, 27 P.2d 855 (1933).

A royalty interest is a single incident of mineral ownership and includes the right to share in oil and gas when produced, or the right to oil and gas after capture. Normally, the interest is free of cost of drilling and producing. A royalty interest does not include the right of ingress or egress, the rights to lease for oil or gas, the right to share in bonus or rentals, nor the right to explore or drill and develop the production. *Pease v.*

Dolezal, 206 Okla. 696, 246 P.2d 757 (1952).

In Oklahoma, the term "royalty" is treated as being uncertain in meaning. A grant of a royalty interest made at a time when no lease is in existence will be generally construed as creating a mineral interest. *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

If a lease is in existence or even has expired, the grant or reservation of a royalty is, generally, construed as a nonparticipating royalty interest. *Colonial Royalties Co. v. Keener*, 266 P.2d 467 (Okla. 1953).

If the royalty interest being conveyed is unusually large (*i.e.*, more than 1/4), a court may interpret the interest as creating a mineral interest and not a royalty interest. The courts may interpret the instrument as conveying one-half of the minerals and not a one-half royalty interest. See, generally, *Hemingway, The Mineral - Royalty Distinction in Oklahoma*, 52 O.B.J. 2791 (1981).

36. Mortgages.

A mortgage does not operate as a conveyance of an estate in land, but creates curing a payment of a debt. *Coursey v. Fairchild*, 436 P.2d 35 (Okla. 1967). A deed of trust is similar to a mortgage. A deed of trust is typically defined as little more than a mortgage, with the power to convey upon default. *Sanders v. Hall*, 74 F.2d 399 (10th Cir. 1934).

As a mortgage is a conveyance of an interest in real property, it is subject to the same legal requirements as a deed and other conveyances. Important clauses in mortgages and deed of trust include the amount of the indebtedness and the final due

date or maturity date.

A future advance clause allows the lender/mortgagee to extend additional money or proceeds to the borrower/mortgagor, and attempts to allow the mortgagee to maintain its priority of lien as against third parties. As a result, this may be important to an examiner.

Mortgages that are properly executed, acknowledged and recorded are superior in title to deeds or leases that are subsequently recorded.

Mortgages may be ignored after they have been of record for seven years past their maturity date (if shown) or thirty years past their recording date (if no maturity date is shown). 46 O.S. § 1 (2007). However, mortgages to the Commissioners of the Land Office are not subject to such statute of limitations.

Mortgages to a federal agency or as part of a federal program (*i.e.*, Federal Land Bank, FHA, etc.) are a lien that lasts for twenty years with the possibility of an extension of an additional twenty years. 28 U.S.C.A. §3201.

If your client secures a lease or acquires the interest in a Corporation Commission pooling procedure, a subordination of the mortgage to the lease or pooling should be secured from the mortgagee.

37. Name Discrepancy.

Persons who are named in an executed conveyance can be considered to be the same as the persons who are named in or executed other documents in a chain of title, if the named person in those conveyances have identical names, or the variants are a) commonly used abbreviations, b) initials, c) have identical first or middle names or

initials, d) simple transpositions that produce substantially similar pronunciations, or e) descriptions of entities as corporations, companies, or abbreviations or contractions of either. 16 O.S. §53(A)(11).

A recital of identity contained in a conveyance, wherein the grantor recites, for example, that Alfred E. Jones is one and the same person as A.E. Jones, may be relied upon unless there is some reason to doubt the truth of the recital. 16 O.S. §53; 16 O.S. Ch. 1, App. 5.3.

38. Nonparticipating Interest.

Where the mineral interest has some, but not all of the incidents of ownership, classification becomes less certain than of a full mineral interest. Just as a property interest is likened to the proverbial bundle of sticks, wherein the sticks can be separated, the executive rights or the leasing rights may be separated from the mineral interest itself. In that situation, the ownership of the interest separate and apart from the executive rights may be classified as a nonparticipating mineral interest. The owner of the executive rights executes an oil and gas lease on behalf of the nonparticipating interest. The owner of the nonparticipating mineral interest enjoys all the other incidents of ownership of a mineral interest, such as the right to receive bonuses, delay rentals and royalties. *McNeill v. Shaw,* 295 P.2d 276 (Okla. 1956). Technically speaking, a nonparticipating mineral interest has the right to ingress and egress upon the property to remove the minerals.

Closely related to the nonparticipating mineral interest is the nonparticipating royalty interest. The owner of a nonparticipating royalty interest is entitled to a

described fraction of oil and gas produced free of costs. *Colonial Royalties Co. v. Keener,* 266 P.2d 467 (Okla. 1953).

39. Partnerships.

A general partnership may purchase, own or lease minerals and oil and gas. 54 O.S. §209 and 215. General rules governing partnerships are applicable to oil and gas leasing. One partner can bind the partnership by executing an oil and gas lease for the partnership. 54 O.S. §208.

Oklahoma Statute Title 54 §144 recites that a limited partnership may conduct any business which a general partnership (without limited partners) may conduct. An oil and gas lease may be executed by the general partner of the limited partnership. 54 O.S. §150.

A professional may rely that a conveyance executed by an individual purporting to act as general partner of a fictitious name partnership, is, in fact, the partner of such partnership and is authorized to execute such a conveyance. 54 O.S. §§209-10.

40. Patents.

If a patent was issued by the United States of America, or any of the Indian Tribes, the minerals were also granted. If a patent was issued prior to 1933, the State did not reserve any part of the mineral estate.

As to any land granted by the United States of America to Oklahoma pursuant to the Enabling Act subsequent to 1933, if the Commissioners of the Land Office determined that the lands were valuable for oil and gas purposes, then the Commissioners had the authority to reserve mineral rights in its patent. 64 O.S. §282.

All lands foreclosed upon by the Commissioners of the Land Office can be resold by the Commission. In such a sale, the Commissioners must reserve 50% of the mineral rights. 64 O.S. §96.

41. Pooling (Compulsory or Forced).

It is estimated that above 70% of the wells drilled in Oklahoma in the past ten years have involved parties who were forced pooled.

The Oklahoma Corporation Commission has previously determined that if a well is drilled and completed timely pursuant to the forced pooling order, the order holds all formations which are both named in the pooling and penetrated in the initial well, unless the order is subsequently modified. This rationale is based on the decision in *Amoco Production Co. v. Oklahoma Corporation Commission*, 1986 OK CIV APP 16, 751 P.2d 203, wherein the Court determined a) that a pooling order unitizes the working interest in the entire unit as to the named formations; b) that requiring an operator to complete in every potentially productive zone in an initial well or lose those formations would not be just or reasonable and often impossible; and c) that the pooling order only had the requirement to commence the drilling of the initial well within 180 days in order to keep the order in existence. To "release" a common source of supply from the pooling order, a party-in-interest in the unit has to file an application to vacate or modify the order to remove the formations which were held under the order.

The Commission has determined in a number of pooling cases that an operator has abandoned certain common sources of supply. The Commission has considered cases where an operator has drilled a well to a deeper formation and completed in an

uphole zone, with no further action to develop the deeper formation, as showing an intent to abandon said deeper formation. It has been determined that abandonment occurs where there was a concurrence of an intention to abandon and the act of physical relinquishment. The Commission has also acknowledged that an intention to abandon may be inferred from the acts rather than the expressions of intention.

42. Railroad Titles.

The issue of whether a railroad owns minerals underlying their strips could be the subject of a separate lengthy paper. However, there are some general rules that can usually be followed.

If the railroad acquired its interest by a deed, and the deed does not limit the estate granted, but only specifies the purpose of the conveyance, the grant is of a fee simple interest. *Marland v. Gillespie,* 168 Okla. 376, 33 P.2d 207 (1934).

If the railroad acquired title by eminent domain, by virtue of authority under Act 2, Section 24 of the Oklahoma Constitution, then the railroad acquired only an easement. If the railroad acquired title by eminent domain proceedings under the authority of the laws of Oklahoma territory, the acquisition could be either a right-of-way or a fee simple interest, depending upon the language in the condemnation proceedings.

If title is acquired by a railroad under an Act of Congress, generally, the railroad acquires only a right-of-way.

43. Reservations of Mineral Interest.

In a typical chain of title, it is more common than not, that a surface or mineral owner will reserve all or a quantum of minerals. The number of reported cases dealing

with reservations are enormous. Unfortunately, case law exists to support both sides of every conceivable controversy concerning the construction of a mineral reservation.

There are some general rules of construction of the deeds. In Oklahoma, the following are the rules in apparent order of priority:

1. The cardinal rule in construing a deed is to effectuate the true intent of the parties thereto, as that intent may be discerned from the instrument itself, taking it all together, considering every part of it, and viewing it in the light of the circumstances existing at the time of its execution. *Dwelle v. Greenshields,* 305 P.2d 1038 (Okla. 1956).

2. The deed is construed most strictly against the grantor and in favor of the grantee as the words are presumed to be those of the grantor's choosing. *Coley v. Williams,* 98 Okla. 143, 224 P. 345 (1924).

3. Exceptions in a habendum clause of a warranty deed cannot be held as reservations of any part of the title conveyed by the granting clause, but must be construed only as excepting them from the covenant of warranty. *Jarrett v. Moore,* 159 Okla. 93, 14 P.2d 390 (1932).

4. The reservation of mineral rights appearing in the habendum clause of a deed will control over the granting clause where the intention of the grantor to create such reservation is clearly expressed. *Abbott v. Woods,* 295 P.2d 793 (Okla. 1956).

5. Where a deed is clear and unambiguous, the court will look to the four corners of the instrument to determine the grantor's intention without resort to explanatory oral evidence. *Meeks v. Harmon*, 207 Okla. 459, 250 P.2d 203 (1952). Implicit in this rule is the court's duty to determine what is unambiguous.

6. It is a general rule that a reservation or exception may not be made in a deed in favor of a stranger, but it may operate as an exception to the grant and will then be treated as held in trust by the grantor for the intended owners. *Burns v. Bastien,* 174 Okla. 40, 50 P.2d 377 (1935).

7. A reservation may not be made in favor of a stranger. *Leidig v. Hoopes,* 299 P.2d 402 (Okla. 1955).

44. Rivers.

Riparian owners adjacent to navigable streams own only to the high water mark. The title to the bed remains in the state or certain Indian tribes. In Oklahoma, all of the major rivers have been judicially determined as non-navigable except that portion of the Arkansas River between the confluence with the Grand River and the Arkansas state line. *Vickery v. Yahola Sand and Gravel Co.,* 158 Okla. 120, 12 P.2d 881 (1932).

As to non-navigable streams, the adjacent (riparian) owners own the oil and gas underlying said stream, each to the middle of the stream. *Ellis v. Union Oil Co.,* 1981 OK 7, 630 P.2d 306. If the channel for a stream or river changes as the result of a natural flow, then the private ownership changes with the changes in the stream. *Goins v. Merryman,* 183 Okla. 155, 80 P.2d 268 (1938). Avulsion, which is the sudden change in riparian land, does not change the boundaries of ownership. The boundary line remains at the old water line and becomes fixed with the ownership of the old stream bed remaining with its former owner. *Mapes v. Neustadt,* 197 Okla. 585, 173 P.2d 442 (1946).

45. Sheriff's Deeds.

Oklahoma statutes allow that there is a rebuttable presumption that if a document purports to be executed pursuant to a judicial proceeding, that the court was acting within its jurisdiction and all steps required for the execution of the title document were taken. 16 O.S. §53(A).

As to all Sheriff's Sales upon general or special execution occurring on or after November 1, 1987, the court files should reflect a written notice of sale, executed by the sheriff, containing the legal description of the property to be sold and the date, time and place where the sale will take place.

As to all sales after November 1, 1987, the notice of sale must be mailed to:

A. the judgment debtor;

B. any holder of record of an interest in the property; and

C. all other persons of whom the party causing the execution to be issued has notice who claim a lien or any interest in the property. The notice must have been mailed at least ten (10) days before the hearing on the confirmation of sale.

If the name or address of any such person is unknown, publication notice must be given in conformity with 12 O.S. §765(a)(1).

Further, notice of the confirmation of sale must be complied with. As to all sales after November 1, 1987, the notice of confirmation of sale must be mailed to all parties in the matter at least ten (10) days prior to the date of the sale, if the names and addresses of such persons are known.

As to all Sheriff's Sales more than ten years old, the examiner can rely on the rebuttable presumption and the Simplification of Land Title Act, and therefore, can generally waive examination of the court file.

46. Statutory Pugh Clause.

Oklahoma has enacted a statutory Pugh Clause which provides that a lease will expire as a matter of law a) as to all leases executed after May 25, 1977, b) 90 days after primary term has expired, c) as to all land covered by a lease that lies outside a

drilling and spacing unit, d) where the drilling and spacing unit is 160 acres or more. 52 O.S. §87.1(b).

47. Tax Deeds.

All real property in Oklahoma is subject to assessment and taxation on an ad valorem basis. The entire tax on a particular tract of real property is levied upon the surface estate.

An Oklahoma tax title may be based on any one of three kinds of tax sale. The three kinds of tax sales are original sale (Certificate sale), resale, and County Commissioners sale.

Oklahoma Statute 68 O.S. 24323.1 provides:

> A Certificate of Tax Deed or Resale Tax Deed shall convey only the surface and surface rights and mineral interests owned by the owners of the surface rights as distinguished from mineral and mineral rights of such real property. The Certificate Tax Deed or Resale Tax Deed shall not convey any other interest owned by any other individual or legal entity.

As this statute became effective on October 1, 1979, there are two time frames to deal with when examining tax deeds.

Before October 1, 1979, when property is purchased at an Ad Valorem Tax Sale, the purchaser under Oklahoma law was vested not only with the surface estate, but also any non-producing mineral estate, even if the minerals were previously severed.

However, if the mineral estate was producing oil and gas, then any tax sale serves to foreclose the surface only. The case of *McNaughton v. Beattie,* 181 Okla.

603, 75 P.2d 400 (1937) states:

> "Where the gross production tax has been paid on oil or gas produced from the land conveyed by resale tax deed, issued pursuant to a levy of ad valorem taxes, after discovery and during production of oil or gas and payment of said gross production tax, said tax deed does not convey the mineral rights in said land, even though the title to the mineral and surface rights are united in one party."

After October 1, 1979, the above statute vests the purchaser of a tax deed with title to only the surface and such mineral interest that was owned by the surface owners.

There is always a concern whether all parties received proper notice of the tax sale. However, if the purchaser has been in actual, open and notorious possession of the property for more than five (5) years, then the purchaser has defensible title through adverse possession. Oklahoma Statute 12 O.S. §93 states:

> Actions for the recovery of real property, or for the determination of any adverse right or interests therein can only be brought within the periods hereinafter prescribed, after the cause of action shall have occurred, and at no time thereafter: . . .
>
> (3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the Tax Deed, except where lands exempt from taxation by reason of any act of the Congress of the United States of America have been sold for taxes, in which case there shall be no limitation; provided, nothing herein shall be construed as reviving any cause of action for recovery of real property heretofore barred nor as divesting any interest acquired by adverse possession prior to the effective date hereof. . .
>
> 6) Numbered paragraphs 1, 2 and 3 shall be fully operative regardless of whether the deed of judgment or the precedent action or proceeding upon which such deed or judgment is based is voidable in whole or in part, for any reason, jurisdictional or otherwise.

Based on the statute of limitations, a land professional can rely on a tax deed for

title if he has knowledge that the grantee of the tax deed is in possession of the property and has paid the taxes. However, adverse possession against a severed mineral owner is quite difficult (if not impossible) to establish.

48. Term Interests.

Conveyances or reservations of mineral interests may be perpetual or may be limited to a lesser term. See *Peppers Refining Co. v. Barkett*, 208 Okla. 367, 256 P.2d 443 (1953). Term interests are divided into two basic types. The first is a grant or reservation for a fixed term only, and the second is a grant or reservation for a fixed term and "as long thereafter as oil or gas is produced" in paying quantities. For a term-mineral deed in its secondary term, production need not be on the land conveyed by the term deed, but can be from a drilling and spacing unit encompassing the described land in the mineral deed. *Fox v. Feltz,* 1984 OK CIV APP 60, 697 P.2d 543, 84 O&GR 157. Unless there is contrary language in the deed, production from one tract in a deed will also perpetuate production from all tracts. *Turner v. McBroom,* 565 P.2d 44, 56 O&GR 574 (Okla. 1977).

To extend a term deed into its secondary term, there must be actual marketing of the oil and gas during the "primary term." *Fransen v. Eckhardt*, 1985 OK 29, 711 P.2d 926, 87 O&GR 326. The payment of a shut-in gas royalty by a lessee under an oil and gas lease will not continue a term mineral interest into its secondary term, unless the instrument creating the term mineral interest ties its term contractually into the term of an oil and gas lease covering said land or contains a shut-in gas royalty clause itself. A shut-in gas well will not perpetuate a term mineral interest into its second term if the

deed calls for production. *Fransen v. Eckhardt,* 1985 OK 29, 711 P.2d 926, 87 O&GR 326.

In *Barton v. Crouch*, 38 O&GR 455, 42 OBAJ 839 (Okla. Ct. App. 1971), the court reformed a term deed from "20 years unless oil is being produced therefrom" to mean "and as long thereafter as oil is being produced therefrom."

49. Trusts.

The trustee of an express trust has the power to grant, deed, convey, lease, and execute assignments or releases with respect to the real property or interest therein which is subject to the trust. A trustee's act is binding upon the trust and all beneficiaries thereof, in favor of all purchasers or encumbrances without actual knowledge of restrictions or limitations upon the trustee's powers by the terms of the trust, and without constructive knowledge imposed by the trust instrument containing restrictions and limitations having been recorded in the county where the real estate is located. 16 O.S. Ch. 1, App. 15.1.

Any estate in real property may be acquired and held in the name of an express private trust which is a legal entity. Where real property is so acquired, any conveyance, assignment, or other transfer of such property shall be made in the name of such trust by the trustee of said trust. If real property is transferred or acquired in the name of an express private trust after November 1, 1989, the trustee or trustees shall file a memorandum of trust, containing the date of creation of the trust, and the name of the trustee or trustees of the trust, in the office of the county clerk of the county where the real property is located. 16 O.S. Ch. 1, App. 15.2

The words "trustee," "as trustee" or "agent" following the name of a grantee, without additional language actually identifying a trust, do not give notice that a trust does exist or any person except the grantee or mortgagee has a beneficial interest.

A subsequent conveyance by such grantee, whether or not such grantee's name is followed by such words in the subsequent conveyance, vests title in the conveyed of the subsequent conveyance free of all claims of others. If such grantee making a subsequent conveyance is an individual and the property conveyed could be subject to the right of homestead, the subsequent conveyance must also be executed by such grantee's spouse, or must show that such grantee has no spouse.

The presence of the words "trustee" or "as trustee" following a grantee's name in a deed will put the examiner on notice that the real property conveyed is subject to a beneficial interest in a person other than the grantee when written evidence, establishing that an express trust does exist with respect to the property conveyed, is recorded in the office of the county clerk of the county where the property is located. 16 O.S. Ch. 1, App. 15.3.

One issue that has arisen is whether a conveyance by a spouse, as trustee of a revocable trust, must also be executed by the nonexecuting spouse if the property is the couple's homestead. There is no court decision on this issue.

50. Unreleased Oil and Gas Leases.

When examining unreleased oil and gas leases, you should note the description and the primary terms. Examination of Oklahoma Corporation Commission Completion Reports (Form 1002A's) from Sooner Well Log Service and examination of Dwight's

Energy Data Reports will indicate whether a well has been drilled on the leased land or in any drilling and spacing unit which includes any of the leased land.

Release of oil and gas leases should be secured from the lessees. While securing releases are the preferred method of curative, the securing of Certificates of Nondevelopment from the Corporation Commission is the usual method of curative. The Certificate of Nondevelopment should cover all the leased land and should include all land included in any drilling and spacing unit which covers any part of the leased land.

51. Wellbore Assignments

In preparing title opinions, traditional lease assignments convey all or some portion of assignor's leasehold interest in specified leases. However, occasionally, an examiner will come across what is entitled a wellbore assignment where, for example, assignor assigns to assignee all of its interest in the wellbore of the Smith #1 Well.

Such wellbore assignments create confusion as to the interest assigned, particularly if the assignee of the wellbore assignment desires to either deepen or drill horizontal legs in the existing wellbore; or if a new well is proposed and the old wellbore is contained within the same spacing unit. It is important that wellbore assignments be drafted so that the parties clearly set forth their intent. Wellbore assignments are often ambiguous and may result in litigation as to what actually was assigned. A well drafted wellbore assignment would state not only the name of the well being assigned and its location, but also describe if the wellbore being assigned includes rights in the spacing unit and in leases. It would also include whether it is limited to certain depths and/or

formations.

A recent Texas case, which may yet be revised, involved the assignment of leases only insofar as they "cover rights in the wellbore of the King F#2 Well." The court indicated that the rights assigned were confined to the wellbore at the time of the assignment, and did not convey any rights in the oil and gas outside of the wellbore or the right to extend the wellbore into other "areas of the lease." Thus, when reviewing a wellbore assignment, if all rights are not clearly expressed, particularly the right to drill to deeper depths, then it may be necessary to request a curative assignment be obtained from the parties. *Petro Pro, Ltd. v. Upland Resources, Inc.*, 2007 WL 1717178 (Tex. App. 2007) (No. 07-05-0327-CV, Petition for review filed (October 11, 2007).