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Current Issue



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IF YOU DO BUSINESS IN THE PERMIAN BASIN OIL & GAS INDUSTRY THIS IS THE BEST TOOL TO CONNECT YOU

The Legal Landscape



By Kirk Bryant, Attorney

Fifty Years after the Deed, Whose Gas is it?

The proliferation of mineral leasing in the Barnett Shale gas formation has affected title to many properties that have not been transferred for many years. The Tarrant County Clerk's Official Public Record Web site shows the recording of 257,859 lease records in 2007 and 2008, 27.67 percent of all recorded real estate instruments during that period. This includes all forms of leases, but the bulk of these filings are mineral leases. By contrast, lease records comprised only 0.13 percent of all recorded real estate instruments in 1997 and 1998.

A mineral lease ("lease") is a conveyance of real property. Like a sale, a lease is only effective if the lessor has title to the property that is covered. Who owns the property is often not as clear as it seems.

When a married couple purchases property in Texas, the property is presumed to be their community property. Each owns an equal share, and usually both must sign a lease. If only one spouse signs, the validity of the lease may be questioned (and royalties could be withheld) without showing why the other spouse has not signed.

The most common situation where one spouse does not sign the lease is where the other spouse has died. This may only be the beginning of the inquiry; the surviving spouse may or may not own the deceased spouse's interest

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in the property.

Ownership of property after a person's death is determined by the Texas Probate Code and depends on: if there is a will, when the person died, whether they left a surviving spouse, whether they had children, the parentage of their children, and if the property is the homestead of a surviving spouse.

A property owner who dies leaving a will can leave their property to whomever they wish. In the case of community property, the deceased's will only controls one half of the property. In order to have a valid transaction, the ownership of both spouses must be taken into account.

Even a properly executed will is not effective unless it is admitted to probate by a court.^[1] There is a misconception that simply filing a will in the deed records is sufficient. A will is just a document until a court declares it to be a legally valid will.

If there is no will that has been admitted to probate, the ownership of property passes according to a specific plan outlined in Texas Probate Code Sections 38 and 45.

Title to 100 percent of community property vests in a surviving spouse if the deceased died on or after September 1, 1993, had no children except by the surviving spouse; or regardless of date of death had no children at all.

If, however, the deceased had children with someone other than the surviving spouse, or the deceased died before September 1, 1993, and had children with the surviving spouse; a completely different set of rules applies. The surviving spouse only receives his or her own 50 percent community interest. The deceased's 50 percent community interest is vested in the deceased's children, or the descendants of their children, depending upon the circumstances.

In order to fully lease the property, all the proper parties must be determined. Without a probated will, this is usually proven by sworn affidavits of disinterested witnesses who knew the family history. When many years have passed, locating suitable witnesses can prove to be difficult, if not impossible.

Even after all of the proper parties have been identified, a lease needs to be executed by all interest holders, which can be particularly challenging when dealing with step-children of a surviving spouse. If the deceased left minor children for whom no guardianship has been established, there is likely no one who is authorized to sign a lease on a minor's interest.

Only when title can be tracked back to a valid deed can a valid lease be granted. When many years have passed between transactions or since the death of one or more record property owners, determining who is the proper party to sign a lease, and what evidence is needed to establish their ownership is a challenge, not only for the landman trying to secure a lease, but also for the title examination attorney attempting to assure producers that the lease is valid.

All of these issues apply equally to efforts to sell real estate, but are normally resolved by the title company handling the sale. In a lease there is not a title policy and, even with lease bonuses of \$25,000 per acre that were seen in the summer of 2008, on small tracts the cost to establish

good title may be prohibitive in relation to the bonus being paid, and may result in the inability to lease the property, or the inability to receive royalties.

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[i] Texas Probate Code Section 94

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