

PROBATE ESTATES IN:

**TEXAS
OKLAHOMA
LOUISIANA**

***OKLAHOMA CITY ASSOCIATION OF PROFESSIONAL LANDMEN
Oklahoma City, Oklahoma
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INTRODUCTION

The authors attempt herein to summarize the estate procedures of Texas, Oklahoma and Louisiana, and to point out the significant differences between said procedures.

DISCLAIMER

The purpose of this article is to provide general principles of probate procedure and its impact upon the mineral estate. All of the subjects discussed herein could be and likely have been discussed in much greater detail in other articles or legal treatises. This article is intended only to provide these principles in a summary form so that a division order analyst may review these principles prior to interpreting instruments that may or may not convey a mineral or royalty interest. This article is not intended to give specific legal advice!

While the authors have sought to draw together statutory and case law from numerous jurisdictions, the law is subject to many exceptions or variations from general principles, depending on the precise fact situation. The law also is subject to frequent change by reason of constant legislative and judicial review. Even as this article reaches publication, it is possible that some change already may have occurred in that statutory or case law. Because of this, any reader who has a legal question, even if it regards a matter discussed in this article, should seek the professional advice of an attorney of his choosing to analyze the application of the law to the specific facts involved.

Favorite Thoughts for the Day:

543. One of the most difficult things in the world is to argue without passion and to meet arguments without wounding. To be utterly convinced of one's own beliefs without at the same time being bitter to those of others is no easy thing.

William Barclay

548. An expert is a person you have to pay whether the advice turns out right or not.

556. Middle age is when you want to see how long your car will last instead of how fast it will go.

51. The most evident sign of wisdom is continued cheerfulness.

2388. What this country needs are more unemployed politicians. Anonymous

1238. If you can distinguish between good advice and bad advice, then you don't need advice.

65. The worst part about being over the hill is that you don't recall ever being on top of it.
1. When Pilgrims landed in this country, there were no taxes, no depression, no foreign aid. The men hunted and fished. The women did all the work. Then the white man thought he could improve on that system. Blackie Sherrod
783. A man who is always satisfied with himself is seldom satisfied with others. LaRoche foucauld

Aggie Medical Terminology

Artery ----- The study of fine paintings
 Barium ----- What you do when CPR fails
 Benign ----- What you are after you be eight
 Cesarean section ----- A district in Rome
 Coma ----- A punctuation mark
 Colic ----- A sheep dog
 Congenital ----- Friendly
 Dilate ----- To live long
 Fester ----- Quicker
 G. I. Series ----- Baseball games between soldiers
 Morbid ----- A higher offer
 Nitrate ----- Lower than a day rate
 Node ----- Was aware of
 Outpatient ----- A person who has fainted
 Post-operative ----- A letter carrier
 Protein ----- In favor of young people
 Secretion ----- Hiding anything
 Serology ----- Study of English Knighthood
 Tablet ----- A small table
 Tumor ----- An extra pair
 Varicose veins - Veins which are very close together
 Urine ----- Opposite of you're out

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LAW RELATED PUBLICATIONS:

Significant Differences in Oil and Gas Principles between Producing States: From the Landman's Perspective - Texas and Oklahoma - Co-author - published in The Landman, 11-12/89 and 1-2/90 issues;
Title Examination Refresher - Review of Oil and Gas Law V (1990)- Oil, Gas and Mineral Section of the Dallas Bar Association;
Title Examination of Fee Lands (Constructive Notice Revisited) Author/speaker - Mineral Title Examination III (1992) Rocky Mountain Mineral Law Foundation in Denver, Colorado;
Probate Estates in Texas, Oklahoma and Louisiana Author/Speaker - 19th Annual NADOA Institute (1992), Dallas, Texas;
A Comparative Review of Oil & Gas Law: Texas-Oklahoma-Arkansas -Co-Author/Co-Speaker - Natural Resources Law Institute (1993), Hot Springs, Arkansas;
Revenge Against the Title Nerds! (How Texas' proposed title standards can help you avoid technical title objections) -Author/Speaker - Review of Oil and Gas Law VIII(1993)- Energy Law Section of the Dallas Bar Association;
Due Diligence Title Review: The Problem Areas, Where to Look and How to Solve. -Author/Speaker - Sixth Annual Dallas Energy Symposium (1994), Dallas, Texas;
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Non-Consenting Mineral Owners. -Author/Speaker - 24th Annual NADOA Institute (1997), New Orleans, Louisiana;
Drafting Tips For Oil & Gas Leases and Conveyance - Author/Speaker - University of Texas 24th Annual Oil, Gas and Mineral Law Institute (1998), Houston, Texas;
State Royalty Payment Statute - State Check Stub Requirement Statutes - Author/Speaker - 2nd Annual National Oil & Gas Royalty Conference (1998), Houston, Texas;
A Model Form Title Opinion Format - Is it Possible? Is it Practical? - Author -Vol. 25, No. 2 - Oil, Gas and Mineral Law Section Report (December, 2000) - State Bar of Texas;
Basic Conveying Rules for Mineral Deeds and Assignments of Oil and Gas Leases - Co-Author/Speaker - 19th Annual Advanced Oil, Gas & Energy Resources Law Institute (2001), San Antonio, Texas;
Shut-In Gas Royalty - How to Avoid a Train Wreck - Author/Speaker - St. Mary's University School of Law Mineral/Royalty Owners & Producers Institute (2002), Midland, Texas;
Constructive Notice (A Multi-statue perspective) - Author/Speaker - 20th Annual Advanced Oil, Gas & Energy Resources Law Institute (2002), Dallas, Texas;
Pooling - From A to Horizontal - Author/Speaker - St. Mary's University School of Law, Mine Fields & Minerals Institute (2003), Midland, Texas.

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I. Definition of Important Terms

Most of the following terms are defined in the Texas Probate Code, Sec. 3. Any references to the Code refers to the Texas probate Code and I will generally refer to a Section by Sec.

“Child” includes an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include a child who has no presumed father.

“Community Property” is all property acquired while married, other than separate property. Texas Family Code, Sec. 5.01(b). Community is owned equally by both spouses. Where title is joint, both can manage. Where title is in one spouse only, then that spouse alone can manage, lease, or sell, except for the homestead. Texas Family Code, Sec. 5.22 and Sec. 5.24.

“Devise,” when used as a noun, includes a testamentary disposition of real or personal property, or of both. When used as a verb, “devise” means to dispose of real or personal property, or of both, by will.

“Decedent” is a person who has died.

“Devisee” includes legatee which means any person who inherits property by will.

“Distributee” denotes a person entitled to the estate of a decedent under a lawful will, or under the statutes of descent and distribution.

“Estate” denotes the real and personal property of a decedent or ward, both as such property originally existed and as from time to time changed in form by sale, reinvestment or otherwise and as augmented by any accretions and additions thereto (including any property to be distributed to the representative of the decedent by the trustee of a trust which terminates under the decedent’s death and substitutions therefore, and as diminished by any decreases therein and distributions therefrom.

“Heirs” denote those persons, including the surviving spouse, who are entitled under the statutes of Descent and Distribution to the estate of the decedent who dies intestate.

“Independent Executor” means the personal representative of an estate under independent administration as provided in Section 145 of this code. The term “Independent Executor” includes the term “Independent Administrator”.

“Intestate” refers to a person who has died without having written a valid will.

“Legacy includes any gift or devise by will, whether of personalty or realty. “Legatee” includes any person entitled to a legacy under a will.

“Minors” are all persons under 18 years of age who have never been married or who have not had disabilities of minority removed for general purposes.

“Net Estate” means the real and personal property of the decedent, exclusive of homestead rights, exempt property, the family allowance and enforceable claims against the estate.

“Personal Property” includes interest in goods, money, choses in action, evidence of debts and chattels real.

“Personal Representative” or “Representative” includes executor, independent executor, administrator, independent administrator, temporary administrator, guardian and temporary guardian, together with their successors. The inclusion of independent executors herein shall not be held to subject such representatives to the control of the courts in probate matters with respect to settlement of estate except as expressly provided by law.

“Property” includes both real and personal property.

“Real Property” includes estates and interests in lands, corporeal or incorporeal, legal or equitable, other than chattels real.

“Separate Property,” generally, consists of:

1. Property acquired while single; or
2. If married, property acquired by:
 - a. Gift
 - b. Inheritance (Texas Family Code, Sec. 5.01)

Normally, both spouses execute oil and gas leases jointly, whether the mineral interest is community or separate property. However, if the mineral interest is separate property, that spouse alone can execute a binding oil and gas lease, except upon homestead property.

“Testate” is a person who has died having executed a valid will.

“Testator” is a person who has written a will and has not died.

577. The world is too dangerous to live in, not because of the men who do evil, but because of the men who sit and let it happen. Albert Einstein

II. Laws of Descent and Distribution
(reference to "Sec." are to the Texas Probate Code)

A. Definitions of Community and Separate Property

Texas has adopted the Spanish-Mexican influenced community property system, not the English common law system, for marital property. Tenancies by the entirety are abolished. Joint tenancies with right of survivorship cannot be created between spouses with existing community property except as discussed at Part V. Spouses using their separate property only, or other persons, can own property as joint tenants with right of survivorship if the creating instrument expressly identifies the grantees as "joint tenants with right of survivorship." Texas Probate Code, Sec. 46.

All property acquired while married, other than separate property, is community property. Texas Family Code, Sec. 5.01(b). Community property is owned equally by both spouses. Where title is joint, both can manage. Where title is in one spouse only, then that spouse alone can manage, lease or sell, except for homestead. Texas Family Code, Sec. 5.22 and Sec. 5.24.

Separate property, generally, consists of:

1. Property acquired while single
2. If married, property acquired by:
 - a. gift
 - b. inheritance (Texas Family Code, Sec. 5.01)

Normally, both spouses execute oil and gas leases jointly, whether the mineral interest is community property or separate property.

If the mineral estate has not been severed from the surface estate and if the surface estate is a homestead, then both spouses must execute an oil and gas lease or it is inoperative as to the non-joining spouse. Texas Family Code, Secs. 5.81 and 5.82.

Property held during marriage takes its status as separate property or community property at the time it is acquired. Such status is fixed by the facts or circumstances existing at that time. This is called the Inception of Title Doctrine. Smith v. Buss, 136 Tex. 566, 144 S.W.2d 529 (1940).

Property possessed by either spouse during or on dissolution of the marriage is presumed to be community property. This presumption can be rebutted by "clear and convincing evidence". Texas Family Code, Sec. 5.02.

- B. The applicable rules of descent and distribution in Texas are summarized as follows:
1. Intestate - community property - no children - all to surviving spouse. Sec. 45.
 2. Intestate - community property - spouse and children - death before 9/1/93 - the decedent's share of the community to the decedent's children, per stirpes. Sec. 45.
 3. Intestate - community property - spouse and children - death after 9/1/93:
 - a. If all children are of the marriage to the surviving spouse - to the surviving spouse (THIS IS NEW!).
 - b. If the decedent's children are the result of two or more marriages - to all of the decedent's children equally, per stirpes (THIS IS THE OLD RULE!).
 4. Intestate - decedent's separate real property - survived by spouse and children - 1/3 life estate to spouse with remainder in children; 2/3 in fee to children. Sec. 38(b).
 5. Intestate - decedent's separate real property - spouse and no children - 1/2 to spouse and 1/3 to "heirs at law." Sec. 38(a). "Heirs at law" are defined as:
 - a. Surviving parents - 1/2 each
 - b. If only one parent survives, the other 1/2 to brothers and sisters, per stirpes -

The result is that the surviving spouse becomes a tenant in common with the "heirs at law."
 - c. If no parents, brothers, sisters, nieces or nephews, then all to surviving spouse.
- C. Texas has adopted the common law lapse doctrine. This doctrine provides that a gift to a devisee who predeceases the testator lapses and passes pursuant to the residuary clause in the will. If the will does not contain a residuary clause, then the gift passes by descent and distribution, as summarized above. In Texas, the common law lapse doctrine is modified by the Texas lapse statute, Sec. 68 of the Texas Probate Code. This section provides that a gift to the testator's "child or other descendant," who predeceases the testator, shall not lapse but shall vest in "the children or descendants of such...devisee in the same manner as if he had survived the testator and died intestate."

D. Some general rules concerning the administration of an intestate decedent's estate are:

1. Formal dependent administration is required if two or more debts, or other necessity is determined by the Court. Sec. 178(b). The purpose of administration of the probate estate is to:
 - a. Qualify the Personal Representative - Secs. 72-94, 178-219.
 - b. Collect the assets.
 - c. Set aside the homestead, allowances, and exempt property - Secs. 270-293.
 - d. Pay debts, taxes and administration expenses - Secs. 294-329.
 - e. Operate the estate's property and make reports - Secs. 331-403.
 - f. Distribute the net estate to the persons entitled.

A dependent administration is court supervised - requiring annual accounts and court orders. Texas is one of the first states to permit administration of an estate independent of court supervision. The personal representative is usually called an Independent Executor. CAVEAT - The Uniform Probate Code creates a Personal Representative who functions without court supervision like a Texas Independent Executor.

The procedure for a dependent administration is substantially the same as the procedure described in Part III infra. However, informal Affidavits of Death and Heirship are frequently used where the estate is small and where all heirs are adults and are in agreement as to the manner of administration.

2. An oil and gas lease from a dependent administrator obtained by private sale must be approved by the court, Sec. 368, unless administration is an "independent administration," as permitted in Sec. 145.
3. Heirs should not manage property until dependent administration is closed by court order.

E. Affidavit of Death and Heirship

While the statutory procedure for determining heirship, Secs. 48-56, is seldom used because of the time and expense involved, Affidavits of Death and Heirship are frequently recorded in the Deed Records of a county in Texas where the decedent owned real property to verify who the heirs at law were at the time of death. Sec. 37. Said Affidavit is effective for this purpose if it contains all of the information required by Sec. 49, which is:

1. The name(s) of the decedent, the decedent's residence at the time of his death, and the time and place of death;
2. The names and residences of the decedent's heirs, the relationship of each heir to the decedent and the true interest of each of said heirs;
3. The decedent's marital history, including the names and addresses of all spouses and children, whether born or adopted, and the date of death and heirs of any predeceased spouse or child;
4. Whether the decedent died testate or intestate and, if testate, the disposition of the decedent's will;
5. At least a general description of the real and personal property belonging to the estate of the decedent located in Texas but, if possible, a legal description of the property in question and a description of how and when the decedent acquired the property;
6. An explanation for the omission of any of the above information; and
7. A statement that all debts are paid or the manner in which all debts will be paid.

BEWARE - An Affidavit of Death and Heirship, like any other affidavit, may contain inaccurate information caused either by the negligence or the intent of the affiant. The benefit of relying upon the statutory proceeding for determining heirship is that all third parties can rely upon the facts confirmed in the court's final order. Sec. 55. Sec. 42(b)(2) provides protection to a good faith purchaser who relies on an Affidavit of Death and Heirship which omits a child if the conditions in said section are met.

584. As life is action and passion, it is required of a person that he or she be involved in the action and passion of the times, at the peril of being judged not to have lived.

Oliver Wendell Holmes, Jr.

1225. You might be a redneck if - you don't recognize several relatives when they're sober.

1226. You might be a redneck if - you've ever used pantyhose as a coffee filter.

1227. You might be a redneck if - the school principal has your number on speed dial.

III. Summary of Probate Procedure for the Testate Decedent
(all references to "Sec." refer to the Texas Probate Code)

A. Determining the Decedent's Domicile

Venue for probating decedent's will is in "the county where the deceased resided, if he had a domicile or fixed place of residence in this State". Sec. 6. The term "domicile" is defined as "that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning". Determining the decedent's domicile is a fact question that is resolved by reviewing the objective evidence of the decedent's subjective intention. While the will may state a county of the decedent/testator's residence, that statement is not determinative.

B. The Types of Testate Probate Administration

The Probate Code requires formal administration if the decedent died owing two or more debts, or if the probate court determines some other necessity for probate. Sec. 178(b).

1. Dependent Administration - Secs. 270-403

After the court appoints an administrator, the administrator must collect the assets, set aside the homestead, allowances and other exempt property, pay debts, taxes and administration expenses, operate the estate's property, make annual reports, and then distribute remaining assets to those persons entitled. All of the above requires petition to and order of the probate court.

2. Independent Administration - Secs. 145-154A

Usually in Texas the will provides for an independent executor and the will further provides that the independent executor shall not be court supervised, is not required to post a bond and need only file an inventory and appraisal. If the decedent died intestate and all heirs are adults and agree, the court can appoint an independent administrator that has the same authority as an independent executor.

3. Muniment of Title - Sec. 89

If no administration is necessary but the heirs wish to probate the will in order to confirm passage of title to real estate, then the will can be probated only as a muniment of title.

4. Formal/Qualified Community Administration - Secs. 161-176

If a spouse dies intestate but is survived by children or other descendants, the surviving spouse may administer the community estate as a qualified community administrator, free of court supervision, but must post a bond when the inventory and appraisal is filed. However, the qualified community administrator is required to keep books suitable for inspection by interested parties, must formally terminate the administration by court order, and upon termination must render an accounting.

5. Unqualified Community Administration: Limited to Conveyances for the Purpose of Paying Community Debts - Sec. 160

When one spouse has died, either testate or intestate, this provision permits the surviving spouse to act until a personal representative qualifies. The surviving spouse has such power as is necessary to “preserve the community property, discharge community obligations and wind up community affairs”. The authority of the unqualified community administrator terminates upon the payment of all community debts.

Since an oil and gas lease in Texas is a conveyance of minerals a community survivor can execute an oil and gas lease for the purpose of paying of community debts. Griffin v. Stanolind Oil & Gas Co., 133 Tex. 45, 125 S.W. 2d 545 (1939).

6. Informal Family Settlements

Frequently, where the size of the estate does not warrant formal administration and where all heirs are all adults and competent, the heirs will execute an Affidavit of Death and Heirship which contains all the requirements of Sec. 49 plus the following:

- a. a statement that no administration is necessary;
- b. a statement of intention not to probate the decedent’s will, a copy of which would be attached (the effect being to permit all heirs at law to inherit by descent and distribution);
- c. A statement of intention to vest title in those persons who would inherit if the will was probated.

The heirs then record the Affidavit in all necessary counties and also record Quit Claim or Special Warranty Deeds which vest title in the manner expressed in the decedent’s will. It is also possible for the heirs, if the facts support a family settlement, to vest title in a different manner than stated in the will and different than the heirs would have received by descent and distribution.

C. Determining Personal Representatives and Beneficiaries

Normally a will identifies the Personal Representative who will be appointed unless the person is disqualified by Sec. 78, because of:

1. minority,
2. incompetency,
3. felony conviction,
4. non-resident who does not have resident agent for service of process,
5. corporation not authorized to act as a fiduciary,

6. person “who the court finds unsuitable”.

If the will does not identify an alternate or substitute personal representative then the court will appoint a successor representative pursuant to the order of priority of Sec. 77:

1. surviving husband or wife,
2. principal devisee or legatee of testator,
3. any devisee or legatee of the testator,
4. the next of kin of the deceased, the nearest in order of descent first, and so on, and next of kin includes a person and his descendants who legally adopted the deceased or have been legally adopted by the deceased,
5. a creditor of the deceased,
6. any person of good character residing in the county that applies therefore,
7. any other person not disqualified under Sec. 78.

A competent person entitled to preference could waive their right to serve in favor of another qualified person to the exclusion of any other person not equally entitled. Sec. 79. For example, a surviving spouse could waive the right to be appointed as administrator in favor of an unrelated party, who would then be entitled to Letters of Administrator over the objection of a daughter or son of a decedent who also sought appointment.

Most wills state that the independent executor shall serve without posting a bond. If the will does not so provide then a bond must be posted for faithful performance of the executor’s duties. Sec. 194.

The “beneficiaries” of the will are those persons or classes of persons named in the will. However, the Probate Code may add beneficiaries in the following situations:

1. the pretermitted child situation adds the after-born child as a beneficiary just as if specifically named in the will - Sec. 68;
2. the descendants of beneficiaries that predecease the decedent (the lapse doctrine) - Sec. 68;
3. if the decedent’s will does not contain a residuary clause, Secs. 38 and 45 determine who will inherit by descent and distribution - see Part II.
4. Special rules apply to the following:
 - a. Sec. 40 - Adopted Children - Adopted children inherit from both of their adoptive parents and from the child’s natural parents. However, only the adopted child’s adopted parents, not the natural parents, inherit from the child.

- b. Sec. 41 - Kindred of the Half-Blood - If kindred of the whole blood and kindred of the half-blood both inherit, then the kindred of the half-blood inherit only half as much as each of those of the whole-blood.
- c. Sec. 42 - Illegitimate - Child will inherit by and through the mother and maternal heirs will inherit from the child.

D. The Hearing before the Court

When a person dies leaving a will all of his estate devised by the will vests immediately in the devisees named in the will, if the will is admitted to probate. When a person dies intestate, all of his estate vests immediately in his heirs at law. Sec. 37.

Most Texas wills are self-proving in that the affidavit attached to the will and executed by the testator and subscribing witnesses is sufficient to prove up the will for probate. Sec. 59. If the will is not self-proven, then the proof necessary to admit the will to probate is testimony that:

1. the testator is dead;
2. the death occurred within four years before the application to probate the will was filed;
3. the court has jurisdiction and venue over the estate; and
4. the will has not been revoked. Sec. 88(a).

If the will is not self-proven, then at least one of the witnesses to the will must be brought into the court, either individually or by discovery, to prove that the will was executed by the decedent and all the required formalities.

After an application for probate is filed citations must be issued and served. Service is usually accomplished by posting at the courthouse door for 10 days before the return date, which is the first Monday after the expiration of the 10-day period. After the required time has lapsed, the court will conduct a hearing and, usually, will order that the will be admitted to probate and appoint a Personal Representative. Sec. 89. The Order will also provide whether or not an appraiser will be appointed, whether or not a bond is required of the Personal Representative and other material matters. Sec. 181. A will is not effective to pass title to property until the Order Admitting Will to Probate is executed. Sec. 37. The clerk of the court will issue Letters of Administration, if the decedent dies intestate, or Letters Testamentary, if the decedent died testate, and these letters will be the “badge of authority” of the Personal Representative. Secs. 181-183.

E. Inventory, Appraisal and List of Claims

The Personal Representative, including an Independent Executor, is required to file an inventory listing all real estate in the State of Texas and all personal property wherever situated. The inventory should include the fair market value of each item as of the date of death. If an

appraiser has been appointed then the appraiser's value shall be used. The inventory shall distinguish between community and separate property and reflect any co-ownership of property with others. Sec. 250. Attached to the inventory shall be a list of claims due and owing by the estate, whether the claim is a community or separate property debt and the portion of any claim against jointly owned property. Sec. 251.

A third party should not rely on the characterization of the property as being community or separate. This is especially true for the title examiner/division order analyst who purports to have examined the entire chain of title to the property.

F. Authority of the Personal Representative

If the will names an Independent Executor, unless the will states otherwise, the Independent Executor can execute an oil and gas lease and other instruments without court approval and without ratification by the heirs for the purpose of preserving and protecting the assets of the estate as long as the estate still has unpaid debts and the estate has not been closed. Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892 (1892). Lowrance v. Whitfield, 752 S.W. 2d (Tex. App. - Houston {1st Dist.} 1988, no writ history). The Lowrance case acknowledges that an Independent Executor has the authority that an administrator or executor under court order would have in the settlement of an estate. Sec. 367(b) permits courts to issue orders allowing personal representatives to execute oil and gas leases. Sec. 367(c)(7) limits the lease to no more than a 5 year primary term and to contain no more than a 60-day cessation of operations clause.

G. Closing the Estate

The Independent Executor closes the estate either by court order or, more commonly, by affidavit. Sec. 151. However, estates are frequently kept open for an indefinite period even though all taxes and debts have been paid and frequently closing affidavits are not recorded in all counties where the decedent owns property. Sec. 188 provides that if executors are legally qualified and their acts appear from the record to be in conformity with provision of the will and the powers which executors have under the law, then their acts will be regarded as valid so far as said acts affect the rights of innocent purchasers for value and subsequent purchases from them. Therefore, such purchasers will be protected against any attack on their title based on a claim of invalidity of the acts of the executors. The following case holds that the actions of an independent executor are protected in the same manner as a dependent executor. 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.).

H. Forced Heirship

Texas does not have any type of forced heirship statute.

590. Education is what survives when what has been learned has been forgotten.

B. F. Skinner

599. Good people are good because they have come to wisdom through failure.
690. The real measure of our wealth is how much we would be worth if we lost our money.
Anonymous
2359. The man who can think but does not know how to express what he thinks is at the same level of he who cannot think.
Pericles
2360. Great people are just ordinary people with an extraordinary amount of determination.
Robert Schuller
2361. The brain starts working the moment you are born, and doesn't stop until you stand up to speak in public.
2362. The trouble with trouble is it usually starts out like fun.
2363. Opportunity knocks once: Temptation pounds on the door for years.
2364. One thing can be said for ignorance. It certainly causes a lot of interesting arguments.
2365. No matter how low in value the dollar may eventually fall, it will never fall as low as some people will stoop to get it.
2366. Conscience has been defined as that still, fine voice that tells you somebody is looking.
2367. Society judges you not by what you stand for but by what you fall for.
2373. The greatest enemy of trust is often not the why, deliberate and contrived, but the myth, persistent, persuasive and realistic.
John Kennedy
2375. Nothing is really work unless you would rather be doing something else.
Sir James M. Berrie

IV. Summary of Ancillary Probate Procedure
(all references to "Sec." refer to the Texas Probate Code)

A. Ancillary Probate of Foreign Will

It is not necessary to probate the foreign will if the only transaction necessary in Texas is to execute an oil and gas lease. If administration is necessary, pursuant to application, the foreign will and the proceeding admitting same to probate in the other state, exemplified in the manner required by Sec. 95©, are filed in the probate records of a county where the decedent owned real property. No order by the probate court is necessary. Sec. 95.

B. Recording Foreign Will in Deed (Official Public) Records

If ancillary administration of the foreign will is not necessary, and usually it isn't, then an exemplified copy of the foreign will and the order admitting same to probate can be recorded in the Deed Records of the county where the decedent owned real property in Texas. Sec. 96. Such recording has the same force and effect as a Deed of Conveyance as to all property in the state covered by the foreign will. Sec. 98. It is a better practice to also include the application to admit the foreign will and, if the foreign estate is closed, the closing order. Both the application to probate the will and the closing order contain important information, such as the date of the decedent's death and the names and addresses of surviving heirs.

C. Conflict of Law Rules

While property acquires its status as community property or separate property at the time it is acquired, there is a rebuttable presumption that property owned on the date of death is community property. See Part I.A. *supra*.

Title to real property is exclusively subject to the law of the state where the land is located. In other words, where a non-resident dies intestate owning minerals in Texas, the Texas statutes of descent and distribution determine who inherits the Texas minerals. Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943). Texas courts, because of their ultimate power over lands located within the State, have the jurisdictional authority to change the above rule and apply the law of the domicile of the parties in preference to the law of Texas. Toledo Society for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W.2d 692 (1953), 43 ALR 2d 553, cert. denied 347 U.S. 936, 98 L Ed. 1086.

It has long been the rule in Texas that, when a non-resident dies intestate owning minerals in Texas that must be characterized as either separate property or community property for descent and distribution purposes, the presumption of community property status can be rebutted by evidence showing that the law of the state of the matrimonial domicile would hold that the property in question was the decedent's separate property. Oliver v. Robertson, 41 Tex. 422 (1874), confirmed by Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987).

CAUTION - Making this determination, and thus rebutting the community property presumption, requires both knowledge of the property law of the state of marital domicile plus "clear and convincing" evidence that the spouses did not intend the property in question to be

owned jointly. In the absence of such proof, a stipulation of interest identifying the actual heirs should be executed by all potential heirs.

D. Non-resident Decedent Dies Intestate Without Administration

While the statutory procedure for determining heirship, Secs. 48-56, is seldom used because of the time and expense involved, Affidavits of Death and Heirship are frequently recorded in the Deed Records of a county in Texas where the decedent owned real property to verify who the heirs at law were at the time of death. Sec. 37. Said Affidavit is effective for this purpose if it contains all of the information required by Sec. 49, which is:

1. The name(s) of the decedent, the decedent's residence at the time of his death, and the time and place of death;
2. The names and residences of the decedent's heirs, the relationship of each heir to the decedent and the true interest of each of said heirs;
3. The decedent's marital history, including the names and addresses of all spouses and children, whether born or adopted, and the date of death and heirs of any predeceased spouse or child;
4. Whether the decedent died testate or intestate and, if testate, the disposition of the decedent's will;
5. At least a general description of the real and personal property belonging to the estate of the decedent located in Texas but, if possible, a legal description of the property in question and a description of how and when the decedent acquired the property;
6. An explanation for the omission of any of the above information; and
7. A statement that all debts are paid or the manner in which all debts will be paid.

BEWARE - An Affidavit of Death and Heirship, like any other affidavit, may contain inaccurate information caused either by the negligence or the intent of the affiant. The benefit of relying upon the statutory proceeding for determining heirship is that all third parties can rely upon the facts confirmed in the court's final order. Sec. 55. Sec. 42(b)(2) provides protection to a good faith purchaser who relies on an Affidavit of Death and Heirship which omits a child if the conditions in said section are met.

701. There are two kinds of people who don't say much - those who are quiet, and those who talk a lot!

724. Liberty doesn't work as well in practice as it does in speeches.
Will Rogers
760. Man blames fate for other accidents, but feels personally responsible for a hole in one.
764. The average time between throwing something away and needing it badly is about two weeks.
769. If you think fisherman are the biggest lairs in the world, ask a jogger how far he runs every morning.
771. Virtue is its own punishment.
750. Our most heated arguments usually are about things for which there is no proof either way.
109. You get credit for what you finish, not what you start.
117. Character emerges from all the things you were too bush to do yesterday but did anyway.
66. All of the animals, except man, know that the principal business in life is to enjoy it.
752. Isn't it interesting that we never refer to a person as happily single.
2374. Wisdom:
We must be silent before we can listen;
We must listen before we can learn;
We must learn before we can prepare;
We must prepare before we can serve;
We must serve before we can lead.
William A. Ward
2383. Each generation imagines itself to be more intelligent than the one that went before it, and wiser than the one that comes after it.
George Orwell

V. Miscellaneous Issues Applicable to Landmen and Division Order Analysts

A. The Size of the Estate, or the Mineral Interest in Question, is too Small to Justify Formal Probate

Some states, such as Oklahoma, require formal ancillary probate for the title to be marketable, as defined in their title standards or by statute. The Oklahoma Statute particularly has been referred to as the “Rural Oklahoma Lawyer’s Relief Act”. If a purchaser insists on title being marketable, there is no alternative to ancillary probate. However, if the purchaser is willing to accept a reasonable business risk, a certified copy of the estate proceedings from another state or an Affidavit of Heirship, particularly where a family settlement is involved, should be acceptable.

B. Payment Pending and Lessors Separated

Hypothetically, we assume the royalty/mineral interest is the separate property of one spouse, but both spouses executed the lease and division order. Now they are separated and the spouse that owns the separate property royalty wants a check that is not payable jointly. What do you do?

The oil and gas lease and the division order are both contracts between the parties thereto. Since the contract requires payment jointly, you must continue to make payments jointly until you receive either:

1. an amended division order or other written directions signed by both spouses directing you to pay royalty to only one spouse; or
2. a Judgment or Decree of Divorce which confirms the separate royalty ownership.

If the Judgment does not specifically state who owns the mineral interest and if the Judgment does not contain a coverall/residuary clause which states that “all property not specifically given to one party is owned by _____ (husband or wife)”, then the husband and wife will continue to own the mineral interest as tenants in common after the divorce. They can later partition this mineral interest.

C. How to Pay Life Tenants and Remaindermen

The life tenant, of either a legal life estate or a conventional 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. Davis v. Bond, 158 SW 2d 297 (Tex. 1942).

The life tenant is entitled to receive the delay rental. In the absence of a written agreement, the bonus and royalty should be paid to the life tenant and remainderman jointly. The life tenant

is entitled to the interest produced from the bonus and royalty as set aside in an interest bearing account. This is because bonus and royalty are considered corpus while the delay rental is considered income or rent. Clyde v. Hamilton, 414 SW 2d, 434 (Tex. 1967), 26 O&GR 220.

An exception to the above is the “Open Mine Doctrine.” This 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. Youngman v. Shular, 155 Tex. 437, 288 SW 2d 495 (1956), 5 O&GR 1069.

Normally, if the lease in effect at the time the life estate was created terminates, then the “mine closes” and the Davis v. Bond rule becomes effective. Moore v. Vines, 474 SW 2d 437 (Tex. 1971), 41 O&GR 82.

D. How to Pay to a Trust

A Trustee appointed in a written trust instrument has the powers stated therein. If the Trustee is expressly given the authority to manage and sell land then he impliedly has the authority to execute an oil and gas lease and related instruments. Wills and trust instruments are liberally construed. Avis v. First National Bank of Wichita Falls, 141 Tex. 489, 174 SW 2d 255 (1943). Sometimes, a trust instrument or will gives the Trustee all powers authorized by statute.

The statutory powers of trustees are provided in the Texas Trust code, which has been recodified as part of the Texas Property Code Sacs. 101-001-115.015. Sec. 113.012 lists the specific actions a Trustee may take, which includes negotiating and executing oil and gas leases covering mineral or royalty interests that extend beyond the term of the trust. Sec. 113.002 authorizes a Trustee to exercise additional powers that are “necessary or appropriate to carry out the purposes of the trust.” The only limitation upon the Trustee’s powers is contained in Sec. 113.001 which provides that the powers granted in Sec. 113.002 et seq. do not apply if the trust instrument, a subsequent court order, or another provision of the trust code “conflicts with or limits the power.” Because of this limitation, an examiner must see the trust instrument or a properly drafted memorandum of the trust agreement.

If a trust is created by conveying to, i.e., “Jack Smith, Trustee” and the creating instruments does not identify a trust instrument or the name of any beneficiary, then the Trustee may “convey, transfer or encumber the title of the property without subsequent question by a person who claims to be a beneficiary under the trust or who claims by, through, or under an undisclosed beneficiary” and “the trust property is not liable to satisfy the personal obligations of the Trustee.” Sec. 101.001. This situation is frequently referred to as a “blind trust,” and permits the trustee to execute an oil and gas lease. However, if the instrument creating the trust, or some other recorded instrument, identifies a trust instrument or the name of a beneficiary of said trust, then you should make inquiry and obtain a copy of said trust instrument to verify that the trust

instruments does not limit the power of the trustee, and to determine that the trust has not terminated.

If there is a question as to the authority of the trustee or the possibility of the trust having terminated, then ratification of the lease should be obtained from the beneficiaries. Also, your well file should always contain a copy of the trust agreement so that you or another person not familiar with the file can verify:

1. that the trustee has authority to execute oil and gas leases and related instruments;
2. who the substitute trustee will be or how the substitute trustee will be determined;
3. who the beneficiaries of the trust are at any point in time (while you will probably not deal directly with the beneficiaries, it helps to know who actually benefits by the payments you are making); and
4. what facts will cause the trust to terminate and who the ultimate owners of the trust property will be.

A Memorandum of Trust should address the same elements. Payment should always be made payable to “John Smith, Trustee” not to “John Smith Trust”.

E. How to Pay Minors and Mental Incompetents (NCM) - Secs. 131-135, 178-274

A person is a minor until he becomes 18 years of age, is married or had the disability of minority removed. Tex. Probate Code, Sec. 3(t). An oil and gas lease executed by a minor is voidable by the minor for a reasonable time after the minor becomes 18. Prudential Bldg. And Loan Assn. V. Shaw, 119 Tex. 228, 26 SW 2d 168, rehearing overruled at 119 Tex. 240, 27 SW 2d 157 (1930). An oil and gas lease executed by a guardian can be effective for a period longer than the time the ward is a minor but said lease cannot be for a primary term in excess of 5 years. Tex. Prob. Code Sec. 367(c)(7).

A person is not mentally incompetent to execute an oil and gas lease until he has been determined by a court to be mentally incompetent. An oil and gas lease taken from a person who has been judicially declared to be mentally incompetent is voidable at the lessor’s election for a reasonable time after the person is judicially declared to be sane. Neill v. Pure Oil Company, 101 SW 2d 402 (Tex. Civ. App. - Dallas 1937, writ ref’d) 3 OGR 419.

F. Joint Tenancy with Rights of survivorship (JTWROS) - Secs. 46, 451-462

A Mineral Deed from Grantor to A and B, as joint tenants, creates a tenancy in common for A and B. Sec. 46. A Mineral Deed from Grantor to A and B (who are not married), as joint tenants with right of survivorship (JTWROS), is effective.

A Mineral Deed from Grantor to husband (H) and wife (W), as joint tenants with right of survivorship when H and W do not sign the deed, is not effective to create survivorship. A Mineral Deed from Grantor to H and W, JTWROS, where H and W do sign the deed probably creates survivorship. A Mineral Deed from Grantor to H and W, will create survivorship where the following phrases are used:

1. “with right of survivorship”;
2. “will become the property of the survivor”;
3. “will vest and belong to the surviving spouse”; or
4. “shall pass to the surviving spouse”.

These phrases are “safe harbors” created by Sec. 452. Sec. 452 also provides that an agreement that otherwise "...is in writing and is signed by both spouses..." shall be effective without including any of the phrases identified above.

Another suggestion for how to create a CPWROSA is that both spouses sign a statement stating:

H and W agree to hold the subject property as their community property with right of survivorship.

This agreement can be on the title document or a separate agreement.

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7. West’s Texas Forms - Probate and Administration of Estates, Volumes 11-12A.

8. Woodward and Smith, Texas Practice Series: Probate and Decedent's Estates, Vols. 17 and 18, West Publishing Co. (1992).

734. People have a way of becoming what you encourage them to be, not what you nag them to be.
154. Opposition by others is often proof that you are on the right track.
62. The reason a lot of people do not recognize opportunity is because it usually goes around wearing overalls looking like hard work. Thomas A. Edison
69. Blessed is the man who is too busy to worry in the daytime, and too sleepy to worry at night.
171. To figure the cost of living, just take your income and add 10%.
226. We judge ourselves by what we feel capable F.O. doing, but others judge us by what we've already done. Longfellow
269. The trouble with man is twofold. He cannot learn truths which are too complicated; he forgets truths which are too simple. Rebecca West
272. One ailment that antibiotics will never stamp out is premature formation of opinion.
2386. Congress is so strange. A man gets up to speak and says nothing. Nobody listens, then everybody disagrees. Boris Marshalov
2387. Politics...from the Latin words poly, meaning many and tics, meaning tiny annoying bloodsucking insects. Highly Placed Source
2388. What this country needs are more unemployed politicians.
2389. The two hardest things to handle in life are failure and success. Unknown

BIOGRAPHICAL SKETCH

Timothy C. Dowd is an attorney and shareholder with the law firm of Elias, Book, Brown Peterson, & Massad, Oklahoma City, Oklahoma. He graduated from the University of Tulsa College of Law in 1979.

Mr. Dowd is a past -President of the Oklahoma City Mineral Lawyers Society. Mr. Dowd is also an Adjunct Professor of Oil and Gas Law at Oklahoma State University-Oklahoma City.

Articles written by Mr. Dowd include:

A Comparative Review of the Oil and Gas Law of Oklahoma and Arkansas, Landman (May/June 1996 and July/August 1996).

Significant Differences in Oil and Gas Principles Between Producing States - Texas and Oklahoma, Landman (November/December 1989 and January/February 1990).

The Doctrine of Merger of Title When the Mortgagee Acquires the Mortgagor's Land, 58 Okla. B. J. 823 (1987).

Oklahoma Senate Bill 160, Landman, (February 1986).

Gulfstream Petroleum Corp. v. Layden: A Spacing is a Jurisdictional Prerequisite to a Pooling Order, 52 Okla. B. J. 1559 (1981).

Mr. Dowd has previously lectured at various seminars sponsored by various groups, including American Association of Petroleum Landmen, The Amarillo Association of Petroleum Landmen, Arkansas Bar Association, Colorado School of Mines, Dallas Association of Petroleum Landmen, Dallas Bar Association, Dallas-Ft. Worth Association of Lease and Title Analysts, Fort Worth Association of Petroleum Landmen, National Association of Lease and Title Analysts, Oklahoma City Association of Petroleum Landmen, Oklahoma State University-Oklahoma City, Sooner Association of Division Order Analysts, Tulsa Association of Petroleum Landmen, Tulsa Association of Lease and Title Analysts, and Women in Energy.

Mr. Dowd is a member of the Legal Committee of the Interstate Oil and Gas Compact Commission.

Mr. Dowd is a member of the American Bar Association, the Natural Resources Section, and the Oklahoma Bar Association, the Mineral Law Section, as well as a member of the Oklahoma City Mineral Lawyers Society and Oklahoma City Title Lawyers.

Mr. Dowd's primary area of practice is oil and gas law, including the rendering of title opinions, litigation and the drafting and negotiation of industry contracts.

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OKLAHOMA

I. DEFINITIONS

Administration - the judicial process of distributing an estate of an intestate decedent.

Administrator - the person appointed by the probate court to take charge of the decedent's estate and distribution of the decedent's property when the decedent died intestate.

Bequeath - the transfer of personal property under a will. The terms devise and bequeath are often used interchangeably without difference in effect.

Descent and Distribution - state laws which determine to whom a decedent's estate will be distributed when the decedent died intestate (no will). 84 Okla. Stat. § 213.

Devise - the transfer of real property under a will.

Estate - the property, rights and obligations comprising the assets of the decedent. Hester v. Snyder, 422 P.2d 432 (Okla. 1967).

Executor - the person appointed by the probate court to have responsibility of the decedent's estate and distribution of the decedent's property when the decedent died testate.

Heir - person entitled to receive property under the laws of descent and distribution. Collar v. Mills, 190 Okla. 481, 125 P.2d 197 (1942).

Intestate - the status of a decedent who dies without having executed a will. 84 Okla. Stat. § 212.

Issue - descendants, lineal descendants, offspring and grandchildren. Hughes v. Fidelity Bank, N.A., 545 P.2d 492 (Okla. 1982).

Personal Representative - term includes and replaces the terms executor and administrator.

Probate - the act of proving a will and the judicial administration of an estate where the decedent died testate. The term has also evolved to mean any proceedings in a probate court.

Succession - succession is the coming in of another to take the property of one who dies without disposing of it by will. 84 Okla. Stat. § 211.

Testate - the status of a decedent who dies having left a will.

Will - a person's written declaration of what is to be done after his death. A will differs from a deed because it is (1) revocable during his lifetime; (2) operative for no purpose until his death; and (3) applicable only to the situation which exists at his death.

II. LAWS OF DESCENT AND DISTRIBUTION

A. Rules of Descent and Distribution.

1. Prior to July 1, 1985, if a person dies intestate, it passes as follows:
 - a. If the decedent dies leaving a surviving spouse and only one child or the lawful issue of the child, it passes in equal shares to the spouse and the child (or issue of such child).
 - b. If the decedent dies leaving a spouse and more than one child, the surviving spouse receives one-third ($1/3$), with the remainder in equal shares to the children and/or to the lawful issue of any deceased child. However, if the decedent shall have been married more than once, the spouse shall inherit property not acquired during coverture, only of an equal share with each of the living children of the decedent and the lawful issue of any deceased child.
 - c. If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue and the lawful issue of any deceased children, by right of representatives. Example: H dies leaving children A & B and two grandchildren, who are the children of deceased child C. In this case, A would be entitled to one-third ($1/3$), B one-third ($1/3$), and the two grandchildren of C one-sixth ($1/6$) each.
 - d. If the decedent dies leaving no issue, one-half ($1/2$) of the estate passes to the spouse and the other one-half ($1/2$) to the decedent's father or mother, or if he leaves both father and mother, to them in equal shares. If there is no surviving father or mother, then the remaining one-half ($1/2$) goes to the brothers and sisters of the decedent and to any children of any deceased brother or sister.
2. 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 and one-third ($1/3$) of all other property. The remaining two-thirds ($2/3$) is inherited by the parents in equal shares. In the event the parents are deceased, two-thirds ($2/3$) of the other property is inherited by the brothers or sisters. In the event there is no surviving issue, parent, brother or sister, the spouse inherits all.

- 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 Okla. Stat. § 213.
- d. Intestate and no spouse--the estate is distributed to the surviving children of the decedent and the issue of any deceased child, in equal share by right of representation.
84 Okla. Stat. §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 non-title holding spouse with any interest in the property except upon the death of the title holding spouse. Essex v. Washington, 198 Okla. 145, 176 P.2d 476 (1947).

Not all property acquired during a marriage by either spouse is automatically acquired by joint industry. Property received by gift or inheritance is obviously separate property when received, before, during or after the marriage. It has generally been held that any property acquired during marriage is presumed to have been acquired by joint industry. Manhart v. Manhart, 725 P.2d 1234, (Okla. 1986).

B. Oklahoma Has Adopted the Common Law Lapse Doctrine.

Under Oklahoma law, a gift to a devisee who predeceases the testator lapses and passes under the residuary clause in the will, if the residuary clause is properly written. In the absence of a residuary clause or a sufficiently broad residuary clause, the gift passes according to the intestacy statutes. 84 Okla. Stat. § 177; Dean v. Moore, 380 P.2d 924 (1963). However, 84 Okla. Stat. § 142 provides that if the gift is to a "child or other relative of the testator," the lineal descendants of the devisee inherit the estate devised by the will.

C. Affidavit of Death and Heirship.

When an owner dies and there has been no probate proceedings, a title attorney will require that probate proceedings be conducted. In some instances, it is considered that the probate or administrative proceedings would be too costly and time-consuming when

the probable value of the interest involved is considered. In the event a business judgment is made to rely upon one or more affidavits, the affidavits should contain the same information referenced in the Texas portion of this paper (Section II.E.)

Different companies have different judgments regarding this matter. Most companies make the business decision to rely upon affidavits for drilling purposes.

In 1995, House Bill 2783 was amended by 16 O.S. §82, stating that recorded and acknowledged affidavits would be notice of matters covered therein, relating to title to real property. The old §82 also specifically stated: “The affidavit shall not take the place of a judicial proceeding, judgment, decree or title standards.”

Under H.B. 2783's amended §82, recorded affidavits now create rebuttable presumptions that the facts stated in them are true insofar as they relate to the real estate, its use, or its ownership. (See: 16 O.S. §83 as to what matters may be addressed by affidavit.) Amended §82 removed the previous statutory provision that affidavits would not take the place of a judicial proceeding, judgment, decree or title standards. Thus, arguably, one might infer that affidavits may now be valid substitutes for probate proceedings. When one encounters an intestate succession situation, and there appears to be no probate, may the title examiner rely on a recorded affidavit of death, heirship and intestacy in lieu of a judicial probate? H.B. 2783's author believes that amended §82 makes an affidavit prima facie evidence of the facts stated therein, and that the statute authorizes the use of affidavits to establish intestate succession in title matters.

If affidavits can be used as prima facie evidence of such things as determination of death and intestate succession, then the current Oklahoma Bar Association Title Standard 3.3 is outdated. Title Standard 3.3 indicates that while affidavits are not substitutes for certain types of judicial proceedings, judgments, decrees or title standards, they are a practical and proven means of assisting anyone examining title in understanding various facts or circumstances relating to property, ownership, and the persons who have relations to either. It states affidavits may be relied upon for interpretation or clarification purposes in determining the marketability of title, “unless the examiner has reason to suspect the personal knowledge, competency or veracity of the affiant.” Amended §82 provides:

An affidavit covering matters named in section 83 of this title may be recorded in the office of the county clerk in the county in which the real property is situated. There shall be a rebuttable presumption that facts stated in a recorded affidavit are true as they relate to real estate, its use or its ownership.

Thus, now such affidavits not only give notice of facts, but also create a rebuttable presumption that those facts are true. Beyond the creation of prima facie evidence of

such facts, most attorneys question whether such affidavits rise to the level of valid substitutes for judicial determinations. Amended §82 does not expressly authorize the use of affidavits as such substitutes. Rather, it merely raises the level of affidavits from notice of possible facts, to prima facie evidence that those facts are true. In trying to determine whether or not one has a valid record “marketable title”, an examiner generally feels safe in relying on a final judicial decree as being determinative of the facts stated therein. An affidavit, on the other hand, creates only a presumption, which can be refuted at a later time with appropriate rebuttal evidence. Thus, affidavits do not have the same conclusive effect as judicial determinations.

Regardless of the conclusiveness of affidavits, in the name of goodwill, many companies will disburse proceeds to presumed heirs if the proceeds are less than a designated amount every month and the heirs sign a division order with warranty language.

III. SUMMARY OF PROBATE PROCEDURE.

A. Determining the Decedent's Domicile.

Venue for probating decedent's will is the county where the decedent was a resident at the time of his death. 58 Okla. Stat. § 5.

In the event the decedent was not a resident of Oklahoma, the will may be probated in the county where the decedent died, if he left an estate there. If the decedent was not a resident of Oklahoma and also died out of Oklahoma, the will may be probated in the county where any part of the decedent's estate is located. If the decedent was not a resident of Oklahoma, but he died in an Oklahoma county in which he did not leave an estate, the will may be probated in the county where any part of the decedent's estate is located. Finally, in all other cases, the decedent's will may be probated in the county where application for letters is first made. 58 Okla. Stat. §5.

B. The Types of Testate Probate Administration.

Oklahoma differs from Texas in that it has only one type of probate proceeding. It does not have dependent or independent executors.

C. Determining Personal Representatives and Beneficiaries.

Normally, a will identifies the personal representative who will be appointed, unless the person is disqualified by 58 Okla. Stat. § 102, because of:

1. minority;

2. conviction of infamous crime; or
3. is adjudged to be incompetent to serve because of “drunkenness, improvidence, or want of understanding and integrity.”

If no personal representative is named in a will, the court will appoint a personal representative in accordance with statutory priorities. The surviving spouse (or his/her nominee) is first in priority the decedent's children and parents in decreasing priority. 58 Okla. Stat. §122

If the personal representative is deemed incompetent, waives his right to serve, fails to apply for letters, or fails to appear and qualify, letters of administration with the will annexed must be issued. 58 Okla. Stat. § 103.

In the event a personal representative is absent from the state, or is a minor, the alternate personal representative named in the will can administer the estate until the return of the absentee representative, or the minor reaches the age of majority when he may be admitted as a joint personal representative. If there is no other executor identified in the will, letters of administration with the will annexed must be granted. However, the court may, in its discretion revoke them upon the return of the absent personal representative, or the arrival of the minor at the age of majority. 58 Okla. Stat. § 106.

If the named personal representative fails to petition the proper court for probate within thirty (30) days after he has knowledge of the death of the testator, he may be held to have waived his right to the letters. When this occurs, the court may appoint any other competent person to administer the estate. 58 Okla. Stat. § 108.

Most wills state that the personal representative shall serve without posting a bond. If the will does not so provide, then a bond must be posted for faithful performance of the personal representative's duties. 58 Okla. Stat. §§ 171, 173 and 178. The bond will usually be set in an amount close to the estimated value of the estate.

D. The Hearing Before the Court.

When a person dies leaving a will, all of his estate devised by the will vests immediately in the devisees named in the will, if the will is admitted to probate. When a person dies intestate, all of his estate vests immediately in his heirs at law. Each of these distributions are subject to the probate process.

Any personal representative, devisee or legatee named in a will, or any other person interested in the estate, may at any time after the death of the testator, petition the court to have the will proved. 58 Okla. Stat. § 22. The petition must show:

1. the jurisdictional facts;
2. whether the person named as personal representative consents to act, or renounces his right to the letters testamentary;
3. the names, ages, and residence of the heirs, legatees, and devisees of the decedent, so far as known to the petitioner;
4. the probable value and character of the property of the estate; and
5. the name of the person for whom letters of testamentary are prayed.

The petition for the probate of the will must be in writing and signed by the applicant or his counsel. 58 Okla. Stat. § 23.

When the petition for probate is filed the court must fix a day for hearing, not less than ten (10) nor more than thirty (30) days from the filing of the petition. If the names and addresses of all heirs, legatees, and devisees of the decedent are known to the petitioner and are set out in the petition, the court will give notice of the hearing by mailing copies of the notice to all heirs, legatees, and devisees at their last known place of residence not less than ten (10) days prior to the date of the hearing. However, if the name or address of one or more heirs, legatees, or devisees of the decedent is not known to the petitioner, notice of the hearing will be given by mailing the notice, and, in addition, notice will be published in one issue of a newspaper, in which case the hearing will not be less than ten (10) days from the date of publication of such notice. After the required time has lapsed, the court will conduct a hearing and, usually, will order that the will be admitted to probate and appoint a personal representative. 58 Okla. Stat. § 25.

E. Inventory, Appraisal and List of Claims.

The personal representative is required to file an inventory and appraisal of the decedent's estate designating the homestead and exempt personal property as provided by law. Also, the inventory must include an account of all monies belonging to the decedent, which the executor has taken possession of, and if none, the fact must be so stated in the inventory. 58 Okla. Stat. § 284. The court must order the inventory or appraisal upon presentation of a written demand by any heir, devisee, legatee, a creditor having filed a claim, guardian, conservator, guardian ad litem, or any other person having an interest in the estate. 58 Okla. Stat. § 281.

F. Authority of the Personal Representative.

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 Okla. Stat. §§ 426, 462 and 924. If the will does not so authorize the personal representative, court approval is needed to obtain a lease from any estate, intestate or testate, 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 Okla. Stat. § 925. If the bonus value of the lease is less than \$500.00, then an open sale is not necessary and a negotiated sale with approval by a judge having jurisdiction over the estate is sufficient without notice or a formal court proceeding. 58 Okla. Stat. § 928.1.

G. Closing the Estate.

To close the estate, a petition is filed requesting the court to approve the account of the personal representative, decide who are the legal heirs of the decedent, decide who is entitled to receive the estate, and order distribution of the estate in accordance with its findings. 58 Okla. Stat. § 634. The court then issues a Final Decree which recites the death of the decedent and the names and degrees of kinship of his living relatives, and determines who are the heirs and the amount of the decedent's property to which each heir is entitled. 58 Okla. Stat. § 632.

H. Forced Heir Statute

It should be noted that Oklahoma has a forced heir statute. The statute provides that a surviving spouse may not be deprived of loss of a share of the deceased spouse's estate by will than he would be otherwise entitled to under the intestate succession statutes. 84 Okla. Stat. §44.

I. Interest Is So Small That It Is Unjustified To Warrant Complete Administration Of The Estate.

When the value of the estate is less than \$60,000.00, the procedure for probate will be the same as for a full probate, but the time for administration can be shortened pursuant to 58 Okla. Stat. §241.

Upon presentation of an estate inventory showing that the value of the estate is less than \$60,000.00, the personal representative can apply to the court for summary administration. If permitted by the court, this will allow the personal representative to combine the Notice to Creditors and the Notice of Hearing Final Account and Petition for Distribution and Discharge, with the following requirements:

1. the combined notice must be published once each week for two consecutive weeks in a newspaper of general circulation in the county in which the probate is filed;

2. the combined notice must be mailed as required for a Notice of Final Hearing at least ten days prior to the date of the final hearing, and must set out a date by which the final account and petition for distribution will be filed;
3. the final account and petition for distribution, etc., must be filed at least five (5) days prior to the order allowing the final accounting, determining heirs and distribution;
4. the final hearing must be set at least thirty-five (35) days following the first publication of the combined notice. 58 Okla. Stat. §241.

IV. ESTATE OF NON-RESIDENT DECEDENT.

A. Ancillary Probate of Foreign Will.

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 known as "ancillary probate." Failure to conduct an ancillary probate will result in a cloud on the title to the minerals, difficulty in selling the minerals, and possible problems with regard to leasing or the distribution of monies from productive wells on the property. This is, of course, subject to interpretation of the laws regarding affidavits as set out in section II.C, above.

In an ancillary probate, upon filing the Petition to have the will admitted into probate, notice must be mailed to all the heirs pursuant to 58 Okla. Stat. §§ 25 and 26. Also, this notice should be published in the county where the estate proceeding is being conducted. Subsequently, the judge will sign an order appointing the personal representative. If the personal representative is not from Oklahoma, he must appoint an agent residing in the county where probate proceedings are held to receive service of any legal process. 58 Okla. Stat. § 162.

B. Conflict of Laws.

The law of Oklahoma governs intestate succession as to real property located in Oklahoma. White House Lumber Co. v. Howard, 286 P. 327 (1930). Therefore, you cannot rely upon a out-of-state probate proceeding to determine who owns the land, minerals or leases in Oklahoma.

C. Non-Resident Decedent Dies Intestate.

For the estate of a non-resident who dies intestate, to be marketable, real property of the estate must be distributed in a probate proceeding.

V. MISCELLANEOUS ISSUES

A. Joint Tenancy With Right of Survivorship.

If any real property is held by a husband and wife in joint tenancy with the right of survivorship, the surviving joint tenant or the personal representative may terminate the joint tenancy by following the statutory procedure for evidencing the death of one of the joint tenants. This procedure is set out in 58 Okla. Stat. § 912, and requires the surviving joint tenant, the personal representative, or a duly appointed attorney-in-fact to any surviving joint tenant to file a certified copy of the joint tenant's death certificate in the county where the real property is located. Section 912 also requires the filing of an affidavit in the county, where the real property is located, which recites:

- I. that the deceased joint tenant and the person named in the death certificate are the same person;
- II. that the parties were in fact husband and wife;
- III. the book and page of recording of the instrument by which the decedent affiant took title as joint tenant, as well as the date of death of the deceased joint tenant.

The filing of these instruments will constitute conclusive evidence of the death of the joint tenant and the termination of the joint tenancy. The title of such property shall be deemed merchantable unless otherwise defective. No probate is necessary.

B. Tax Releases

While all title examiners require that an Oklahoma Tax Release and a Federal Tax Release be supplied upon the death of any decedent, many times the decedent's estate is not of a sufficient size to warrant a Federal Tax Return. In that event, an affidavit executed by the personal representative stating that no Federal Tax Return was filed because of insufficient size is necessary.

A title examiner also normally requires that an Oklahoma Tax Commission release be returned and filed. While the estate is pending most examiners will determine that the title is marketable until such time as a release is filed. Once an Oklahoma Tax Release has been obtained, then it is permissible for the company to pay the personal representative of the estate, even while the probate proceeding is pending. Upon the issuance of a Final Decree, then the oil company should require a Final Decree for examination.

BIOGRAPHICAL SKETCH

Rick received a B.A. from Louisiana State University in 1972 and a B.A. and M.A. from Louisiana Tech University I 1975. He graduated with honors from LSU Law School in 1980 where he served as an associate editor of the Louisiana Law Review. After graduation, he completed a judicial clerkship with Justice James L. Dennis, then on the Louisiana Supreme Court, and now on the federal Fifth Circuit Court of Appeals. Since 1981, he has been engaged in the practice of oil and gas law with an emphasis on title and contract matters and administrative law before the Office of Conservation and State Mineral Board. He is a shareholder in the Lafayette, Louisiana office of Liskow & Lewis.

Rick is a member of the Lafayette, Louisiana and Amerada Bar Associations and a member of the Lafayette and American Landmen Associations. Rick is a frequent speaker at and contributor to bar and industry seminars and publications.

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SUMMARY OF LOUISIANA INTESTACY PROVISIONS AND PROBATE PROCEDURES

I. INTRODUCTION

Outlined below in summary fashion are certain aspects of Louisiana intestacy provisions and probate procedures, particularly as they relate to producing properties, mineral rights and functions and duties of division order analysts. The comments are very general in nature and may be subject to significant exceptions and qualifications in a particular fact situation. The reader is also cautioned that these comments relate to current Louisiana law, i.e., through the 1991 Louisiana legislative session unless otherwise stated. State law has been legislatively amended and revised numerous times in the past and will, no doubt, continue to be changed in the future.

II. DEFINITIONS

1. **Succession** - The -Transmission of the estate of the decedent to his successors. Louisiana Civil Code Article 871. This word is also often used to refer to the judicial proceedings by which the successors are recognized as succeeding to the decedent's estate.
2. **Estate** - The property, rights and obligations that a person leaves after his death. Louisiana Civil Code Article 872.
3. **Intestate Succession** - A succession in which the decedent left no valid will. Louisiana Civil Code Article 875.
4. **Testate Succession** A succession in which the decedent left a valid will. Louisiana Civil Code Article 874.
5. **Representation** - The legal term for allowing a descendent to step into the position of his ancestor and receive similar treatment and rights. Louisiana Civil Code Article 881. Under Louisiana succession law, only the direct descendants of the decedent and the descendants of his predeceased siblings are allowed to represent their ancestors in the decedent's succession. Louisiana Civil Code Articles 882 and 884. In those cases in which representation is allowed, the property is divided by roots (per stirpes) rather than by heads (per capita). Louisiana Civil Code Article 885.

6. **Degree of Relationship** - The closeness of blood relationship measured in generations, In the direct ascending or descending lines, the degree of relationship is the number of generations between the parties. In the collateral line, the number of degrees is determined by counting generations from one party up to the common ancestor and then back down to the other party. Louisiana Civil Code Articles 900 and 901.
7. **Separate Property** - Property acquired by a spouse: (a) while unmarried, judicially separated or divorced or after establishment of a separate property regime by matrimonial contract; (b) with separate things; and, © by inheritance or donation to the acquiring spouse individually. Louisiana Civil Code Article 2341.
8. **Community Property** - All property acquired during the marriage that is not separate property, which includes: (a) property acquired through the effort, skill, or industry of either spouse; (b) property acquired with community things; and, © natural and civil fruits of community property or of separate property when a proper reservation has not been made. Louisiana Civil Code Article 2338 and 2339. All property in the possession of a spouse during the existence of the community regime is presumed to be community although this presumption is rebuttable. Louisiana Civil Code Article 2340.
9. **Usufruct** - A type of personal servitude in which the usufructuary is the owner of a real right of limited duration on the property of another (the "naked owner"). This right entitles the usufructuary to use and enjoy the property subject to the usufruct according to certain rules and restrictions. This right is similar to a life estate under common law. Louisiana Civil Code Articles 535 through 629 and Louisiana Mineral Code Articles 188 through 196. The legal usufruct of a surviving spouse includes the use and enjoyment of the landowner's rights in minerals; however, the naked owner must consent to any mineral lease executed by the surviving spouse, as usufructuary. Louisiana Mineral Code Article 190. In the absence of any controlling provision in the instrument creating the usufruct, other usufructs of land include minerals only to the extent mines or quarries are actually worked at the time the usufruct is created. As to oil and gas, this "open mines" doctrine applies to all pools penetrated by wells producing at the time the usufruct is created. Louisiana Mineral Code Article 191. See related provisions at Louisiana Mineral Code Articles 188 through 196.

III. SUMMARY OF INTESTACY PROVISIONS

- A. If a decedent is survived by a spouse and children:
 - 1. The surviving spouse receives an undivided one-half interest in the community property plus a usufruct on the decedent's one-half interest in the community inherited by the children;
 - 2. Decedent's one-half interest in the community property devolves to the children in equal proportions, subject to the usufruct in favor of the surviving spouse which terminates upon death or remarriage of the surviving spouse; and,
 - 3. Decedent's separate property devolves to the children in equal proportions. Louisiana Civil Code Articles 888 and 890.

- B. If a child predeceases the decedent and has children of his own, those children represent their parent in the succession of their grandparent and are entitled to share in equal proportions that which their parent would have otherwise inherited had he survived the decedent. Louisiana Civil Code Articles 881 through 888.

- C. If the decedent dies intestate, survived by his spouse, parents, and siblings:
 - 1. The decedent's one-half interest in the community goes to the surviving spouse if the decedent died after December 31, 1981. Louisiana Civil Code Article 889.
 - 2. If the decedent died prior to January 1, 1982, the surviving spouse would get one-half of the decedent's community interest, and the decedent's parents would get the other one-half (resulting in the surviving spouse having a three-fourths interest in the former community property--her own one-half plus one-half of decedent's one-half community interest--and the parents, or parent if only one survives, get the other one-half of decedent's one-half interest in the community) . Louisiana Civil Code Article 915, prior to amendment by Act 919 of 1981.
 - 3. Decedent's separate property devolves to the siblings in equal proportions subject to a usufruct (joint and successive) in favor of the parents of the decedent if the decedent died after December 31, 1981. Louisiana Civil Code Article 891.
 - 4. If the decedent died before January 1, 1982, the parents would receive one-half of the decedent's separate property in full ownership, or one-fourth if only one parent

survived, and the decedent's siblings (and descendants thereof) would receive the remainder. Louisiana Civil Code Articles 903 and 904, prior to amendment by Act 919 of 1981.

5. If, in the above example, the decedent was survived by half-siblings and German siblings, his separate property would be divided equally between paternal and maternal lines. German siblings participate in both lines, but half-siblings participate only in the line of the common parent. Louisiana Civil Code Article 893.
- D. If the decedent is not survived by descendants, parents, siblings, or descendants of siblings:
1. The surviving spouse succeeds to the separate property of the decedent to the exclusion of other ascendants and other collaterals if the decedent died after December 31, 1981. Louisiana Civil Code Article 894.
 2. If the decedent died on or before December 31, 1981, the decedent's ascendants inherit the decedent's separate property to the exclusion of the surviving spouse and all collaterals. The ascendant nearest in degree excludes all others. If there are ascendants in the same degree, the estate is divided into two equal shares, one of which goes to paternal ascendants and the other to maternal ascendants. Louisiana Civil Code Articles 904 through 906, prior to amendment by Act 919 of 1981.
- E. If the decedent is survived only by collaterals, the nearest in degree excludes all others. If several collaterals are in the same degree, they take equally by heads. Louisiana Civil Code Article 896.
- F. If the decedent is not survived by any relatives or spouse, the decedent's estate goes to the State. Louisiana Civil Code Article 902.

IV. FORCED HEIRSHIP

The civil law of Louisiana is different from that of any other state in limiting a decedent from disposing of all of his property to the prejudice of his forced heirs. As outlined below, presently under Louisiana law, forced heirs are basically limited to the decedent's minor (under age 23) or incompetent children. See Louisiana Civil Code Articles 14931518. A forced heir has an action to enforce recognition of his right to his forced portion, or legitime. The balance of the decedent's estate that he may dispose of

in any manner he chooses is referred to as the disposable portion. Recent changes have given the decedent more flexibility to deal with his estate free of the claims of forced heirs. The actual calculations necessary to determine whether a forced heir has received his legitime are complicated. For present discussion purposes, suffice it to note that prior donations made by the decedent during his life are added back in to the calculations and are subject to being reduced. Generally though, forced heirship problems arise in testate successions in which the decedent bequeaths his estate to other than his forced heirs. This is particularly common in ancillary successions in which a non-resident dies testate unaware of Louisiana forced heirship provisions.

A. If the decedent died before September 7, 1979:

1. The legitime, or forced portion of children, living or represented, is as follows:

(a) If the decedent leaves one child-- $\frac{1}{3}$ of the entire estate;

(b) If two children survive-- $\frac{1}{2}$ of the entire estate; and,

(c) If three or more children survive-- $\frac{2}{3}$ of the entire estate.

2. No children, but parents surviving:

$\frac{1}{3}$ of the entire estate to the parents or parent as to both separate and community property of decedent (if only one parent survives and decedent has one or more siblings surviving, living or represented, then as to separate property, the single parent's forced portion is $\frac{1}{4}$ rather than $\frac{1}{3}$).

B. If the decedent died on or after September 7, 1979, and prior to January 1, 1982, same as Item A above, except parents are not forced heirs as to community property.

C. If the decedent died after December 31, 1981, and before January 1, 1996, the legitime or forced portion of children, living or represented, is as follows:

(a) If one child survives the decedent-- $\frac{1}{4}$ of the entire estate; and,

(b) If two or more children survive-- $\frac{1}{2}$ of the entire estate.

D. If the decedent died after December 31, 1995:

1. Same as Item C above, except that a child is a forced heir only if, at the date of decedent's death, the child is:
 - (a) under the age of 24;
 - (b) incapable of taking care of himself or administering his estate because of mental incapacity or physical infirmity. Louisiana Civil Code Article 1493.
2. Representation of a predeceased child is permitted if said child would not have reached the age of 23 prior to the decedent's death. Louisiana Civil Code Article 1493.
3. Notwithstanding the above, the forced portion is reduced to the fraction a forced heir would otherwise be entitled under intestacy provisions. Louisiana Civil Code Article 1495. This reduction takes place as the result of the decedent being survived by some children who are forced heirs and some who are not (i.e., over age 23 and not incompetent).
4. The Louisiana legislature attempted to change forced heirship in 1990 in the same fashion as now applies; however, the Louisiana Supreme Court determined that this attempt was unconstitutional. Succession of Lauga, 624 So. 2d 1156 (La. 1993); Succession of Terry, 624 So. 2d 1201 (La. 1993). It was thus necessary to amend the state constitution to allow for limitation of forced heirship in the manner that now applies to persons dying after December 31, 1995.

V. PROBATE PROCEDURES

A. Opening of Succession

A succession is judicially opened in the parish in which the decedent was domiciled at the time of his death. If the decedent was not domiciled in Louisiana at the time of his death, his succession may be opened in any parish in which immovable property of the decedent is situated, or in the absence of immovable property, where any movable property of the decedent is situated. Louisiana Code of Civil Procedure Article 2811. This venue may not be waived, and proceedings filed in an improper parish are null. Louisiana Code of Civil Procedure Article 44. An affidavit of death and heirship executed by two knowledgeable, disinterested parties is deemed to constitute sufficient evidence to allow the decedent's succession to be opened in a particular parish.

B. Probating Decedent's Will

If the decedent died testate, his will must be probated within five (5) years of the judicial opening of the succession. Louisiana Code of Civil Procedure Article 2893; Louisiana Revised Statutes 9:5643. A will must be in one of the forms recognized by Louisiana law to be valid. Such will forms include nuncupative wills by public and private acts, mystic wills, olographic and statutory wills. See Louisiana Civil Code Articles 1570 through 1604. Perhaps the most common will form in Louisiana, particularly in larger estates, is the statutory will. This will form is set forth in Louisiana Revised Statutes 9:2442 through 9:2444. In the absence of any objections wills may be probated ex parte by affidavits.

C. Capacity

All persons have capacity to make and receive donations except as provided by law. Louisiana Civil Code Article 1470. Unmarried minors have the capacity to execute a valid will upon reaching the age of 16. Louisiana Civil Code Article 1476.

D. Administration

Often it will not be necessary to administer the decedent's succession. The attorney for the succession may simply proceed in filing a descriptive list of the succession assets with a petition to place the decedent's successors in possession. E.g., Louisiana Code of Civil Procedure Articles 3001 and 3031. Once state inheritance taxes are paid, a judgment of possession may be rendered by the court. Louisiana Code of Civil Procedure Article 2951. Of course, in other cases, where the affairs of the estate are complex, particularly if federal estate taxes will be owed, or if there are substantial debts of the decedent, an administration may be necessary. In an intestate succession, a succession administrator qualifies and is recognized by the court. In a testate succession, generally the decedent has named a person in his will to serve as executor who likewise must qualify and petition the court to be recognized. See Louisiana Code of Civil Procedure Articles 3081 through 3159. Qualification generally requires taking an oath of office and furnishing security unless this requirement has been waived by the decedent in his will or by the court.

E. Powers of the Succession Representative

The succession representative has fairly broad administrative powers. Often the succession representative will, however, be required to petition the court for special

authorization, such as to sell, mortgage or lease succession property. If the succession representative wishes to execute a mineral lease covering succession property, he must follow the provisions of Louisiana Code of Civil Procedure Article 3226 which requires that the court be petitioned for authority and that legal advertisement of the request for authority be made in the parish in which the succession is pending and in which the property to be leased is located. Louisiana Code of Civil Procedure Article 3229. When the need for administration of the succession has ended, the succession representative must file a final account. That account and a final tableau of distribution is approved or homologated by the court, and the succession representative is discharged.

VI. ANCILLARY PROBATE PROCEDURES

Ancillary probate procedures are set forth at Louisiana Code of Civil Procedure Articles 3401 through 3405. Such procedure is applicable when the decedent was not domiciled in Louisiana at the time of his death. Ancillary probate procedures generally follow that applicable in the case of a Louisiana domiciliary. If the decedent's succession has been opened in the state of his domicile, a Louisiana court will recognize the probate of his testament and the qualification and appointment of a succession representative made in the succession proceedings filed in the other state. Louisiana Code of Civil Procedure Articles 3402 and 3405. Louisiana has adopted the Uniform Probate Law which is found at Louisiana Revised Statutes Articles 9:2421 through 9:2425. Of particular note are the new conflict of law provisions enacted in Act No. 923 of 1991, effective January 1, 1992, found at Louisiana Civil Code Articles 3528 through 3534. Insofar as ancillary successions are concerned, the law of Louisiana will be applied with regard to Louisiana immovable property owned by the decedent at the time of his death. Such immovable property includes land and mineral rights (mineral servitudes, mineral royalties, overriding royalties and mineral leases). See Louisiana Mineral Code Articles 16 and 18.

VIX. MISCELLANEOUS PROVISIONS OF IMPORTANCE

Of some comfort to oil companies dealing with recognized successors of the decedent is Louisiana Revised Statutes 9:5630. That statute establishes a two-year liberative prescription running from the finality of the judgment of possession which bars an action by a person claiming to be a successor of the decedent, but who was not recognized in the judgment of possession, against a third party who has acquired an interest from a recognized successor of the decedent by onerous title (for value as contrasted with a gratuitous transfer).

\\ARTICLES\Probate Estates in TX, OK, LA