

Chapter 3

Types of Real Property Ownership

In the United States, only a handful of types of ownership of real property will be created through conveyances. Not all states allow all of the types of ownership. For instance, Texas does not recognize tenancy by the entirety.

Community Property

Most states that have adopted community property rules were first colonized by Spain or France. In the United States, there are nine community property states: **Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin**. Wisconsin is not really a true community property state; however, its laws bear a strong resemblance to the laws of the other community property states.

Most other states are considered equitable property distribution states, rather than a community property state. Property acquired during marriage is owned as title is vested. In the case of divorce, the property is subject to a special "marital share" and will be divided by the court in a "fair and just" manner with the presumption that the property will be divided equally.

Property in **Alaska** also can be considered community property if a married couple signs an agreement to that effect.

Michigan enacted community property laws for a short period between July 1, 1947 and May 10, 1948. Although these states have repealed community property, when examining title ownership, community property laws must be considered during these time periods. MCL 557.252

Oklahoma enacted community property laws for a short period between July 26, 1945 and June 2, 1949.

Pennsylvania enacted community property laws for a short period between September 1, 1947 and November 26, 1947.

Three other states that have enacted and then repealed community property are **Nebraska, Hawaii, and Oregon**.

In community property states, property accumulated during the course of the marriage, any earnings, profits, income, and/or assets would be owned jointly by both spouses, and are divided 50/50 or by a dollar value that

would be equitable upon divorce, annulment, or death. This is true even if only one of the parties earned and acquired all of the assets.

Community property would include:

1. Property accumulated during marriage
2. Earnings, profits, and income

The exceptions to this 50/50 rule would be property acquired from:

1. Gifts
2. Property acquired through inheritance
3. Property owned prior to marriage

Although community property laws vary from state to state, generally, community property cannot be conveyed separately. In other words, both parties would need to sign an oil and gas lease.

Because **Texas** had such a strong Spanish and Mexican influence, they have adopted community property rules. Under this system, all property that is acquired after the marriage of a couple is owned equally as community property by the couple.

A Texas court in *Orr v. Pope* determined that when a spouse from a common law state purchases real property in Texas with his or her separate funds, even though the purchase was made during the couple's marriage, the real property would be considered his or her separate property.

Scenario: After ten years of marriage, Kenny and Ruthie separated and are considering getting a divorce. When they first got married, they moved into the home given to Kenny by his father-in-law. It is located near Dallas, Texas. Since their marriage, they acquired a rental property in the Dallas area. Ruthie had the good fortune to buy her sister's house located in Oklahoma.

1. Which property would be considered community property?

2. Which property would be considered Kenny's separate property?

3. Which property would be considered Ruthie's separate property?

Answer: The Rental Property would be considered community property because it was purchased during the marriage and is located in Texas. The Texas house would be considered Kenny's separate property because it was

given to him as gift. If Kenny and Ruthie considered it their homestead, then both Kenny and Ruth must sign oil and gas leases and sign as grantors if it is sold. The Oklahoma House would be considered Ruthie's separate property. Even though it was purchased during the marriage, Oklahoma is not a community property state and ownership is determined by the vesting nature of the conveyance.

Distribution of Community Property Rights at Death

In 1971, the National Conference of Commissioners drafted The Uniform Disposition of Community Property Rights at Death Act. In essence, the act deals with property acquired in a non-community property state from funds derived from community property located in a community property state. For instance, assume that Abe and Betty owned a house in Texas, a community property state. They sold the house, moved to Wyoming and bought a new house with those funds. The purpose of this act is to preserve the rights of each spouse as to their community property, prior to moving to a non-community property state. Several non-community property states have adopted the act including **Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Montana, New York, North Carolina, Oregon, Virginia, Wisconsin, and Wyoming.**

The act basically says, upon death of one spouse, that the surviving spouse is entitled to:

1. All personal property, wherever located, which was acquired or became community property under the laws of another jurisdiction (and all or the proportionate part of any property acquired with the rents, issues or income of, or the proceeds from or in exchange for community property, or otherwise traceable to that community property) and,
2. All or that proportionate part of any real property situated in the state which was acquired with the rents, issues or income of, or the proceeds from, or in exchange for, property acquired as of which became and remained community property under the laws of another jurisdiction or the property traceable to that community property.
3. All such property is to be distributed upon death of a married person with *one-half going to the surviving spouse and one-half being distributed according to the will or through the laws of intestate succession of the state where the property is located.* The one-half not passing to the spouse is not subject to the spouse's right to elect against the will.

Although **Arkansas** is not a community property state, it passed the Uniform Disposition of Community Property Rights at Death Act. §§28-12-101, et seq.

Although **Colorado** is not a community property state, in 2002, Colorado adopted the Uniform Disposition of Community Rights at Death Act. Colo. Rev. Stat. §§ 15-20-101–15-20-111.

Although **Florida** is not a community property state, in 1992, Florida passed the Uniform Disposition of Community Property Rights at Death Act. Fla.Stat. §§ 732.216 to 732.228.

Although **Kentucky** is not a community property state, it passed the Uniform Disposition of Community Property Rights at Death Act. §§391.210, et seq.

Although **Michigan** is not a community property state, effective March 31, 1976, Michigan passed the Uniform Disposition of Community Property Rights at Death Act. §§557.261, et seq.

Although **Montana** is not a community property state, effective March 31, 1976, Michigan passed the Uniform Disposition of Community Property Rights at Death Act. §§72-9-101, et seq.

Although **New York** is not a community property state, it passed the Uniform Disposition of Community Property Rights at Death Act. New York Estates, Powers & Trusts Section: Part 6 6-6.1 through 6-6.7. Last modified Feb. 15, 2012.

Although **North Carolina** is not a community property state, it passed the Uniform Disposition of Community Property Rights at Death Act. §§31C-1, et seq.

Although **Wyoming** is not a community property state, it passed a Distribution of Community Property Rights at Death Act. W.S. § 2-7-720 - § 2-7-729.

Scenario: Assume that Abe and Betty live in Texas with their biological son, David. They own both their home and an apartment building as community property. They also own a small farm in Oklahoma. The vesting deed to this farm says, "**Grantees, Abe and Betty, husband and wife..**"



Recently, they sold their Texas home, moved to Wyoming and bought a home there. The vesting deed to this home says, "**Grantees, Abe and Betty, as joint tenants with the right of survivorship.**"

Two years ago, they used the income that is being generated from the Texas apartment complex to buy a small cabin in the mountains of Wyoming. The vesting deed to the cabin says, "**Grantees, Abe and Betty, husband and wife.**"

Last year, Abe died intestate. Using the descent and distribution charts that follow, and according to the laws of intestate succession, how should the ownership of the property be divided?



	a.	b.	c.	d.
	TX Apt.	OK Farm	WY Home	WY Cabin
Betty				
David				

TEXAS INTESTATE SUCCESSION

Survivors

Division of the Estate

Spouse and all children are also children or grandchildren of the couple.	Spouse already owns 1/2 of the community property and receives the decedent's 1/2 in real property .
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OKLAHOMA INTESTATE SUCCESSION

Survivors

Division of the Estate

Spouse with children who are also children of the spouse	The surviving spouse will receive 1/2 of all the property of the estate. The couple's joint children will receive the remaining 1/2 of the estate by representation.
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WYOMING INTESTATE SUCCESSION

Survivors

Division of the Estate

Spouse and children	1/2 to the surviving spouse. The other 1/2 to the children or descendants of any deceased children, the descendants taking the share their parent would have taken.
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Answer: The Texas apartment complex would be owned as follows: Because Texas is a community property state, Betty would already own 50% of the complex. The other 50% would pass to Betty through intestate succession.

The Oklahoma farm: Since Oklahoma has not enacted a Uniform Disposition of Community Property Rights at Death Act, Betty would receive one-half of the interest and David would receive the other one-half.

The Wyoming Home: Since the vesting deed was a joint tenancy with right of survivorship, Betty would own 100% of the home.

The Wyoming Cabin: Since Wyoming has enacted the Uniform Disposition of Community Property Rights at Death Act, Betty would receive 50% automatically; the other 50% would be divided according to the Wyoming laws of descent and distribution. In this case, 50% of that 50% would pass to Betty, the other 50% of that 50%, or 25%, would pass to David.

Tenants in Common

Tenancy in common is the most prevalent type of joint ownership in real property in the United States. In most states, unless stated otherwise, a *tenancy in common* would occur and would become the default ownership when two or more parties receive title to a piece of property. Tenancy in common would occur when two or more parties own an interest in the same tract of land or in the same mineral estate. Ownership can be equal or unequal, with each party owning their separate undivided ownership in the property.

Tenancy by the Entirety

Tenancy by the entirety is a type of ownership between a married couple, whereby the property is co-owned by the two while they are married.

The Five Unities

Generally, for a tenancy by the entirety to be valid, the deed or conveyance must contain five characteristics known as the "Five Unities."

The first unity deals with time. The property must be acquired by the parties at the exact moment in time.

The next unity concerns itself with the way title is vested. All parties must have the same title to the property in the deed. If the conveying deed places a specific condition on one tenant but not the other(s), then they would not have the same title.

The third unity is about interest. Both parties must possess the interest in the property as one owner.

The next condition revolves around possession. Both parties must have the rights to possess the entire property *set out in the conveying deed*.

Lastly, both parties must be a married couple.

In the United States, there are several states and the District of Columbia that have tenancy by the entirety.

Arkansas – In Arkansas, any conveyance to a husband and wife creates a tenancy by the entirety unless the conveyance directs otherwise. This would be true even if the conveyance did not state that the man and wife were married. Therefore, it is always best to have both spouses execute an oil and gas lease. Also, one spouse has the right to convey his or her interest in the property to a third party without the other party entering into the conveyance; however, such a conveyance will only convey the right of possession to the property. The conveyance does not affect the rights of

survivorship of the non-conveying spouse. If the conveying spouse were to die first, the third party has no right against the survivorship interest of the remaining spouse. On the other hand, if the non-conveying spouse were to die first, then the third party would take the entire title to the property. Prior to March 28, 1947, a divorce would destroy tenancy by entirety only with the consent of the parties. Between March 29, 1947 and March 7, 1975, courts had the right to destroy the tenancy by entirety in cases of divorce. After March 8, 1975, unless stated otherwise, a divorce decree will automatically destroy a tenancy by entirety. In one court case, a husband lost a suit that resulted in a large judgment against him. After the suit, he conveyed the interest he had as tenants by the entirety to his wife and children. His wife then transferred her interest to her children. In *Lowe v. Morrison*, 711 S.W.2d 833 (1986), the Court found the conveyances to be fraudulent. The Court also found that the judgment against the husband was not able to attach to the other spouse's possession of the property and her rights of survivorship. If the non-debtor wife were to die, the Court found that the judgment could then be satisfied. Until that time, the creditor was entitled to one-half of all profits from the property. If the debtor husband were to die prior to his wife, all interest would be vested in the surviving wife and the creditor would then lose its interest.

Florida – A Florida Court found that a husband and wife constitute an indivisible unit, "An estate by the entireties is an almost metaphysical concept which developed at the common law from the Biblical declaration that a man and his wife are one." *U.S. v. Gurley*, 415 F.2d 144, 149 (5th Cir. 1969). The Florida Supreme Court in *Hunt v. Covington*, 200 So. 76 (1941) stated that tenancy by entireties "Is not subject to execution for the debt of the husband. It is not subject to partition; it is not subject to devise by will; neither is it subject to the laws of descent and distribution."

Kentucky – An interesting case arose in Kentucky that involved a husband owning property as tenant by the entirety with his wife. He mortgaged the property without the wife's consent. He then conveyed his interest in the property to his wife. The man later murdered his wife and then committed suicide. The Kentucky court, in *Peyton v. Young*, 659 S.W.2d 205 (1983), concluded that because the deaths were simultaneous, the mortgage was attached to one-half interest in the property and allowed the mortgage company to satisfy the debt out of that one-half interest. They also concluded that if the wife had survived the husband, she would have owned the entire property through survivorship, thus the debt would have been extinguished.

Maryland – In Maryland, in order to claim tenancy by the entirety, certain criteria must be met. First, both parties must acquire their interest at the same time and through one title. Second, both parties must share equal interests (each tenant effectively owns the entire estate) and share equal

right of possession of the property. Lastly, the parties must be husband and wife.

Massachusetts – By statute in Massachusetts, "The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse as long as such property is the principal residence of the non-debtor spouse...." G.L.e. 209 § This statute became effective after February 11, 1980, or by election earlier than that date. Prior to this statute, a creditor of a debtor husband could take possession of the property for as long as the husband lived. This was subject to the non-debtor wife's right of survivorship. *Pray v. Stebbins*, 4 N.E. 824 (Mass. 1886); *Raptas v. Pappas*, 155 N.E. 787 (1927).

Michigan – A Michigan Court found that a creditor who was attempting to collect a debt from one spouse could not attach the debt to property owned by both spouses as tenants by entirety. *Schliess v. Thayer*, 136 N.W. 365 (1912).

Mississippi – In Mississippi, a husband and wife owned property as tenants by entirety. In an attempt to lower his asset exposure because of an impending divorce, the husband transferred his part of the property to his girlfriend. In *Cuevas v. McCallum*, 191 So.2d 843 (1966), the Mississippi Supreme Court found the transaction to be invalid because neither spouse can separately dissolve the entirety property.

Missouri – In Missouri, the courts found, "It is also the law in this state that where a judgment and execution are against the husband alone, such judgment cannot in any way affect property held by the husband and wife in the entirety." *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524 (Mo. Ct. App. 1959).

New York – Unless a conveyance would state otherwise, if made to a husband and wife, it would create a tenancy by the entirety. Tenancy by the entirety was first codified in New York in 1896. Two spouses are viewed as a single person and it is in this vein that title is vested; therefore, each spouse would own an undivided 100% interest in the property. This interest cannot be sold, severed, or diminished by the other spouse without the consent of the other. Upon the death of a spouse, the survivor is fully vested in title. Unless explicitly stated, a conveyance to a husband and wife will create a tenancy by the entirety.

North Carolina – In North Carolina, by statute, N.C. Gen. Stat. § 39-13. (2007), one spouse may not "in any manner encumber" the property without written joinder. The court found in *L & M Gas Co. v. Leggitt*, 161 S.E.2d 23 (1968) that a husband could, in fact, convey property owned as tenants by the entirety to his wife, and that conveyance would not be considered fraudulent.

Ohio – Ohio law, effective April 4, 1985, the creation of a tenancy by the entireties is not allowed. Ownership tied to tenancy by entireties deeds between 1972 and April 4, 1985, will remain as such. Ohio replaced the entireties ownership with what is called a “survivorship tenancy.”

Oklahoma – Several years ago, the Oklahoma State Legislature enacted a provision that allows for judgment debtors to seize an individual's ownership in land owned as tenants by entirety. Oklahoma Statutes Title §60-74. “...nothing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such estates, and such sale shall constitute a severance.” In essence, a creditor can claim, through debt judgment, interest or partial ownership in the tract of land. One spouse cannot convey their ownership interest in a jointly owned tract of land to a third party without the consent of the other spouse.

Oregon – In Oregon, tenancy by the entirety is much like a tenancy in common with an unbreakable right of survivorship. Assume a creditor has won a judgment against one spouse. If this spouse were to die, the court found that the non-debtor surviving spouse would come into full title to the property and any interest in the property claimed by the creditor would be defeated. *Brownley v. Lincoln County*, 343 P.2d 529 (1959).

Pennsylvania – In *Sterrett v. Sterrett*, 1661 A.2d 1 (1960) (Musmanno), a Pennsylvania Supreme Court case, it was determined that “A husband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade, and fruit as much as the other.” One spouse would not have the right to convey the property in an attempt to destroy the tenancy by entirety. Both parties would have the right to destroy the tenancy by the entirety if they jointly executed a mutual agreement or conveyance. Divorce would also destroy the tenancy by the entirety. Subsequent to the divorce, each party would own the property as tenants in common as their separate interests in equal shares.

Wyoming – In Wyoming, a Court found, “Entirety in this connection means indivisibility. The estate is owned not by one but by both as an indivisible entity” *Ward Terry & Co. v. Hensen*, 297 P.2d 213, 215 (Wyo. 1956). In another instance, in *Colorado Nat'l Bk v. Miles*, 711 P.2d 390 (1985), the Court found that one spouse cannot subject tenant by entirety property to a mortgage without the consent of the other spouse. Tenancy by the entirety is presumed when a married couple acquired property.

Joint Tenants with Rights of Survivorship

Taking title to a piece of property as *joint tenants with the rights of survivorship*, "JTWRS," is very different from taking title as *tenants in common or tenants by the entirety*. Joint tenants must own identical undivided interests in the property. If three siblings inherited their parent's property, each would own an undivided 1/3rd interest. Upon death, the remaining joint tenant(s) would automatically receive their proportionate part of the decedent's interest in the property.

Texas – One of the differences between joint tenancy in Texas and elsewhere is that most states would recognize a joint tenancy with the right of survivorship if the deed simply read, "*To Earnest Beal and Sonia Beal, husband and wife, as joint tenants.*" Texas is an exception to the rule and requires the additional language, "*with right of survivorship.*"

Oklahoma – Oklahoma courts have ruled that a JTWRS would be created if the following words appear after the grantee's names, "with right of survivorship," "survivor," or "JTWRS". If the single word "joint" appears, the instrument would not create a joint tenancy.

Utah – "Beginning on May 5, 1997, every ownership interest in real estate granted to two persons in their own right who are designated as husband and wife in the granting documents is presumed to be a joint tenancy interest with rights of survivorship, unless severed, converted, or expressly declared in the grant to be otherwise."
Utah Code Annotated §57-1-5 (Supp. 2003).

The Four Unities

For a joint tenancy to be valid, the deed or conveyance must contain four characteristics, known as the "four unities."

The first unity deals with time. The property must be acquired by all joint tenants at the exact moment in time.

The next unity concerns itself with the way title is vested. All joint tenants must have the same title to the property in the deed. If the conveying deed places a specific condition on one tenant but not the other(s), then they would not be able to claim joint tenancy.

The third unity is about interest. All tenants must possess the exact same interest in the property. Two owners would each own an undivided 50% interest. Five owners would each own an undivided 20% interest.

The final unity revolves around possession. All tenants must have the rights to possess the entire property *set out in the conveying deed*.

Dissolving a Joint Tenancy with Right of Survivorship

Once a joint tenancy with the right of survivorship is created, in most states, one of the joint tenant's interests can be dissolved as to its right of survivorship status if the joint tenant conveys his or her interest to another party. In a situation where there are two or more owners, and one of the owners breaks the joint tenancy, the other joint tenant's rights are still intact. The interest that was broken becomes a tenancy in common interest.

Currently, most states allow the joint tenancy to be broken without the use of a straw man, and without the knowledge or consent of the other joint tenants. A straw man would be defined as a person who is used as a cover for a usually questionable transaction, or a person whose function is to cover another's activities.

Both Texas and California hold that a joint tenancy cannot be broken unless consent is obtained from all the other joint tenants, or there is a partition of the property from the courts.

Transfer on Death Deeds

One of the issues regarding survivorship deeds (joint tenancy, life estates) is that once they are filed of record, all named survivors become co-owners of the property. In the past, this has created problems. Assume you and your two siblings inherit the family farm from your parents as joint tenants with the right of survivorship. Also assume that your younger brother has a history of bad credit, bankruptcy, and liens filed against previous properties. In this scenario, your co-ownership of the family farm may now be subject to creditors and claims. Creditor actions have resulted in the forced sale of property.

A Transfer-on-Death Deed, "TODD," is a deed that alleviates this type of problem. It would essentially transfer all right, title, and interest to a designated grantee-beneficiary at the time of death, thus avoiding probate. Since the grantee-beneficiary would have no present interest in the real estate until the death of the grantor, the grantor would be protected from bankruptcy, divorce, lawsuits, judgments, and/or liens that might arise against the beneficiaries prior to the grantor's death. Generally, the grantor has full power to transfer and revoke the deed at any given time.

Before 2007, nine states (Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, Ohio, and Wisconsin) had enacted laws that allowed homeowners to use TODDs, thus avoiding probate, and the expenses of a Trust. Since 2007, Minnesota, Montana, North Dakota, and Oklahoma have also passed such laws. It is assumed that more states will follow.

Arkansas – In Arkansas, a handful of conditions must take place in order to have a valid TODD. First, the deed must clearly establish that no interest is being conveyed until after death. The deed must be recorded prior to grantor's death. The deed can be revoked or the grantee-beneficiary can be changed prior to death. Any prior Last Will and Testament established by the grantor has no effect on the TODD. The property is subject to creditor's claims against the grantor. Estate tax liability remains against the grantor's estate and the grantee-beneficiary must record the decedent's death certificate.

Colorado – In Colorado, a Beneficiary Deed is the equivalent of a TODD. It essentially transfers all right, title, and interest to a designated grantee-beneficiary at the time of death, thus avoiding probate. While living, the grantor has the full use, enjoyment, and all rights and interest in and to the property. The beneficiary has absolutely no enforceable rights prior to the death of the grantor. This law became effective August 4, 2004, and establishes that the deed must be recorded before death of the grantor; that the grantor can change the beneficiary at any time; and, that if the beneficiary dies prior to the grantor, the deed is no longer effective. It is important to note that the Beneficiary Deed does not guarantee Marketable Title, and all prior reservations and liens are still enforced. If the interest in the property is owned in joint tenancy, the grantor in the Beneficiary Deed must be the last surviving joint tenant. If not, upon death, the interest would automatically pass to the remaining joint tenant(s). Up to three years after the death of the grantor, claims can be made against said grantee-beneficiary, as long as the owner's death certificate has been made public record.

Minnesota – Minnesota allowed TODD beginning in 2008. This type of deed is similar to a "pay-on-death" or "transfer-on-death" bank account in that a TODD allows the grantor of real property to designate a grantee-beneficiary of the property prior to death of the grantor. Because all real property in Minnesota is assumed to be the grantor's homestead, both spouses must execute the TODD. Upon death, the property passes to the grantee-beneficiary as non-probate property. Similar to the conditions in other states, prior to death, nothing is conveyed to the grantee-beneficiary. The deed can be revoked at any time. The deed must be recorded prior to grantor's death. The property is subject to creditor's claims or liens that became attached during the grantor's lifetime. Estate tax liability remains against the grantor's estate, and the grantee-beneficiary must record the decedent's death certificate and affidavit of survivorship and clearance certificate.

Montana – Montana has similar laws regarding the use of a TODD. In order to be valid, the deed must be recorded during the grantor's lifetime; the grantee-beneficiary must record an affidavit and death certificate; the

grantor retains the exclusive control over the property and all the rights of ownership; the grantee-beneficiary has no present interest in the real estate, thus the grantor is protected from bankruptcy, divorce, lawsuits, judgments and/or liens that might arise against the beneficiaries prior to the grantor's death; and, the deed can be revoked at any time without the consent of the grantee-beneficiary. If there is more than one named beneficiary, each will own an equal share in the property. A TODD does not avoid State and Federal Estate Taxes. Any mortgages, liens, or other encumbrances assessed against the property prior to death will carry over to the beneficiaries. All beneficiaries must agree and sign for the sale or disposition of the property. If a beneficiary dies, their share is terminated.

North Dakota – In North Dakota, the Uniform Real Property Transfer on Death Act, or URPTODA was signed into law on April 27, 2011. This act allows citizens in North Dakota to transfer title to real property without a probate. Like other states, the TODD gives the grantor a specific advantage over joint tenancy deeds. Since the TODD does not convey ownership to the grantee-beneficiary, the grantor is protected from the creditors of the beneficiary. The other advantage is that the grantor has the power to revoke or change the grantee-beneficiary at any time.

New Mexico – In New Mexico, the TODD must be recorded in the county where the property is located. Like other states, it has many of the same advantages. The grantor maintains control of the property until death they have the right to borrow against or sell the property to a third party. Additionally, unlike property that goes through probate, the TODD is exempt from Medicaid recovery for nursing home care expenses. Unlike some of the other states, TODD does not affect joint tenancy. If two or more people owned the property as joint tenants with right of survivorship, the grantee-beneficiary would only assume ownership of grantor's portion of the property. A TODD will prevail over any existing last will and testament. Within one year after the death of the grantor, creditors can make claims against the property. The transfer of title to the grantee-beneficiary is accomplished by submitting a certified copy of the grantor's death certificate to the County Clerk's office to be recorded.

Ohio – Ohio first allowed the use of TODDs in 2000. As of December 28, 2009, the use of the deed has been eliminated and replaced with a *transfer on death designation affidavit*. The affidavit must contain specific requirements: the lands must be specifically described along with their instrument number; the instrument must state whether or not the grantor is married; the instrument must specifically name each beneficiary, use of terms like "all my children" would not meet this requirement; the instrument must be properly executed with all appropriate signatures and acknowledgements and filed before the death of the grantor; and, the instrument must contain the language prescribed under the Ohio revised

Code 5302.22. Spouses must also sign the affidavit. It is important to note that TODDs drafted and recorded prior to 2009 are still valid.

Oklahoma – Oklahoma has allowed the use of TODDs since November 1, 2008, through the passing of the Nontestamentary Transfer of Property Act. Through the act, certain types of oil, gas, and mineral rights can be conveyed through a TODD, including exclusive rights and the owner's right to a royalty. To create a TODD, the grantor must record the deed in the county where the property is located and name a primary beneficiary. In order to avoid the probate process, if the named beneficiary dies prior to the grantor, alternative beneficiaries should be named. Once the grantor dies, the beneficiary must execute a notarized affidavit affirming that the grantor is deceased, giving the marriage status of the grantor at the time of death, and confirming the legal description of the property. This affidavit must be recorded, along with a copy of the death certificate. It is important to note that if these items are not filed within nine months of the grantor's death, the interest in the property would revert to the grantor's estate.

Oregon – With the passing of SB 815, and effective January 1, 2012, Oregon has allowed the use of TODDs. Most of the provisions were taken from the Uniform Real Property Transfer on Death Act. For the deed to be effective, it must be designated as a Transfer on Death Deed, and it must identify a beneficiary and/or alternate beneficiaries. In Oregon, there is an "18-month Cloud on Title" period. This allows interested parties to contest the capacity of the grantor and to make a determination of whether the grantor drafted the deed through duress, fraud, or undue influence. At the end of the claim period, clear title to the property may be transferred.

Wisconsin – On March 27, 2006, Wisconsin Act 206 created a means whereby a person could transfer real property at death other than using the probate system. An owner of real property can record a deed which designates one or more beneficiaries who will receive title to the property upon the owner's death. Wis. Stats. §705.15. This type of transfer is unlike a deed from the grantor where the grantor retains a life estate. The TODD is not a conveyance at the time the deed is recorded, but only acts as a conveyance when the grantor dies. Thus, the grantor may change his or her mind on who the beneficiary might be.

Creating a Future Ownership

Picture the owner of a piece of property as one who owns a “bundle of sticks.” In other words, there are many types of rights associated with the ownership of the land. The owner might own the rights to the subsurface minerals, air rights, or timber rights; the right to lease the surface to a tenant farmer, or the right to sell portions of the land, or lease only certain depths to the land. In other words, property ownership comes with a bundle of many sticks, or rights, not just one, and a property owner can be, at times, very creative in how they divide their sticks.

For instance, a fee owner can convey his or her property for either a limited time or a potential limited time. It might appear, from the face of the conveyance, that 100% of the bundle of sticks has passed to the new owner; however, the future interest or potential future interest has *not* passed to the new owner. It has been maintained by the fee owner. *Understanding this concept becomes important for the land professional. For instance, assume that the fee owner has conveyed a tract of land to another for a term of ten years. Certainly, the new owner has the right to encumber his or her ownership in the land during the time period of that ownership; however, does the new owner have the right to encumber the ownership of the land past the ten years of ownership?* Generally, states have concluded that the holder of a term interest can sign an oil and gas lease or encumber their interest during their term of ownership, but that lease or encumbrance, or portions thereof, *will not continue* beyond the expiration date of the term interest.

Fee Simple Defeasible refers to ownership that is transferred with conditions attached and can be terminated by the grantor if certain specified events take place or the conditions are not met. A transfer in “fee simple” would have no such conditions and could be referred to as an “indefeasible estate.” Because a fee simple defeasible grants less than 100% of the full fee simple, future interests or potential future interests are always established. Understanding the implications of these future owners when oil and gas leases are involved becomes paramount for the land professional.

There are three types of fee simple defeasible conveyances.

1. *Fee simple determinable*
2. *Fee simple subject to a condition subsequent*
3. *An executor limitation or interest*

Fee Simple Determinable Fee refers to ownership that will end automatically if certain conditions of ownership as set out by the grantor are either broken or fail to be met. The subject interest will revert back to the

grantor or heirs of the grantor without any action of law. Determinable fee would be different from absolute fee since the owner does not own absolutely everything. For instance, assume that Abe conveyed Tract A, in the following illustration, to Ben, under the condition that the property only be used for raising livestock. Although Ben has a deed of conveyance, he does not own 100% of the “bundle of sticks.” If he fails to raise livestock, Abe can make entry to repossess the property.

Assume Abe conveyed Tract B to the First Baptist Church with the condition that church ownership would be maintained as long as the church was built and was active on the land. Determinable fee ownership may last forever if the condition, as set out in the conveying document, is maintained. In this example, as long as the church building was built and church services were held, ownership was maintained. If, however, some years later, a new, larger building was built on another tract of land, the ownership would revert back to Abe. In other words, the future ownership has already been “determined” and the church’s ownership would automatically terminate.

Fee Simple Subject to Condition Subsequent refers to ownership that is very similar to simple determinable with this exception: any failure to meet the condition will not automatically cause the ownership to revert back to the grantor.

Assume that Abe conveyed Tract B to The First Baptist Church using these words,

“...so long thereafter as the church continue to conduct religious services in the building which is built on the property. If the church is not built on the property or fails to hold services on the property, the grantor or his heirs shall have the right of entry or termination.”

<p>Tract A</p> <p>Ben must raise livestock</p>	<p>Tract B</p> <p>The Church must be built and hold active services</p>

With these added words, the church’s ownership continues even if the conditions are not met. Abe has the option, if the conditions are not met, to reassert his right of ownership and reenter the property; however, if Abe fails to reassert his right of ownership, he will eventually lose that right. Such words of option to retake the property must be explicitly set forth in the original conveyance. Abe’s option to establish his rights of ownership are called the “right of reentry.”

Fee Simple Subject to Executory Limitation refers to ownership that is very similar to simple determinable with this exception: the property will not

revert back to the original grantor, but rather to a third party set forth in the conveying document.

Assume that Abe conveyed to David the mineral rights in Tract C using these words,

“...for as long as David pursues his MBA degree in finance and uses the degree for his future career success. If David fails to meet either of the stipulated requirements for ownership, the minerals will automatically pass to his younger brother Douglas.”

With such language and with a fee simple subject to executory limitation conveyance, Abe would no longer possess any future right to the property.

<p>Tract A</p> <p>Ben must raise livestock</p>	<p>Tract B</p> <p>The Church must be built and hold active services</p>
<p>Tract C</p> <p>David must pursue his MBA and future in finance.</p>	

Term Mineral or Royalty interests are a type of fee simple determinable estate which can create future ownership. *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539 (1922). From time to time, a reservation of minerals or a conveyance of minerals will be tied to a certain term, thus creating temporary ownership for a period of years with the interest reverting back to a future party. Such ownership creates a *defeasible fee* ownership in the party. When this occurs through a term conveyance or reservation, the present, temporary owner has ownership for a *tenancy of years*.

Term deeds or reservations can be divided into two primary categories:

1. The term is for a fixed period of time.
2. The term is for a fixed period of time and as long thereafter as oil and gas is produced.

Assume that, without any other stipulations, Abe conveyed the subsurface minerals in Tract D to Edward for a term of ten years. At the end of ten years the minerals automatically revert back to Abe.

<p>Tract A</p> <p>Ben must raise livestock</p>	<p>Tract B</p> <p>The Church must be built and hold active services</p>
<p>Tract C</p> <p>David must pursue his MBA and future in finance.</p>	<p>Tract D</p> <p>Edward only owns the minerals for 10 years</p>

What does this mean for the land professional?

Now, assume that Ben, the church, David, and Edward all negotiate oil and gas leases with your company. The four tracts of land are pooled into a drilling unit and your company drills a very productive oil and gas well somewhere inside the unit.

Five years after the well is completed, Ben sells all of his livestock and begins to plant corn; the Church builds a larger building three miles away from Tract B; David moves to Nashville in hopes of beginning his music career; and, Edward's term ownership has expired.

The land professional should ask some very important questions

What is the status of the oil and gas leases? _____

What is the status of your company's producing well? _____

Are the leases held by production of the well? _____

Do the lessor's interests covered in the leases also cover the reversionary future interests of Abe? _____

ANSWER: When a fee owner conveys the bundle of sticks for either a limited time or a potentially limited time, the future reversionary interest has been maintained by the fee owner. Although the new owner has the right to encumber his or her ownership in the land, generally, states have concluded that the holder of a term interest can sign an oil and gas lease, but that lease, or portions thereof, *will not continue* beyond the expiration date of the term mineral interest. This issue can create a challenge for oil and gas personnel. Unless the conveying document provides for the continuation of the lease past the expiration date, a lease will not transfer to the reversionary mineral owner and two leases should be taken: one from the holder of the term interest and the other from the holder of the reversionary interest.

The Oklahoma Supreme Court found that unless language in the deed expressly gives the term mineral interest holder the right to encumber both the term mineral interest and the future reversionary interest with an oil and gas lease, or unless the lease had been ratified or joined in by the holders of the reversionary interest, the oil and gas lease will terminate upon the expiration of the term mineral interest. *RLM Petroleum Corp. v. Emmerich*, 896 P.2d 531 (Okl. 1995)

In Texas, the term mineral interest holder has the right to encumber the term mineral interest with an oil and gas lease; however, it is presumed that unless the future interest is covered by the lease or the future interest owner has ratified the lease, the lease would be lost at the

reversion of the minerals. *Andrews v. Brown*, 283 S.W. 288 (Tex. Civ. App.1926

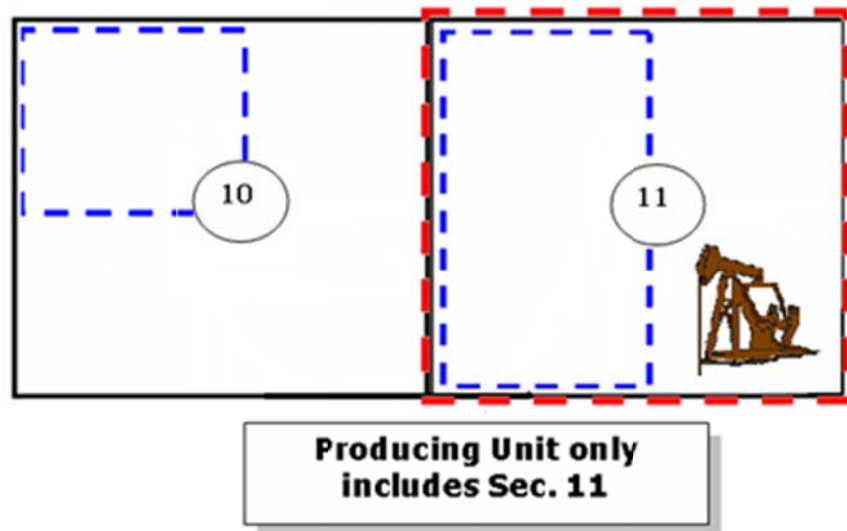
Problems to be aware of with Term Conveyances

When term minerals or royalty exist, the land professional must also know:

1. Which owners have the power and authority to enter into an oil and gas lease;
2. Which owners should receive payment out of the proceeds resulting from an oil and gas lease;
3. Would the Defeasible Fee ownership be extended by certain types of production such as a shut-in well;
4. Would operations extend the term ownership to the Defeasible Fee owner?

When language is used such as "conveyed or reserved for a fixed term and as long thereafter as oil or gas is produced," in order for this option to take effect and move the term mineral into a "secondary term," there must be either oil or gas production in paying quantities not only during the term of the deed, but at the date of expiration of the term, or there must be diligent operations in place. If not, the minerals will revert back to the other party.

Assume the following: Chester Morrow conveyed to Victor Sherman on March 3, 2001, all of his interest in Section 10: NW/4 and Section 11: W2 (as seen in the following illustration). The conveying deed contained these words: "I convey 100% of the minerals in and under the land for a period of 10 years and as long thereafter as oil or gas is produced." The deed was dated March 3, 2001.



Assume your company leased both tracts of land on the same lease. The only portion of the lease that was pooled into the drilling unit was the W2 of Section 11. The drilling unit comprised all of Section 11 and a producing well was drilled in the SE/4 of the section.

No other wells were drilled on the other lands prior to March 3, 2011.

Would production from the well in Section 11 perpetuate the mineral ownership to Victor Sherman as to the lands in Sections 10 and would the production from the unit hold those lands outside the unit?

_____ Yes _____ No

Answer: This answer depends on what state this scenario is taking place in. Since these lands are tied to a term mineral and potential reversionary interest, in states like Kansas, only the acreage included in the spacing unit would perpetuate into the secondary term. Since the lands in Section 10 fall outside the production unit, they would revert back to Chester Morrow. If your company did not have a lease from him on this tract of land, these lands would not carry into the secondary term.



In other states, since the well was not located on *any of the lands* covered in the granting clause of the conveying deed, the minerals would not perpetuate into the secondary term. *All* of the lands would revert back to Chester Morrow. If your company did not have a lease from him, these lands would not be covered nor would they be held by production from the unit.

In Texas, if the well was drilled on lands covered in the conveying deed as shown in the following illustration, then as long as there was production on March 3, 2011, all lands covered in the lease would perpetuate into the secondary term and the lands located in Section 10 would be held by production from the unit.

In Oklahoma, production can simply be on lands pooled with those involving the term mineral interest; however, actual marketing of the production must have taken place on or before the expiration date of the term mineral interest. In Oklahoma, the production attributed to those leased lands inside the unit would continue the entire lease into the secondary term. However, the Oklahoma statutory pugh clause would apply to this situation since the lease was executed after May 25, 1977, and the spacing unit contained 160 acres or more. The lands outside the unit would automatically expire 90 days after the primary term of the lease.

Many states such as Texas have held that a shut-in payment will not perpetuate the term mineral interest into the secondary term unless the conveying document states that a shut-in gas well will continue the term interest.

Scenario:



On March 1, 2002, Violet gave her daughter Faith a 10-year mineral deed covering subsurface mineral rights she had inherited from her mother years ago. On April 1, 2005, an oil company leased Faith and promptly drilled a successful well.

On March 1, 2012, the minerals will revert back to Violet.

If the deed covered lands in Texas, what would be the status of the lease?

If the deed covered lands in Oklahoma, what would be the status of the lease?

ANSWER: Unless the conveying document provided for the continuation of the lease past the expiration date, a lease will not transfer to Violet and two leases should be taken; one from Faith (the term interest owner) and one from Violet (the holder of the reversionary interest).

Life Estates and the Open Mine Doctrine

When a person holds land in fee simple, it means that the person is the absolute owner with all the rights of ownership during that person's lifetime, and they have the right to dispose of it as they wish at death. Many such owners have transferred property into what is known as a "Life Estate." A life estate is established through a "life tenancy" conveyance. This deed will grant all the benefits of ownership in the property to a "life tenant" during his or her life and will establish who the owners are at the time of the life tenant's death. These parties are called remainderman. The "life tenant" is entitled to the use and benefits of the property for life, the rights of possession to the property, the right to receive income from the property and the obligation not to destroy the property.

The type of interests that are owned by the life tenant can, in fact, be conveyed to a third party. In other words, the life tenant can convey his or her right of use to the property and his or her rights of possession to the property to a third party. In a case like this, the new possessor of the property would have the right for possession and use during the life tenant's life.

The "Open Mine Doctrine" – Picture a mine that is actively conducting business. The doors are open and ore is being brought to the surface. This

concept impacts life estates, life tenants, and remainderman. For instance, if the mine was *open* and doing business at the time of the creation of the life estate, payments will be made one way. If the mine was not open at the time of the creation of the life estate, payments will be made another way. The theory behind open mine doctrine is that if the mine were closed or did not exist prior to the creation of the life estate, the life tenant would be able to make any and all decisions on his or her property, since he or she would own 100% of the bundle of sticks. On the other hand, if the mine were not opened or the lease was not executed until after the creation of the life estate, the life tenant would not have complete authority to explore for and develop a mine without the consent of the remainderman. In this case, the life tenant would own only a portion of the bundle of sticks with the remainderman owning the remainder of the sticks. Neither the life tenant nor the remainderman can act alone in developing the property for oil and gas purposes. Therefore, an oil and gas lease would not be effective unless all parties joined in the execution of the lease. *Davis v. Bond*, 158 S.W.2d 297 (Tex. 1942). Both life tenant and remainderman can sign the same lease or have one lease ratified by the other parties.

Arkansas – Under the open mine doctrine, if the mine was closed at the time an oil and gas lease was executed, any bonus and delay rental payments are considered income and thus payable to the life tenant; royalty would be considered corpus and would be payable to the remainderman. If the mine had been opened prior to the creation of the life estate, the life tenant would be entitled to the royalty. If the life estate involves property that is subject to dower or curtesy rights of a spouse, the life tenant is only entitled to receive their fractional percentage of royalty.

Montana – It appears likely that Montana would follow the majority rule concerning the open mine doctrine as recognized by the courts in Texas. *Ayotte v Nadeau*, 81 P.145, 149 (MT 1905), *Danielson v Danielson*, 560 P.2d 893, 895 (MT 1977).

Michigan – If an oil and gas lease was executed prior to the establishment of a life estate, unless limits have been established, the life tenant can “work the mines even to exhaustion and take the profits.” *Poole v Union Trust Co*, 191 Mich 162; 157 NW 430 Mich (1916). If the oil and gas lease was executed after the establishment of the life estate, unless otherwise directed, it appears that minerals produced should be allocated to the remainderman.

North Dakota – A life tenant and remainderman must both execute an oil and gas lease for the lease to be effective. If the instrument creating the life estate fails to specify how income shall be shared, the life tenant shall be entitled to all rentals. Any bonus, royalty, and all income derived from actual production constitutes corpus and must therefore be retained for the

remainderman; however, the life tenant is entitled to any interest derived from such corpus during the life tenant's life; and, the remainderman is not entitled to receive any of the income during the life tenant's life. North Dakota Mineral Title Standard 7-03.

The North Dakota courts have not specifically recognized the "open mine doctrine."

Oklahoma – In Oklahoma, the life tenant owns the right of possession to the property. The remainder interest in the property is owned by the designated remainderman, who will take possession of the property upon the death of the life tenant.

The "Open Mine Doctrine" – If a lease existed or a producing well existed prior to the creation of the life estate; the life tenant would be entitled to receive all royalty. If the lease did not exist prior to the creation of the life estate, neither the life tenant nor the remainderman can act alone in developing the property for oil and gas purposes. An oil and gas lease would not be effective unless all parties joined in the execution of the lease. *Nutter v. Stockton*, 1981 OK 30, 626 P.2d 861, 69 O&GR 497.

If the mine was not open at the creation of the life estate, *delay rental payments* (considered income) should be made to the life tenant. The *signing bonus* (considered income) should be made to the life tenant. *Royalty* (considered the principal or capital sum, as opposed to interest or income) should be made to the remainderman. *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944).

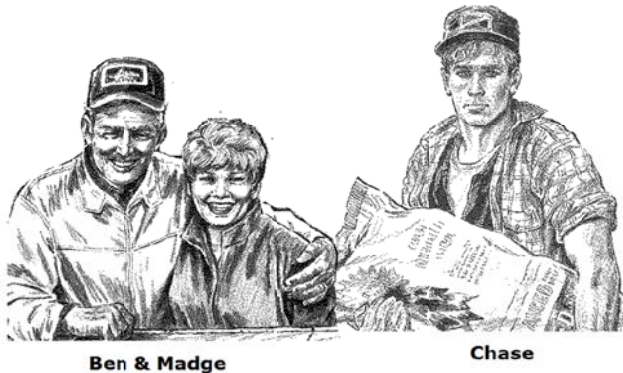
If an oil and gas lease had been negotiated prior to the life estate or if a producing well existed on the property prior to the life estate, then the mine is considered open prior to the life estate and the life tenant would be entitled to all royalties. If such a lease expires or terminates during the life estate, normally, the mine has been considered to be "closed."

Pennsylvania – If a non-producing lease was established prior to the life estate, the life tenant would have the right to enter into new leases once the prior lease expired, even though the new leases were subsequent to the life estate. *Cronan v. Castle Gas Co.*, 354 Pa.Super 381, 512 A.2d 1 (1986), 90 Oil & Gas Rep. 111 (1986).

Texas – In Texas, the life tenant owns the right of possession to the property. The remainder interest in the property is owned by the designated remainderman, who will take possession of the property upon the death of the life tenant. If the mine was not open at the creation of the life estate, *delay rental payments* (considered income or rent) should be made to the life tenant. The *signing bonus* (considered the principal or capital sum, as opposed to interest or income) unless otherwise agreed upon should be made to both the life tenant and remainderman jointly. *Royalty* (considered

the principal or capital sum, as opposed to interest or income) unless otherwise agreed upon, should be made to both the life tenant and remainderman jointly. If an oil and gas lease had been negotiated prior to the life estate, or if a producing well existed on the property prior to the life estate, then the mine is considered open prior to the life estate and the life tenant would be entitled to all royalties.

Scenario 1: Read the following scenario and answer the question.



Ben and Madge are life tenants in a life estate that covers the family farm. The life estate was established 3 years ago naming their son, Chase, as the remainderman. Last year, an oil company leased the life estate and six months later drilled a producing well.

If these lands were located in either Texas or Oklahoma...

Who should be receiving royalty checks?

Who should have received the bonus check?

ANSWER: Since the mine was not opened until after the establishment of the life estate, in Texas, unless stipulated differently, both royalty and bonus should be paid to all three parties. In Oklahoma, unless stipulated differently, the signing bonus should be paid to Ben and Madge and royalty should be paid to Chase.

Scenario 2: Read the following scenario and answer the question.



Melvin created a life estate whereby he designated himself as life tenant naming his son Charles and grandson Charlie as remainderman.

Five years later, Melvin deeded the property to Celeste. She has lived on the property for the last twenty years.

Last year, Melvin died.

What is the ownership status of the property?

ANSWER: The type of interests that are owned by the life tenant can, in fact, be conveyed to a third party. In other words, Melvin can convey his right of use to the property and his rights of possession to the property to a third party. In a case like this, Celeste, the new possessor of the property, would only have the right for possession and use during Melvin's life.

Usufructs in Louisiana

Louisiana provides for a type of life estate; however, it is known by a different name. Since Louisiana is a civil law state rather than a common law state, it does not adhere to common law rules surrounding Life Estates. Instead, Louisiana recognizes something very similar to a Life Estate:

<u>Louisiana</u>	<u>Common Law</u>
Usufructs	Life Estates
Usufructuary	Life Tenant
Naked Owner	Remainderman

The usufructuary has the right of the use and enjoyment of the property. This right has limitations and restrictions based on Louisiana Civil Code Articles 535 through 629 and Louisiana Mineral Code Articles 188 - 196.

Louisiana Mineral Code Article regarding Usufructs and Minerals

Article 118. A *usufructuary of land* may grant a mineral lease on the estate of which he or she has the usufruct if their usufruct includes mineral rights susceptible to leasing, *but any such lease is extinguished with the termination of the usufruct.*

A *usufructuary of a mineral servitude* or other executive interest may grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner of the servitude. (NOTE: A mineral servitude is similar to a mineral conveyance or mineral reservation. However, in Louisiana, a mineral servitude is limited by a 10-year non-use provision. If the minerals are not used in 10-years they revert back to the surface owner.)

Article 189. A conventional usufruct, including one created by a donation inter vivos or mortis causa, may *by express provision* include the use and enjoyment of all or a specified portion of the landowner's rights in minerals.

Definition of "donation inter vivos" - donation of personal property made by the donor during his/her lifetime, delivered to the donee with the intention of irrevocably surrendering control over the property.

Definition of "mortis causa" - A phrase sometimes used in reference to a deathbed gift. A gift causa mortis is distinguishable from a gift inter vivos, which is a gift made during the donor's lifetime. (Italics added for emphasis)

Article 190. If a *usufruct of land* is that of parents during marriage, or any other legal usufruct, or if there is no provision including the use and enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals as to mines or quarries actually worked at the time the usufruct was created.

If a *usufruct of land* is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created. However, the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease without the consent of the naked owner.

Article 191. As applied to oil and gas, the principle stated in Article 190 means that if at the time a usufruct is created minerals are being produced from the land or other land unitized therewith, or if there is present on the land or other land unitized therewith, a well shown by surface production test to be capable of producing in paying quantities, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals as to all pools penetrated by the well or wells in question.

Article 192. If the land subject to the usufruct, or any part thereof, is subject to a lease granted by the landowner prior to the creation of the usufruct, the usufructuary is entitled only to royalties on actual or constructive production allocable to him under Article 191.

If such a lease terminates, or if the land or any part thereof is not under lease at the time the usufruct is created, the usufructuary's right of use and enjoyment includes the right to execute leases as to any rights to which he is entitled under Article 190 and, accordingly, to retain bonuses, rentals, or other payments, or the proportionate part thereof, allocable to payments, or the proportionate part thereof, allocable to his interest under Article 191. Such a lease executed by the usufructuary may not extend beyond the period of his usufruct.

Article 193. One who has the *usufruct of a mineral right*, as distinguished from the usufruct of land, is entitled to all of the benefits of use and enjoyment that would accrue to him if he were the owner of the right. He may, therefore, use the right according to its nature for the duration of his usufruct.

Note: It is presumed that this right exists without regard to whether the mines are open or closed.

Article 194. A usufructuary of land benefitting under Article 190 or 191 or a usufructuary of a mineral right is not obligated to account to the naked owner of the land or of the mineral right for production or the value thereof or any other income to which he is entitled.

Article 195. If a usufruct of land does not include mineral rights, the naked owner of the land has all of the rights in minerals that he would have if the land were not subject to the usufruct. If the usufructuary is entitled to the

benefits provided in Article 190 and 191, the rights of the landowner are subject thereto.

	OPEN MINE If mine was open and/or a lease existed prior to the creation of a Usufruct <u>Article 192</u>	CLOSED MINE prior to Usufruct <u>Article 192</u>	Does the lease extend beyond the usufruct? <u>Article 118 & 192</u>	<u>Who can Execute a lease?</u>
Usufruct in land that also include minerals <u>Article 189-190</u>	The usufructuary is entitled only to royalties	Usufructuary can execute lease and is entitled to bonus, rentals, and royalty	NO	The better part of judgment would be to secure the signatures of all parties with a Rental and Royalty Division Order setting out payment to each of the parties.
Usufruct of a Mineral Servitude <u>Article 118</u>	The usufructuary is entitled only to royalties	Usufructuary can execute lease and is entitled to bonus, rentals, and royalty	Yes	The better part of judgment would be to secure the signatures of all parties with a Rental and Royalty Division Order setting out payment to each of the parties.

Scenario:



Issue 1: Assume Opal, a usufructuary of land, granted an oil and gas lease to an oil company. Six months later, a producing well was drilled.

Last year, Opal died. Her daughter, Sarah was designated the naked owner of the usufruct.

What is the status of the lease?

Issue 2: Assume Opal, a usufructuary of a mineral servitude granted an oil and lease to an oil company. Six months later, a producing well was drilled.

Last year, Opal died. Her daughter, Sarah was designated the naked owner of the usufruct.

What is the status of the lease?

ANSWER: Louisiana mineral law makes a distinction between leases that cover a usufruct of land and those leases that cover a usufruct of a mineral servitude. In the first issue, Opal, the usufructuary of the land, is able to grant a mineral lease on the estate if her usufruct includes mineral rights, *but the lease is extinguished with the termination of the usufruct (her*

death). In issue 2, Opal, the usufructuary of a mineral servitude, is able to grant an oil and gas lease that would extend beyond the term of her usufructuary. In this case, when she died, the lease would extend to Sarah, the naked owner of the servitude.

When securing a lease in Louisiana, the best judgment would be to always secure the signatures of all parties and have them sign a Rental and Royalty Division Order setting out payment to each of the parties.

Water Ownership

In the United States, groundwater and surface water laws and policies are often very complicated and ownership can be complex. When examining this subject, one must make a distinction between “groundwater ownership,” or water found beneath the surface, and “surface ownership” of water. More than one system of ownership can be found across the country, with laws that can be very comprehensive and involved. Some states have very comprehensive groundwater laws while others rely on long-standing laws. In the United States, there are a handful of different doctrines that govern groundwater ownership and use. The following is a brief description of groundwater and surface water ownership and does not purport to be an exhaustive work on the subject.

Groundwater Ownership

The Doctrine of Absolute Ownership – established under English common law and often referred to as the Common Law System, this doctrine of absolute ownership became the earliest type of groundwater ownership in the United States. Under this doctrine, a property owner owns not only the soil beneath his property but also the groundwater it contains. With this type of ownership, a landowner can use as much groundwater as possible without regard to its effects on neighbors, as long as it is done without malicious intent. Because the rule of capture applies with this type of ownership, there is the potential of overproduction of groundwater by one owner, resulting in the loss to neighbors. In states that adhere to the doctrine of absolute ownership, government interference with the operation of water wells is minimally seen.

Usually, absolute ownership does not apply to surface water such as rivers, streams, and lakes. States that have adopted the absolute ownership rule are Connecticut, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Rhode Island, and Texas.

In 1904, the Texas Supreme Court handed down a ruling that demonstrates both the doctrine of absolute ownership of water and the rule of capture. The case involved the Texas Central Railroad Company which, in order to supply water for its locomotives, drilled a water well on its property. The well produced 25,000 gallons of water each day but, in the process, lowered groundwater levels, causing a neighbor's well to go dry. The neighbor sued the railroad for damages.

The court applied the rule of capture and found in favor of the railroad. The court stated:

"Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would therefore be practically impossible."

The court further stated that "this inconvenience to his neighbor falls within the description of *damnum absque injuria* [an injury without a remedy], which cannot become the ground of an action."

Essentially, this ruling granted unlimited rights to take as much groundwater as could be pumped, and the rule of capture became known as "the law of the biggest pump." *Houston & Texas Central Railroad Co. v. East*.

Today, under Texas law, underground water belongs with the surface estate and in some instances, the surface estate may sell the water rights to another entity. Texas is the only western state still following the rule of capture as it relates to water rights.

The Doctrine of Reasonable Use – The reasonable use rule is often referred to as the American Rule and was developed in the 19th century. Under this rule, private ownership of groundwater applies; however, landowners are only entitled to use a "reasonable" amount of ground water from their own land without waste. Under this system, groundwater cannot be transported off the land if doing so would interfere with the rights of neighboring landowners.

This type of groundwater ownership does not guarantee any set amount of water, but would allow the landowner to take as much water as possible as long as it would not result in damage to other wells from the same water aquifer.

If it is determined that the landowner used an unreasonable amount of the groundwater, the landowner would be liable for damages. The power to determine who would be given rights to a new well is usually granted by a court or a state regulatory agency. Usually, this rule will base rights to

water from historical uses. Any new “competing” uses might be required to meet a “reasonableness of the use” test. Failing this test, the new uses would, most likely, be prevented if they would interfere with the prior uses. As can be imagined, the laws and policies regarding the standard of reasonable use can change with increased demand, population growth, environmental concerns, and land use. A number of states have adopted or lean toward the Doctrine of Reasonable Use, including: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Maryland, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming.

The Correlative Rights Doctrine – Correlative rights are often applied to water rights. For instance, the Supreme Court of California has applied the doctrine to govern certain water law in that state. Landowners are entitled to a “fair and just” proportion of the *supply of groundwater*. This right extends only to the quantity of water that is necessary for use on one’s land. The remaining or surplus groundwater is available for “appropriation” by others. Others can use this appropriated surplus water for “off-tract” purposes, but the “rights of appropriators are subordinate to correlative rights for on-tract users.”

The correlative rights doctrine creates a limited ownership of groundwater and would establish that each landowner has the beneficial use of the groundwater underlying their land; however, if the land is situated above a common groundwater source, and in times when the supply is insufficient to meet the needs of all landowners, each user can be required to share and share alike with the other landowners. Usually, the landowner is allotted a correlative right corresponding with the available water and based on the size of surface ownership and reasonable uses on their land. Six states have adopted or lean toward the Correlative Rights Doctrine including: California, Hawaii, Iowa, Minnesota, New Jersey, and Vermont.

The Prior Appropriation Doctrine – In a handful of states, the priority of use of groundwater is given to the landowner that first beneficially used the water. Once this “first use” owner has put the water to a beneficial use, they have the right to continue to do so. Landowners that follow this first use owner are in a subordinate position and have “junior” rights.

The first use owner may be limited in the amount of groundwater that can be withdrawn based on “reasonableness” and/or beneficial purposes. In several of the states that have adopted or lean toward this doctrine, the water is owned by the state, which issues water permits to the landowner. Once all of the water rights have been granted, no further permits will be

allowed. Some states allow a landowner the right to sell their water permits, other do not. States that have adopted the Prior Appropriation Doctrine are generally located in the western United States and include: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Washington.

The Restatement of Torts Rule – Three states including Michigan, Ohio, and Wisconsin have adopted or lean toward the Restatement of Torts Rule. Under this rule, a landowner's beneficial use of groundwater cannot be withheld if that use meets certain conditions. First, the water use cannot lower a neighbor's water table or reduce the neighbor's artesian pressure. Secondly, the water use cannot *exceed* a reasonable proration of the total amount of groundwater available. Lastly, the water use cannot significantly change or influence the course of surface water or of a lake.

The Reasonable Use Doctrine and the Prior Appropriation Doctrine are both used in the states of Arkansas, Delaware, Missouri, and Wyoming. Nebraska has adopted both the Reasonable Use Doctrine and the Correlative Rights Doctrine.

Surface Water Ownership

The Natural Flow Doctrine – This doctrine was born out of the English Water Law and has two primary elements. First, a landowner may use water that is flowing in a definite stream, but he is restricted from changing the natural flow of the stream or the quantity of water that is flowing. Secondly, the landowner is restricted from polluting a stream. This doctrine makes a distinction between surface water that does not form a definite stream from surface water that does form a definite stream. Generally, a landowner has absolute ownership of surface water that does not form a definite stream. However, permission to use surface water that does form a definite stream may be required from an appropriate state agency.

The Riparian Rights Doctrine or the Reasonable Use Doctrine – As was seen with groundwater use, the reasonable use of water also applies to surface water. A landowner whose land borders a river or stream (riparian) is allowed to use the water for reasonable purposes, so long as the use would not unreasonably hinder the reasonable use of the water by another riparian landowner. In case of a shortage of water, under riparianism, all comparable riparian owners would be affected proportionally.

The Prior Appropriation Doctrine can also be applied to surface water use, and grants the first user of water for economic or beneficial purposes superior rights to the water. “First in time, first in rights” is a phrase commonly used with this doctrine. This senior user would have a superior right to water in case of a shortage and could shut off the water to any junior users. The doctrine requires that the riparian owner’s use be in an economically efficient manner. Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming apply this doctrine to surface water use.