Chapter 6

Who Should Sign the Lease?

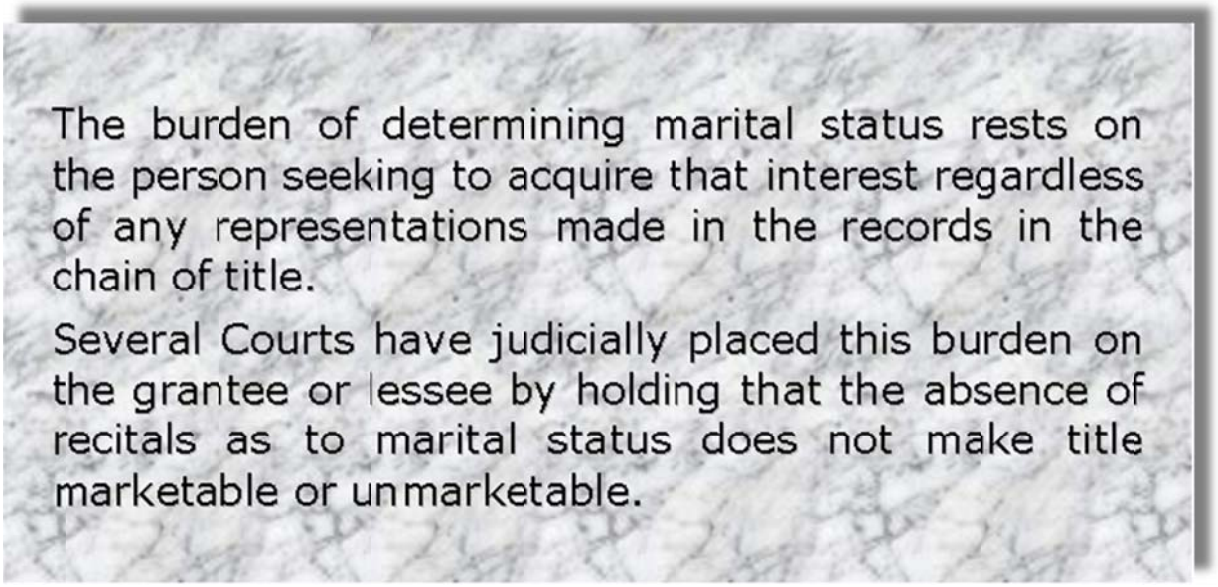
Marital Property

Generally, there are two types of marital property systems in the United States - *community property* or *common law*. The community property system is embraced by a handful of states and sees certain types of property as owned in partnership between spouses, since each contributed equally to the marriage. Under community property, even though only one spouse may be the income earner in the marriage, each spouse would own an undivided one-half interest in the property acquired during the marriage. Common law takes a different approach to property ownership. Separate earnings are owned individually by each spouse. Property would vest in the party whose name is listed as the grantee, and would not be owned jointly simply because of the marriage.

When an oil and gas lease is being signed by a married person, the land professional must not only take into consideration the status regarding marital or separate property ownership, but must also consider certain marital rights such as:

1. Community property
2. Homestead rights
3. Dower and Curtesy laws
4. Tenancy by the entirety
5. Marital property laws
6. Marriage Dissolution laws

Many states require the signature of both spouses in any of the situations listed above. Because instruments of record rarely recite marital status, the land professional may not have a clue as to whether the property falls into any of the above listed categories, thus further examination of the issues may be needed. It is customary that conveyances by single persons contain recitals showing their status as single.



Community Property

Normally, property acquired in a community property state would be considered separate property if it was:

1. Property acquired prior to marriage.
2. Property acquired while married, but the property was acquired by a gift or through and inheritance.

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 community property states. 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.

Pennsylvania enacted community property laws for a short period between September 1, 1947 and November 26, 1947. **Oklahoma** enacted community property laws for a short period between July 26, 1945 and June 2, 1949. **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. Three other states that have enacted and then repealed community property are **Nebraska, Hawaii,** and **Oregon**.

Common Law Ownership

In all non-community property states, the ownership of *personal property* by a spouse will be administered by *common law rules*. This means that the ownership of the property will generally depend on how the property is "vested, titled, or held." In most cases, the key to ownership would depend on whose name or names are on the title. Many times, the property in question is property other than land, a home, or minerals ownership. The property involves items that do not contain a title of certificate, such as a microwave, household items, or jewelry. In a divorce, the person whose income was used to purchase this item generally becomes its owner. If the married couple's joint funds were used, then the property is jointly owned.

For oil and gas purposes, if the vesting title to the minerals was in *James and Martha Johnson, husband and wife,* then the oil and gas lease should be styled exactly as the vesting deed showed.

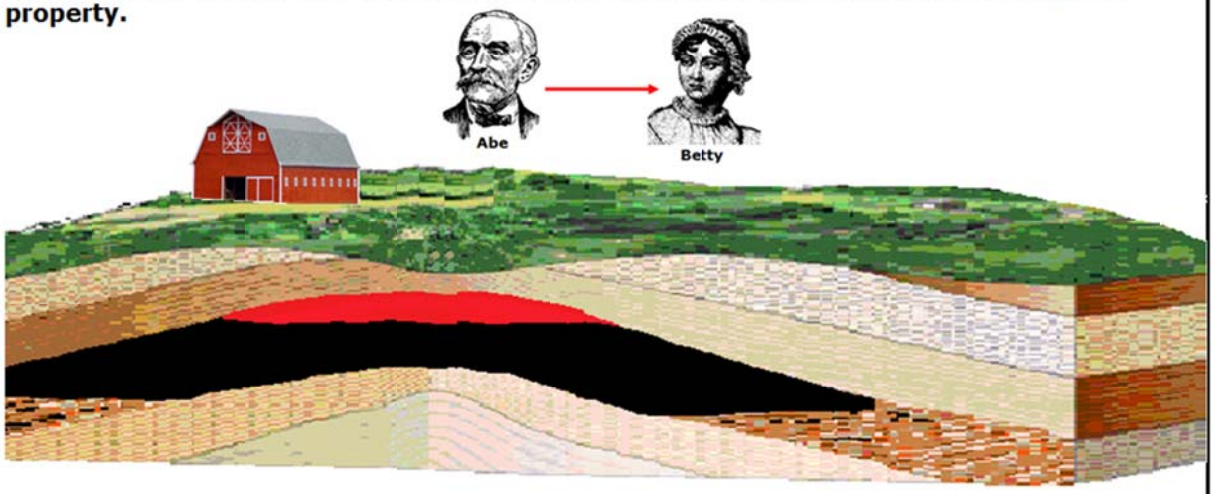
Regardless of marital status, property acquired in a common law state would normally be considered separate property if it was owned in the individual's name. However, as can be seen from glancing at several states issues, acquiring a lease simply from the spouse who appears to own separate property may not adequately address all of the issues.

Colorado – Because Colorado has enacted both the Uniform Disposition of Community Property Rights at Death Act and the Uniform Dissolution of Marriage Act, certain property that would qualify under either or both of these acts may require the execution of both spouses for conveying or leasing purposes.

Under the Uniform Dissolution of Marriage Act, once a petition for dissolution of marriage or legal separation is filed, the act provides for a temporary injunction "Restraining both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business or for the necessities of life." Colo. Rev. Stat § 14-10-107 and 113. *Marital property* is defined as *any* property which either spouse acquired during the marriage. Property acquired by gift, inheritance, or property excluded by a prenuptial agreement would be exceptions to this definition. Therefore, any property acquired during the marriage, even if it is titled in one spouse's name, may still be considered marital property.

Additionally, if property was acquired prior to the marriage and increased in value during the marriage that part of the increased value is considered to be marital property. An example of this would be a home, land, or mineral rights. Only the increase in value becomes marital property.

1. Assume Abe and Betty married in 1985. In 1995, Abe purchased a 40-acre tract of land in Colorado where he wished to build a barn and raise livestock. The court house records show title to the 40 acres as vested in Abe's name as his sole and separte property.



2. Provision Petroleum wishes to lease the 40 acres. Who should execute the lease?

- ☐ **Betty**
- ☐ **Abe**
- ☐ **Both Betty and Abe**

ANSWER: In Colorado, any property acquired during the marriage, even if it is titled in one spouse's name, may still be considered "Marital Property." The Colorado statute reads, "Restraining both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, *except in the usual course of business or for the necessities of life."* Some would make the claim that executing an oil and gas lease would fall into the "usual course of business" category and, therefore, take the lease from Abe, as his sole and separate property. However, getting both Betty and Abe to execute the lease would always be the preference.

Kentucky – According to KRS 403.190, separate property in **Kentucky** would be:

1. Property owned prior to marriage
2. Property acquired during the marriage by gift or inheritance

3. The increase in value of separate property not related to the efforts of the parties is exempted from "marital property"

Illinois – In October 1, 1977, Illinois passes the Uniform Dissolution of Marriage Act. "Restraining both parties from transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business or for the necessities of life." (750 ILCS 5/)

Marital property is defined as all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

1. Property acquired by gift, legacy or descent
2. Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy, or descent
3. Property acquired by a spouse after a judgment of legal separation
4. Property excluded by valid agreement of the parties
5. Any judgment or property obtained by judgment awarded from a spouse to another spouse
6. Property acquired before the marriage
7. The increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or other-wise, subject to the right of reimbursement provided in subsections (c) of this Section
8. Income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse

Maryland – Regardless of how property is titled in Maryland, *marital property* means the property acquired by one or both parties during the marriage. Unless excluded by a valid agreement, it would include real property held as tenants by the entirety.

Marital property would not include property acquired before the marriage, acquired by inheritance, gift, or excluded by a valid agreement.

Michigan – In Michigan, *marital property* would be any property acquired during the marriage through the effort or earnings of the spouses and each would own an undivided 50% interest in the property. *McNamara v Horner*, 249 Mach App 177, 187; 642 NW2d 385 (2002).

In Michigan, property owned by a spouse prior to marriage or acquired through inheritance or gift would be considered *separate property*. *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999). Because Michigan has abolished curtesy rights, property acquired by the wife during the marriage and vesting in the wife would be owned by the wife. Michigan, however, has not abolished the dower rights for the wife. If a husband acquired property in his name during the marriage, the wife's right of dower ownership would attach to the property.

New York – In New York, either husband or wife may own property and convey property as their separate property.

Pennsylvania – Pennsylvania is a common law state and does not recognize community property. Each partner in the marriage is recognized as an indivisible unit. Because Pennsylvania recognizes tenancy by the entirety for married couples, as defined in Title 23, Chapter 35 of the *Pennsylvania Consolidated Statutes*, *marital property* consists of all property acquired by either party during the marriage, as well as the increase in value of property that was acquired prior to marriage. There is a presumption that property acquired during marriage is *marital property*. Exceptions to marital property includes property acquired prior to marriage or by gift, devise, or descent. Separate property can be conveyed separately without the joinder of the other spouse.

Virginia – *Separate property* is generally defined as all property acquired prior to marriage; acquired during the marriage by bequest, devise, descent, survivorship, or gift; and, all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property. Income received from separate property during the marriage is separate property if not attributable to the personal effort of either party. The increase in value of separate property during the marriage is separate property, unless marital property or the personal efforts of either party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions. The personal efforts of either party must be significant and result in substantial appreciation of the separate property if any increase in value attributable thereto is to be considered marital property.

Marital property is property titled in the names of both parties, whether as joint tenants, tenants by the entirety, or otherwise, or all other property acquired by each party during the marriage which is not separate property.

Mixed property would be income received from separate property during the marriage that is attributable to the personal efforts of either party. In the case of the increase in value of separate property during the marriage, such

increase in value shall be marital property only to the extent that marital property or the personal efforts of either party have contributed to such increases, provided that any such personal efforts must be significant and result in substantial appreciation of the separate property.

West Virginia – Although West Virginia is not considered a true community property state, because it is an *equitable distribution* state, it is somewhat of a blend between the two. *Marital property* can generally be defined as property acquired by either spouse during the course of the marriage. In cases of divorce, marital property will typically be divided equally. It appears that classifying property as marital rather than separate is the inclination in West Virginia. *Fitzgerald v. Fitzgerald*, 219 W. Va. 774; 639 S.E.2d 866, 872, citing *Whiting v. Whiting,* 183 W. Va. 451, 396 S.E.2d 413 (1990). Because of this, when leasing, the land professional should obtain signatures from both spouses unless separate property ownership can be determined beyond a reasonable doubt. Separate property is defined as property acquired before the marriage, gifts, inheritances, personal injury awards that vested before marriage, and any properties purchased solely with the separate funds of one spouse. Domestic Relations, W.Va. Code §48-1-237.

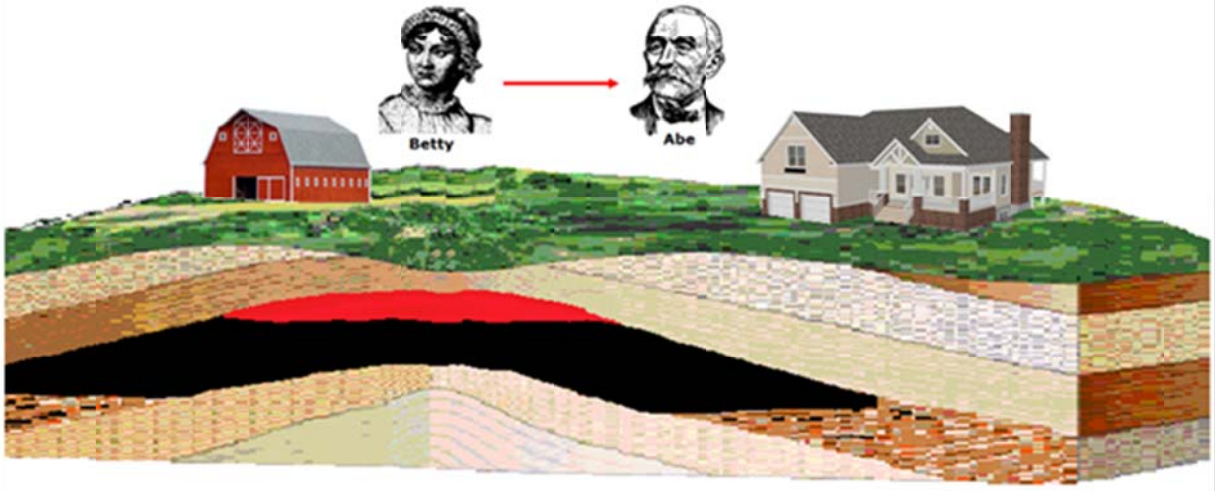
Wisconsin – In 1986, Wisconsin passed the Marital Property Act. It's a complex law, full of exceptions. The purpose of the act is to benefit both husband and wife regardless of which contributed financially to the marriage and says that, with exceptions, whatever the couple acquired during the marriage should belong to them equally.

Marital property would be defined as all income and property the couple acquired after their "determination date" (with certain exceptions). The determination date is the latest of: the couple's marriage day, the date they both took up residence in Wisconsin, or January 1, 1986.

Separate property would be defined as property acquired before marriage, through an inheritance, or by personal gift. However, for separate property ownership to be valid, records proving its nature must be secured. A deed that purportedly vests title in one of the spouses would not necessarily prove separate property. Wisconsin law, under this act, presumes that all property is marital property, unless specific records prove separate property.

Mixed property would be separate property that has partially become marital property. Assume a wife brings into her marriage a home she inherited from her mother's estate. During the marriage, the husband remodels the kitchen and bathrooms in an effort to increase the home's value for sale. The increased value in the home would become marital property. The original value would be considered separate or individual property.

1. Assume Betty and Abe married in 1985. They moved into this Wisconsin home and onto the land inherited by Betty from her mother's estate. This would be her "Separate Property."



2. Abe spent a lot of time and effort restoring the old barn so that it is functional. He also added a garage on the home. Since their marriage, the home and property has doubled in value. The increased value would be "Marital Property", the original value would be considered "Separate or Individual Property."

3. Provision Petroleum wishes to lease the land. The court house records show that the property is owned by Betty as her sole and separate property. Who should execute the lease?

- ☐ **Betty**
- ☐ **Abe**
- ☐ **Both Betty and Abe**

ANSWER: Both Betty and Abe should appear as lessors on the oil and gas lease.

Doctrine of Dower and/or Curtesy Rights

The English common law system of curtesy was brought to America by the early colonists, and created a provision whereby a widower could use his deceased wife's property (that is, property which she acquired and held in her own name) until his own death, but he could not sell or transfer it to anyone except children of his wife. Curtesy rights were those rights a widower was entitled to after the death of his wife.

The English common law system of dower rights for widows was also brought to America by our early colonists. Since most property was owned in the name of the husband, dower provided a way for the woman to support herself after his death. Through this right, the widow would receive a life estate in one-third of the real property owned by the husband. Even if the husband died intestate, the widow's one-third share would still be

recognized. Because of the dower rights of a married woman and her legal interest in any land being sold or purchased, most early deeds included the wife. It is important to note that Dower rights have been removed in many states in the United States.

Because discrimination on the basis of sex is now illegal, most states have abolished dower and curtesy, and generally provide the same benefits regardless of sex. This benefit is known simply as the statutory share. But dower and curtesy still exist in a few states and under certain circumstances, a living spouse may not be able to sell or convey property that is subject to the other spouse's dower, curtesy, or statutory share rights. In states that still recognize dower rights, these rights may now apply to both husband and wife.

The following states allow dower rights: Arkansas, Kentucky with exceptions, Massachusetts, Michigan, Ohio, and Vermont.

The following states allow curtesy rights: Alaska under the Uniform Probate Code §§13.06.005, et seq., Arkansas statutory curtesy provided §28-11-301 et seq., Kentucky with exceptions, and Vermont.

Arkansas – Arkansas Code Section 28-11-301. Property that appears to be one's sole and separate property can be impacted by dower or curtesy rights. Arkansas is one of the few remaining states that recognize both dower and curtesy rights. If a husband or wife died, leaving a spouse and one or more children, the spouse would be entitled to receive a life estate in one-third of all real property seized by the deceased spouse during the marriage, plus a one-third interest in all personal property owned by the deceased spouse at the time of death. This right applies to all property, regardless of how the property was titled. In Arkansas, dower or curtesy interest is not subject to creditors. If the husband or wife died leaving no children, the spouse would be entitled to one-half fee simple interest in the deceased spouse's real property owned at the time of death. In this case, the one-half interest could be reduced to a one-third interest depending on creditors; secondly, if any of the real property is considered an "ancestral estate," the interest passing to the spouse would be a life estate interest rather than a fee simple interest. Arkansas Code Section 28-11-304 states, "…the surviving spouse shall be entitled, absolutely and in his or her own right, to one-third (1/3) of all money received from the sale of timber, oil and gas or other mineral leases, oil and gas, or other mineral royalty or mineral sales, and one-third (1/3) of the money derived from any and all royalty . . . in lands in which he or she has a dower, curtesy, or homestead interest, unless said surviving spouse shall have relinquished same in legal form." Because these laws create a life estate with remaindermen, the oil and gas professional attempting to acquire an oil and gas lease should obtain signatures from the surviving spouse and all remaindermen.

Kansas – Although common law dower has been abolished in Kansas, an undivided one-half of a husband's estate in real property will be transferred to his widow upon his death in cases of intestate succession when there are no children.

Kentucky – Both dower and curtesy rights still exist in the state of Kentucky. KRS Chapter 392. By state statute, both dower rights for a widow and curtesy rights for a widower would be the same. According to KRS Chapter 392.010, a surviving spouse would be entitled to receive:

1. An "estate in fee" in the "surplus" of real property owned by the deceased spouse at the time of the spouse's death (Surplus refers to the interest left after a creditor's claim.). *Mattingly v. Gentry*, 419 S.W.2d 745 (KY 1967)
2. A life estate in one-third of the real property which the deceased spouse owned sometime during marriage but did not own at death. KRS 392.020. The only way a dower or curtesy right can be released is for both husband and wife to join in the conveying deed. With this in mind, it is assumed the property referred to is property acquired during marriage but not released by the surviving spouse prior to the death of the spouse. *Faulkner v. Terrell*, 287 S.W.2d 409 (KY 1956).

Michigan – As of 2010, only Michigan provides dower rights exclusively to women. Dower rights would include a life estate in one-third of the husband's real property acquired during the marriage. *Stearns v Perrin,* 10 Mich 456; 90 NW 297 (1902). These dower rights would not apply to any real property jointly owned. *Schmidt v Jennings*, 359 Mich 376; 102 NW2d 589 (1960). If a husband acquired property in his name during the marriage, the wife's right of dower ownership would attach to the property. Because of this, both husband and wife should execute an oil and gas lease. If a husband died owning such property in Michigan, the widow would have three choices.

1. If the widow was listed as an heir in her husband's last will and testament, she may, in fact, elect to take that portion of her husband's estate left to her in the will or that portion that would pass to her through intestate succession.
2. If the widow was not included in her husband's will, she could elect to take her elective share under Michigan law.
3. Lastly, the widow could elect to take her dower rights to a life estate in one-third of the husband's real property acquired during the marriage. Unless the dower rights were released by the wife prior to the husband's death, they would apply to all real property transferred by the husband

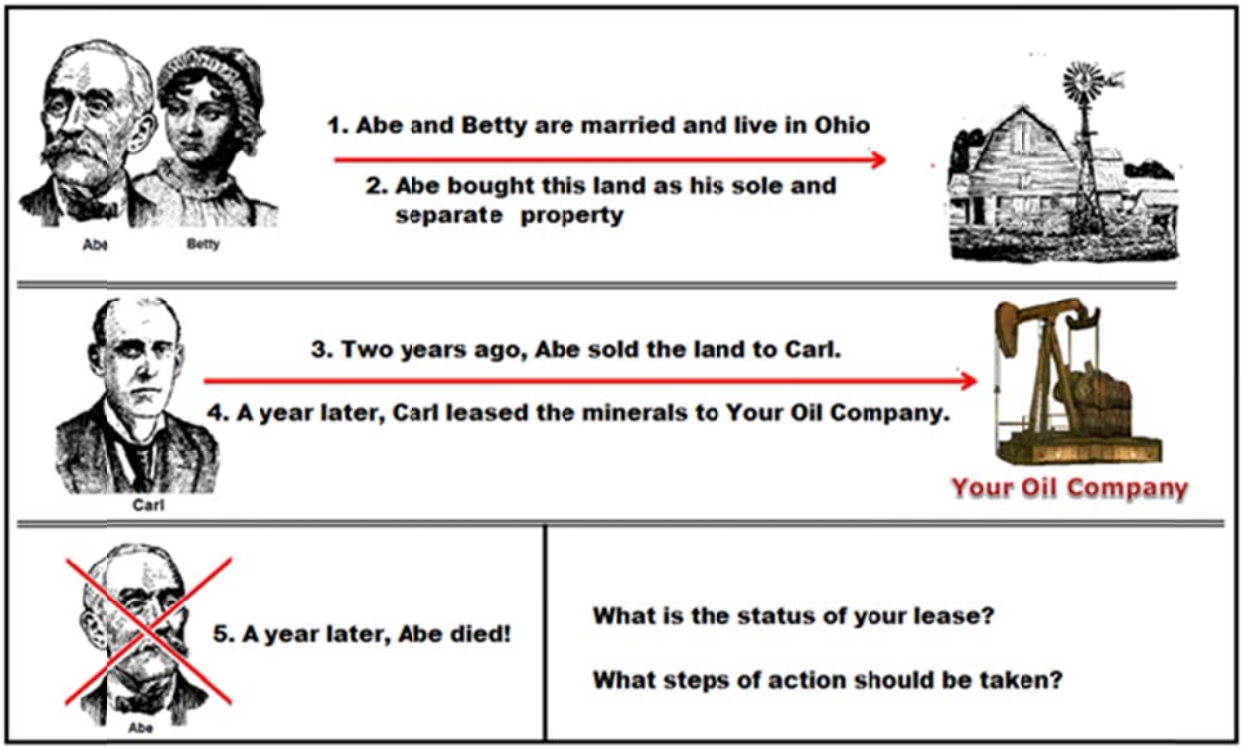
prior to his death. *In re Estate of Shroh,* 392 N.W.2d 192, 194 (Mich. Ct. App. 1986).

Ohio – Ohio is one of the few remaining states that still recognize dower rights. Whenever a married person acquires real property in Ohio, the spouse automatically becomes the recipient of this downer interest, which is a one-third life estate interest in the real property. Termination of this dower interest can come by one of three ways:

1. Releasing the dower right through signature
2. Divorce and/or the dissolution of a marriage
3. Death of the recipient of the interest

It is important to note that if a spouse (Abe) acquires real property as his separate property, the dower rights of his wife (Betty) automatically attach. If Abe conveys the property to Carl without the signature of Betty, thus releasing her dower rights, the conveyance is not effective as to the dower interest of Betty.

For this reason, all conveyances of real property should include the marital status of the grantor along with the spouse's signature, thus releasing any and all dower rights.



Answer: Since dower automatically attaches to the lands, if Betty failed to sign the conveying deed to Carl, his purchase would contain a cloud on title. When Abe, her husband, died, Carl would appear to be the remainderman to Betty's one-third life estate in the lands. If she died, he would be made whole. It would be appropriate for the Oil Company to have her ratify Carl's lease.

States and years in which either dower or curtesy rights ended:

Alabama	1983
Colorado	1963
Georgia – dower	1969
Hawaii – dower to wife is extended during marriage prior to July 1, 1977	
Illinois	1973
Maryland – ended as to persons dying on or after January 1, 1970	
Massachusetts	modified 1966
Missouri – dower ended unless they had vested as of January 1, 1956	
New Hampshire – dower ended unless choate as of August 10, 1971	
New Jersey	1980
New York	1930
Oregon – ended as to a spouse dying after June 30, 1970	
Pennsylvania	1978
Rhode Island – dower ended as to persons dying after April 17, 1978	
South Carolina	1985
Tennessee	1977

Homestead Ownership

Many states have homestead laws. A *homestead* is defined as "the home or the dwelling place of a landowner which would include a specific amount of the adjacent land." Generally, homestead rights are valid only if the parties claiming these rights actually occupy the homestead property.

Homestead exemption laws are designed to safeguard those who are incapable of paying their debts. One's homestead is immune and free from all debts except taxes. Some states, however, do not exempt the homestead from prior liens or monetary penalty resulting for public offenses.

The homestead exemption does not mean that a person cannot lose their home to creditors or that a lien cannot be placed on the home. If a person borrows money on their home, the mortgage holder can foreclose and the exemption has no affect. If an unsecured creditor (someone who has loaned

money without obtaining specified assets as collateral) sues and obtains a judgment, that creditor has the ability to place a lien on the property.

When leasing lands for oil and gas purposes, court house records are often inconclusive as to the homestead status. Because public records hardly ever establish homestead status, the lessee must determine its status prior to or during leasing.

Colorado – In the state of Colorado, both husband and wife should execute any conveyance or encumbrance of homestead property. Colo. Rev. State. § 38-41-202(1). However, "If the owner of the property (householder) or the spouse of such owner records in the office of the county clerk and recorder of the county where the property is situated an instrument in writing describing such property, setting forth the nature and source of the owner's interest therein, and stating that the owner or the owner's spouse is homesteading such property (which instrument may be acknowledged as provided by law), then the signature of both spouses to convey or encumber such property shall be required." It is assumed that if notice of the homestead has not been recorded in the appropriate county then the owner can lease the property free and clear of the homestead rights. Colo. Rev. Stat. § 38-41-202(4).

Kentucky – According to the homestead laws in Kentucky, both spouses must join in the execution of any mortgage, release, or waiver of the exemption. KRS 427.100.

Louisiana – In Louisiana, for conveyance purposes, both husband and wife must execute jointly. After January 1, 1980, both husband and wife must execute any oil and gas lease if the lands contain the *family home.* Homestead lands cannot exceed 200 rural acres of land or five urban acres of land. Louisiana Statutes Annotated, § 20:1.

Michigan – An oil and gas lease covering homestead property that does not have the signature of the lessor's spouse is absolutely void. *Jasper Twp v Martin*, 161 Mich 336; 126 NW 437 (1910).

Montana – Leasing oil and gas interests that are tied to the homestead of a married couple must be executed and acknowledged by both husband and wife. Separate leases would be invalid. MCA § 70-32-301.

New York – Homestead will only apply to occupied property. NY CPLR Sec. 5206.

North Dakota – To constitute a homestead, the property must actually be occupied as such. N.D.C.C. § 47-18-01. N.D.C.C.§47-18-05 provides, in part: "The homestead of a married person, ..., cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is

executed and acknowledged by both the husband and wife." A conveyance of a homestead that is not executed and acknowledged by both the husband and wife is void. *Nichols v. Schutte*, 26 N.W.2d 515 (ND 1947). The homestead right does not extend to severed minerals.

Oklahoma – In Oklahoma, a homestead property is free from any forced sale of the property, except for debts created in order to purchase the property, liens, property improvement liens, and taxes. If one spouse dies, the surviving spouse has the right to possession of the homestead property for his or her lifetime, regardless of how title was vested at the time of the spouse's death. *A* guardian for any minor child would have the right to possession of the homestead regardless of how title was vested at the time of the parent's death. A severed mineral interest would not be covered by homestead rights. When leasing homestead lands for oil and gas purposes, both spouses must sign the same lease.

If both spouses claim homestead rights, then both spouses must sign the same oil and gas lease. A lease containing only one signature or two separately executed leases would make the lease or leases void.

Pennsylvania – The concept of homestead is different in Pennsylvania than in other states. Homestead is used to define a limited ad valorem tax benefit.

Texas – In Texas, a homestead property is free from any forced sale of the property, except from debts created in order to purchase the property, liens, property improvement liens, and taxes. Regardless of how title is vested, neither spouse can sell or mortgage the homestead without the express written adherence of the other spouse. Tex. Family Code Sec. 5.81. According to Texas Family Code, Sec. 5.81 and 5.82., a lease containing only one signature becomes inoperative as to the non-joining spouse. It is recommended that all homestead parties join in the execution of a lease.

If one spouse dies, the surviving spouse has the right to live in the homestead property for his or her lifetime regardless of how title was vested at the time of the spouse's death. Tex. Probate Code Sec. 283. Any guardian of minor children would have the right to live in the home regardless of how title was vested. A severed mineral interest would not be covered by homestead rights. A party can only claim homestead rights on occupied lands or land that is intended to be occupied. If both spouses claim homestead rights, then both spouses must sign an oil and gas lease. According to Texas Family Code, Sec. 5.81 and 5.82., a lease containing only one signature becomes inoperative as to the non-joining spouse. It is recommended that all homestead parties join in the execution of a lease.

Utah – Homestead rights do not cover severed minerals. Utah Code Ann. § 78-23-3.

Wyoming – If property in Wyoming qualifies as homestead, both husband and wife must join in the execution of a lease or it is not valid as to the homestead interest of the non-joining spouse. WS § 34-2-12. A severed mineral interest is not subject to homestead.

Scenario:

Dan

Several years ago Dan inherited both surface and subsurface lands from his father's estate. He owns the land as his sole and separate property. After his marriage to Susan, they moved into the home that Dan grew up in as a child. Dan and Susan are currently separated and are anticipating a divorce.

What steps need to be taken in order to secure a valid oil and gas lease if this land was located in

- ☐ **Colorado**
- ☐ **Michigan**
- ☐ **Oklahoma**

ANSWER: Even though the land belongs to Dan as his sole and separate property, the real issue is the possibility of "homestead property." In Colorado, it is assumed that if notice of the homestead has not been recorded in the appropriate county by Susan, then the owner can lease the property free and clear of the homestead rights. If Carl had filed notice that Susan was homesteading the property, the signature of both spouses is required. In Michigan, an oil and gas lease covering homestead property that does not have the signature of the lessor's spouse is absolutely void. In Oklahoma, if both spouses claim homestead rights, then both spouses must sign the same oil and gas lease. A lease containing only one signature or two separately executed leases would make the lease or leases void.

Acquiring a lease from and Attorney-in-Fact

An *attorney-in-fact* is a person that has been specifically named by another through a written *"power of attorney."* The power of attorney is a legal document that must be signed by a competent adult (the principal) authorizing the attorney-in-fact (the agent) to act on behalf and in the name of the principal for the purpose of conducting business. A person would not be considered a legitimate attorney-in-fact without the written power of attorney document. In real estate maters, this document must be formally acknowledged and should be recorded. The extent of the powers granted to the attorney–in-fact is established in the document.

A General Power of Attorney

The *"general power of attorney"* or a *"universal power of attorney"* grants the attorney-in-fact power to conduct all types of business and execute any document. These broad powers might authorize the agent to…

> "do any and every act and exercise any and every power that I might or could do or exercise through any other person and that he shall deem proper or advisable. I intend hereby to vest in him a full and universal power of attorney."

A Special Power of Attorney

The *"special power of attorney"* grants limited powers to the attorney-in-fact for signing documents or conducting business that have been specifically set out in the power of attorney document.

When a presumed attorney-in-fact executes an oil and gas lease, a demand to see the written power of attorney would be both reasonable and necessary.

The laws surrounding a power of attorney vary from state to state; however, the following are general standards:

1. The attorney-in-fact is responsible to keep accurate records of all dealings made on behalf of the principal and is responsible to act in good faith at all times.
2. Normally, the attorney-in-fact is paid. If the power of attorney document does not provide for such payment, the court can determine the amount. This payment cannot rise above a set percentage of the assessed value of the principal's property.
3. A spouse, adult child, or friend can be an attorney-in-fact.
4. The power of attorney will terminate upon the death of the attorney-in-fact, if an alternate had not been named by the principal.
5. All proceedings done by the attorney-in-fact for the benefit of the principal are lawfully deemed to be the actions of the principal.

6. The power of attorney can be revoked by recording a written cancellation of such in the county where the original document was filed.

The Uniform Statutory Power of Attorney Act, technically called the "Uniform Statutory Form Power of Attorney Act," was created by the National Conference of Commissioners on Uniform State Law (NCCUSL) in 1988. The Act provides a legal template for a standardized power of attorney law. States began enacting all or part of the act in their jurisdictions. According to USLegal.com, Louisiana is the only state that has not adopted the Uniform Power of Attorney Act.

A Durable Power of Attorney

A durable power of attorney differs from a power of attorney in that it would continue the principal/agent relationship beyond the incapacitation of the principal. Prior to the creation of the durable power of attorney, the only way to deal with the affairs of an incapacitated principal was through the appointment of a guardian.

A durable power of attorney document can grant either general power or special limited powers. All fifty states recognize some version of the durable power of attorney. In some states, certain powers cannot be delegated, including the powers to make, amend, or revoke a will, change insurance beneficiaries, contract a marriage, and vote.

A Proxy

A "proxy" is much different than an attorney-in-fact. An attorney-in-fact can execute an oil and gas lease through a special power of attorney only if the document grants such authority-in-fact. A proxy is generally a written authorization empowering another person to vote or act on behalf of others.

Colorado – A Colorado court ruled that the powers of attorney authorizing the agent to sell real estate are to be strictly construed. "If, therefore, instead of authorizing any act relating to real property the power of attorney contains a limited authority, the agent cannot act outside that authority." *Springer v. City Bank & Trust Co.,* 149 P.253 (Colo. 1915).

According to Colorado Real Estate Title Standards, Revised, effective July 1, 2012, if a power of attorney authorizes the attorney-in-fact to "sell" certain real property, the document "permits only the negotiation by the agent of a purchase contract to be signed by the principal and does not allow the agent to execute a binding agreement to sell, much less to convey the property." *Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962).

Colorado has authorized a *"statutory form power of attorney."* Colo.Rev. Stat. 15-1-1302 (2002). When a statutory power of attorney is properly

drafted and recorded, the granting powers include the right to execute oil and gas leases in real property.

New York – The statutory short form power of attorney is set out in NY G.O.L. §5-1513 and provides: "that it is durable, unless you provide otherwise." In 2009 and 2010, New York significantly revised its power of attorney law. The new law set forth stronger requirements for a valid power of attorney in terms of format and means of execution. The 2009 law set forth a presumption that granting of a new power of attorney would revoke prior powers of attorney previously executed by the same principal, unless the principal affirmatively states otherwise. Among other things, the 2010 revision amended the 2009 law and eliminated the presumption of automatic revocation. The statutory short form of power of attorney will now read as "(e) this POWER OF ATTORNEY does not revoke any Powers of Attorney previously executed by [the principal] unless [the principal has] stated otherwise."

North Dakota – North Dakota Title Standards 2-11: An attorney-in-fact has the power to execute an oil and gas lease if the power of attorney document expressly authorizes such power to sell, lease, or otherwise dispose of real estate.

In North Dakota, a general power of attorney is deemed to convey to the attorney-in-fact powers to convey any interest in property. NDTS 2-14.

A durable power of attorney should be recorded in the county where the property is located. N.C. Cent Code 30.1-30-02.

Montana – A Montana court ruled that powers of attorney are to be strictly construed. *Jamieson v. Bolich,* 8 P.3d 83, 87 (MT 2000*).* Montana Code Annotated 2009 72-31-224 dealing with statutory powers of attorney states that the powers granted under the statutory power of attorney "with respect to real property transactions empowers the agent to… lease… an interest in real property…."

Under the Uniform Statutory Form Power of Attorney Act MCA 72-31-339, "Unless the power of attorney otherwise provides, language in a power of attorney granting *general authority* with respect to real property authorizes the agent to… lease… an interest in real property…."

Texas – A Texas court ruled that an attorney-in-fact that had been given the rights to "grant, sell, and convey" had only a "naked power to sale of land, and such power does not include the right to lease it." *Bean v. Bean* 79 S.W.2d 652 (Tex.Civ.App. 1935).

A different court ruled that an implied power to execute an oil and gas lease had been granted the trustee from this language "full, ample, complete, and absolute power to manage, control, sell, and dispose of said trust property,

rent, make leases thereon, and in every way handle same…" *Avis v. First National Bank of Wichita Falls,* 174 S.W.2d 255 (Tex.1943).

In Texas, a "universal power of attorney" has been allowed for leasing, even though the power of attorney did not expressly authorize the powers to execute an oil and gas lease. *Dockstader v. Brown,* 204 S.W.2d 352(Tex Civ. App. – Forth Worth 1947).

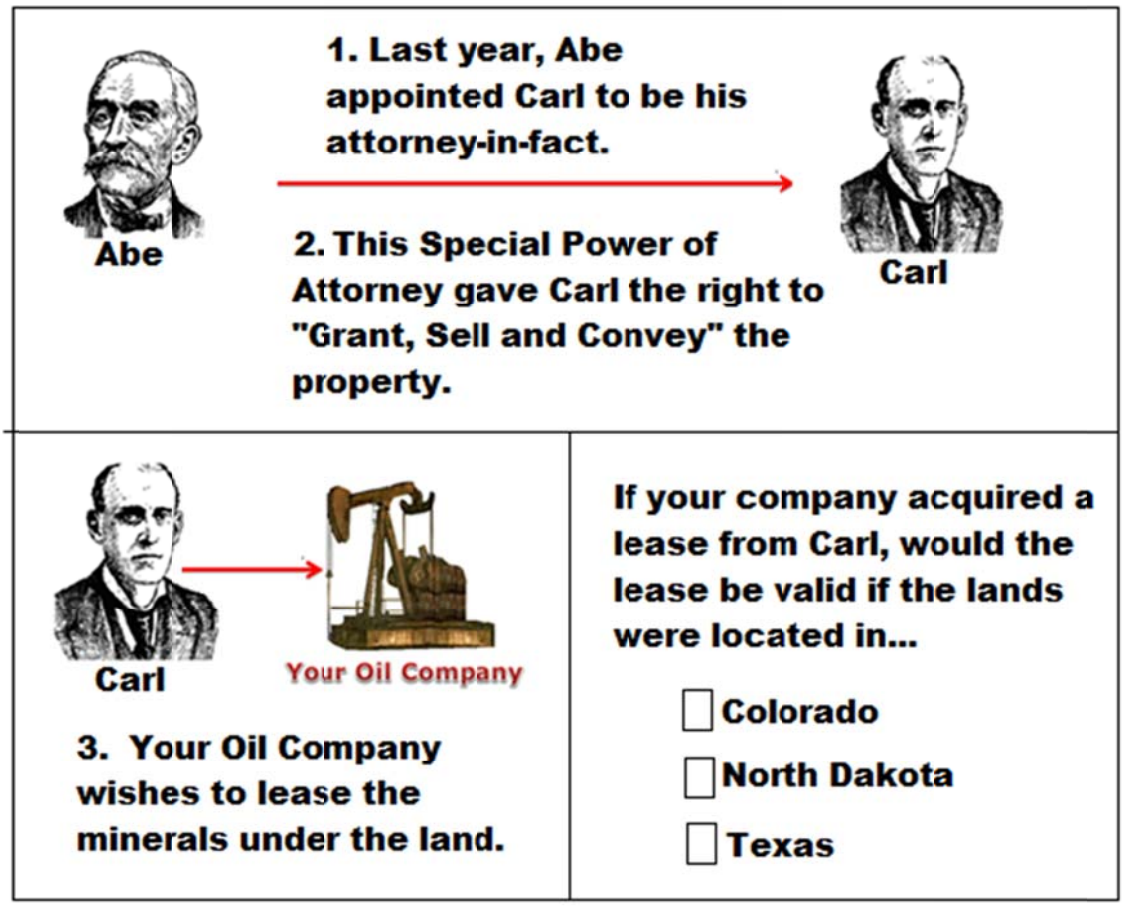
After September 1, 1993, a durable power of attorney must be recorded in the county were the property is located. Texas Probate Code Sections 489.

Utah – Utah courts have ruled that "A power of attorney is an instrument in writing by which one person, as principal, authorizes another to act as agent." *In re Estate of Lienemann,* 222 Neb. 169, 382 N.W. 2d 592, 602 (1986); *In re Estate of Rolater,* 542 P.2d 219, 223 (Okla. App. 1975). The scope of the authority so conferred may, by the terms of the instrument itself, be general or limited, but the instrument creating this agency relationship is to be strictly construed. Rolater, 542 P.2d at 223; *Huntsman v. Huntsman,* 56 Utah. 609, 192 P. 368, 370 (1920). Utah does not require a power of attorney to be recorded.

West Virginia – §36-1-8. "If in a deed of land, or a conveyance by writing of personal property, made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed or conveyance as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the instrument that it should be construed to be that of the principal to give effect to its intent."

In relation to this statute, a court ruled in *Milner v. Milner*, 183 W.Va. 273, 395 S.E.2d 517 (1990), that a bank was not held liable in honoring an invalid power of attorney. In this case, the bank had made unsuccessful attempts to contact the grantor but still relied upon a power of attorney that was invalid. It is assumed that rulings in West Virginia will allow a third party to rely on power of attorneys that are broadly worded without having a duty to strictly verify it validity.

Wyoming – A Wyoming court ruled that the powers of attorney are to be strictly construed and authorize only those acts which are within the "undoubted limits" of the power of attorney." *Luikhart v. Boland*, 45 Wyo. 461,21 P.2d 542 (Wyo. 1033).



ANSWER: If this lease covered lands in Colorado, since the special power of attorney only grants the rights to sell and convey the property, "the agent cannot act outside that authority." It does not appear the lease would be valid. In North Dakota, an attorney-in-fact has the power to execute an oil and gas lease if the power of attorney document expressly authorizes such power to sell, lease, or otherwise dispose of real estate; therefore, the lease would not appear to be valid. In Texas, Carl had only a "naked power to sale of land, and such power does not include the right to lease it."

Acquiring a Lease from an Estate

Louisiana – In Louisiana, the executor of a testate estate is required to gain approval from the court for activities such as signing an oil and gas lease. The procedures are found in Louisiana Code of Civil Procedure Article 3226. Louisiana Code of Civil Procedure Article 3226 requires that the court be petitioned and that a legal advertisement be published in the appropriate parish. When it appears in the best interest of the succession, the court may authorize a succession representative to grant a mineral lease on succession property. The lease may be for a period greater than one year, as may appear reasonable to the court. A copy of the proposed lease contract shall be attached to the application for the granting of a mineral lease, and the court may require alterations as it deems proper. The order of the court shall state the minimum bonus to be received by the executor or administrator of the estate under the lease and the minimum royalty to be reserved to the estate, which in no event shall be less than one-eighth royalty on the oil and such other terms as the court may embody in its order. Amended by Acts 1974, No. 131, §1.

Montana – In Montana, a personal representative, unless restricted by the will or by a formal proceeding, and if acting reasonably for the benefit of any interested persons, has the authority to negotiate and execute an oil and gas lease. MCA § 72-3-613(10).

North Dakota – Unlike many states, in North Dakota a personal representative to a testate estate has the authority under N.D. Cent. Code. § 30.1-18-15(9) to negotiate and execute an oil and gas lease.

Oklahoma – In Oklahoma, if an oil and gas lease is to be acquired from an intestate or testate estate, the court must grant its approval. Title 58 O.S. 925.

If the signing bonus is less than $500, the prospective lessee must receive approval by the overseeing judge of the estate. This approval can be in the form of the judge's signature on the lease. If the signing bonus is over $500, the prospective lessee must publish notice of the proposed lease in the appropriate county, followed by an auction in the courtroom where the lease is sold to the highest bidder. If the last will and testament gives approval for an executor to sign an oil and gas lease, the executor may, in fact, negotiate and execute a lease but the lease must still be approved by the court.

Texas – In Texas, the court must first give approval before an oil and gas lease can be acquired from a *dependent administrator* of an estate. If the administration is an *independent administration,* no approval process is necessary. Texas law requires the appointment of a *dependent administrator*

or executor if the estate is not deemed to be independent. The biggest difference between an *independent* or *dependent* administrator is the fact that a *dependent administrator* must receive the approval of the court for almost all of the actions they perform. With a dependent administration the dependent administrator must petition the court, in writing, in order to receive the right to lease oil and gas mineral rights.

In *Lowrance v. Whitfield*, 752 S.W.2d 129 (Tex. App.-Houston [1st Dist.] 1988), the court limited the term of the lease to be no more than five years and no more than a 60 day cessation of operations clause.

Ervin

Several years ago, Ervin inherited both surface and subsurface lands from his father's estate. He owns the land as his sole and separate property. He recently died and his estate is being probated. His will designates that his wife, Margaret, is his only heir at law.

What steps need to be taken in order to secure a valid oil and gas lease if this land was located in

- ☐ **Montana**
- ☐ **North Dakota**
- ☐ **Oklahoma**

ANSWER: In Montana, a personal representative, unless restricted by the will or by a formal proceeding and if acting reasonably for the benefit of any interested persons, has the authority to negotiate and execute an oil and gas lease. In North Dakota, a personal representative to a testate estate has the authority to negotiate and execute an oil and gas lease. In Oklahoma, if an oil and gas lease is to be acquired from an intestate or testate estate, the court must grant its approval. If the amount of signing bonus is more than $500 per acre, the lease is to be offered at auction in the courthouse. If the last will and testament gives approval for an executor to sign an oil and gas lease, the executor may negotiate and execute a lease with the court's approval.

When Mineral Owners Cannot be Located or Contingent Future Interests are Involved

When the location of mineral owners are unknown or they cannot be located, or when a future contingent interest owner is involved, many oil and gas producing states have statutes in place that allow the appointment of trustees or receivers by the courts. The trustees or receivers are given the power and authority to lease the minerals on behalf of the unknown, unlocatable or contingent owner, usually, upon court approved terms. Any bonus or royalty that comes from the leases is usually held in escrow for the owners. If the funds are not claimed they will eventually escheat to the state. When a contingent future interest is involved, the person requesting the lease usually must have a vested, contingent, or possible interest in said lands.

Arkansas – An unlocatable mineral owner owning lands within an established field or lands that can be unitized as an exploratory drilling unit can be force pooled. An application must be filed with the Arkansas Oil and Gas Commission and evidence must be shown that a diligent effort was made to locate the owner of the mineral estate. The commission will render a pooling order setting out the owner's interest pursuant to the default election in the orders.

Colorado – Statute § 38-43-101 (2007) allows for the appointment of a trustee to sign an oil, gas, or other mineral lease only when *contingent future interests* are involved. The statute states, "Where lands in this state, or any estate or interest therein, are subject to contingent future interests, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise, created by deed, will, or other instrument, and whether a trust is involved or not, and it is made to appear that it will be advantageous to the present and ultimate owners of said lands or any estate or interest therein that such lands, estate, or interest be leased for the production of minerals, including oil, gas, and other natural resources, or any of them, upon the filing of a complaint by any person having a vested, contingent, or possible interest in said lands, or any estate or interest therein, or by any trustee holding title to any such property in trust, the district or probate court which is administering such lands or any estate or interest therein under a testamentary trust shall have the concurrent power and jurisdiction, pending the happening of any contingency and the vesting of such future interest, to appoint a trustee for such lands, or any estate or interest therein, and to authorize and direct such trustee to sell, execute, and deliver a valid lease covering the minerals, oil, gas, and other natural

resources, or any of them, in, on, or under said lands, or any estate or interest therein."

Where the instrument appointing any executor, trustee, or other fiduciary confers the power on such fiduciary to execute leases for the production of minerals, oil, gas, and other natural resources from the lands, or interest therein, which is subject to any such contingent future interest, then no other person except such executor, trustee, or other fiduciary shall have the right to file a complaint as provided in this article.

Kansas – Kansas has no compulsory or forced pooling statute, but does make provision, under law, for missing or unlocatable owners. Kansas statute § 55-220 (2006) allows for the appointment of a receiver and provides for the following: when a mineral owner cannot be located, the plaintiff shall file a verified petition setting forth the interest of the plaintiff in the tract of land described; the apparent interest of the defendant as appears from the record of the county clerk; the last known address, business, residence, which plaintiff has been able to ascertain; the sources of information which plaintiff has checked; statement that plaintiff has exercised due diligence and cannot by any means within plaintiff's control ascertain the present address or whereabouts of said defendant; that there are persons or corporations who are willing to purchase an oil and gas lease upon the interest of the defendant; that the existence of these unleased mineral interests is detrimental to and impairs the enjoyment of the interest of the plaintiff; and, that the plaintiff has acquired or has good reason to believe that he or she can acquire operating rights covering all mineral interests other than the interest of said defendants in said tract or tracts. Upon the filing of the petition, the court shall set a time for a hearing. "On the date of the hearing, the court shall dismiss the action as to all defendants who answer and request such dismissal, and as to all other defendants the court shall… hear testimony as to the matters set forth in plaintiff's petition, and at said hearing shall determine the bonus value for oil and gas leases on lands in said vicinity and the prevailing rental and royalty rate; and…the court shall appoint a receiver for the purpose of selling an oil and gas lease upon the interest of said defendant, and said order appointing the receiver and authorizing the sale of such lease shall set forth the minimum bonus which may be accepted and the minimum royalty and rental rate."

Mississippi – Under Mississippi Code Ann. Section 11-17-33, upon application accompanied by a sworn affidavit, an oil company can petition the chancery court to appoint the chancery clerk as the receiver for an unlocatable or unknown mineral owner in order to secure the execution of an oil and gas lease. Unless otherwise released by the court, the receiver appointed in Section 11-17-33 shall hold all net proceeds paid in connection

with such lease for a period of ten (10) years from the date of the decree establishing the receivership. If, at the end of that period of ten (10) years, no valid claim has been made for such moneys and said mineral interests, all moneys and mineral interests held by the receiver shall immediately escheat to the state. Miss. Code Ann. Section 11-17-34.

Montana – In Montana, if a mineral owner's place of residence and present whereabouts is unknown and cannot reasonably be ascertained, any person who owns an interest in minerals underlying a tract of land may petition the district court to declare a trust in favor of the persons owning or claiming an interest in the minerals. If approved, the court appoints the clerk of court or the Department of Revenue to act as trustee with the authority to execute and deliver an oil and gas lease, ratification, division order, or any other related document. MCA § 82-1-302. The statute also provides that any person may not personally hold for longer than six months any income for unlocatable mineral owners. Within the six month period, the person must petition the district court for creation of a trust, with substantial penalty for failing to do so. MCA § 82-1-305. The statute was found to be constitutional. *Montana Pacific Oil & Gas Co.,* 614 P.2d 1045 (MT 1980).

Michigan – It is assumed that because Michigan has a 20-year Dormant Mineral Act, the appointment of a receiver for unlocatable mineral owners is only used in extreme cases. *Michigan Minerals* v *Williams*, 306 Mich 515; 11 NW2d 224 Mich (1943).

New Mexico – Under Section 45-5-101 N.M.S.A. (1995 Repl.), a conservatorship proceeding can secure the execution of an oil and gas lease for the interest of an unlocatable mineral owner. The court will appoint a guardian ad litem to represent the interest of the missing person.

New York – When a mineral owner cannot be found, New York State Real Property Actions and Proceedings Law, Sec. 1211 provides for the extinguishment of a missing co-tenant's estate. "Where real property is held by two or more persons in their own right as tenants in common, joint tenants, or tenants by the entirety and one of such tenants is missing under circumstances which afford reasonable ground to believe that he is dead, the other tenants or tenant may maintain an action in the supreme court to obtain a determination of the value of the estate of the missing co-tenant and a judgment extinguishing the estate of the missing co-tenant upon payment into court for his credit of the amount so determined to be the value of his estate."

North Dakota – North Dakota Century Code Section 38-13-01 provides for the appointment of a trustee to execute mineral leases and other documents where the owner is unlocatable. The statute provides, in part:

"Where any undivided mineral, leasehold, or royalty interest in land is claimed or owned by a person whose place of residence and whereabouts is unknown, and cannot reasonably be ascertained, the district court of the county in which the said land or a portion thereof is situated has the power to declare a trust in the interest of such owner or claimant and appoint a trustee therefore. Upon satisfactory proof made by the petitioner that a diligent but unsuccessful effort to locate such owner or claimant has been made and that it will be in the best interest of all owners of interests in said lands, the court shall authorize such trustee to execute and deliver an oil, gas, or other mineral lease, an assignment of leasehold interest, a ratification, division orders or other related documents or instruments, on such terms and conditions as the court may approve." N.D.C.C. Section 47-30.1-16.1 provides any sum payable as mineral proceeds, that has remained unclaimed by the owner for more than three years after it became payable or distributable, and the owner's underlying right to receive those mineral proceeds are deemed abandoned. The sum deemed abandoned is subject to the custody of the state as unclaimed property, but does not "escheat" to the state.

West Virginia – Under West Virginia Code § 55-12A-4, when a mineral owner is unknown, missing, or has abandoned minerals, and if the "development of minerals would be advantageous to a prudent owner," the courts will allow the appointment of a "special commissioner" to lease the interest. Code § 55-12A-7 makes a provision whereby "if an owner of any mineral interest leased under section six of this article remains unknown or missing, or does not disavow the abandonment, for a period of seven years from the date of the special commissioner's lease, the special receiver shall report the same to the court, whereupon the court shall enter an order naming those who then appear to be surface owners as additional parties and giving notice to them…. Upon a finding by the court of the present ownership in fee of the surface estate, the court shall order the special commissioner to convey to the proven surface owner… and order the special receiver to pay to the surface owner the funds which have accrued to the credit of the mineral interests specified in the motion to the date of his report after payment of all allowable fees, expenses, and court costs, including special commissioner's fees paid or to be paid in amounts determined by the court. After the date of the special commissioner's deed, the surface owner grantee shall be entitled to receive all proceeds under the lease attributable to the mineral interests specified in the deed."

Scenario:

Ellen

Several years ago, Ellen inherited a 25% mineral interest from her father's estate. She owns these mineral lands as her sole and separate property. Her current address cannot be located.

In order to secure a proper lease, what can be done if this land was located in

- ☐ **Mississippi**
- ☐ **New Mexico**
- ☐ **West Virginia**

ANSWER: In Mississippi an oil company can petition the chancery court to appoint the chancery clerk as the receiver for an unlocatable or unknown mineral owner in order to secure the execution of an oil and gas lease. In New Mexico, a conservatorship proceeding can secure the execution of an oil and gas lease for the interest of an unlocatable mineral owner. In West Virginia the courts will allow the appointment of a "special commissioner" to lease the interest.