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Introduction

The oil and gas lease is, without question, the foundation of every oil and gas exploration and production company. It can be said, with a great deal of certainty, that these simple pieces of paper are, indeed, the greatest assets a company can own.

One might argue that the *production* from a great discovery well is a far greater asset than an oil and gas lease. Someone might even argue that the geologic *knowledge* gained from a multi-million dollar seismic shoot is a much greater asset than a simple piece of paper called an oil and gas lease. The argument might suggest that the discovery well is projected to produce millions of dollars and the seismic data has revealed a field worth tens of millions of dollars. However, both are worthless to a company unless that company has gained the *leasehold right* to the tracts of land. This process takes place through the oil and gas lease.

With this in mind, the role of the oil and gas personnel who oversee and manage these simple pieces of paper becomes paramount for the success of the oil and gas company. These people have been hired not as data input personnel but rather as the *guardians of the company assets*. Their responsibility goes far beyond shuffling paper and capturing information into a computer system. Their job is as an analyst, overseer, maintainer, and guardian of these assets. For the company to realize its maximum success those who oversee the leases must also succeed. A part of that success will come as a result of mastering the oil and gas lease.

Who Should Sign the Lease?

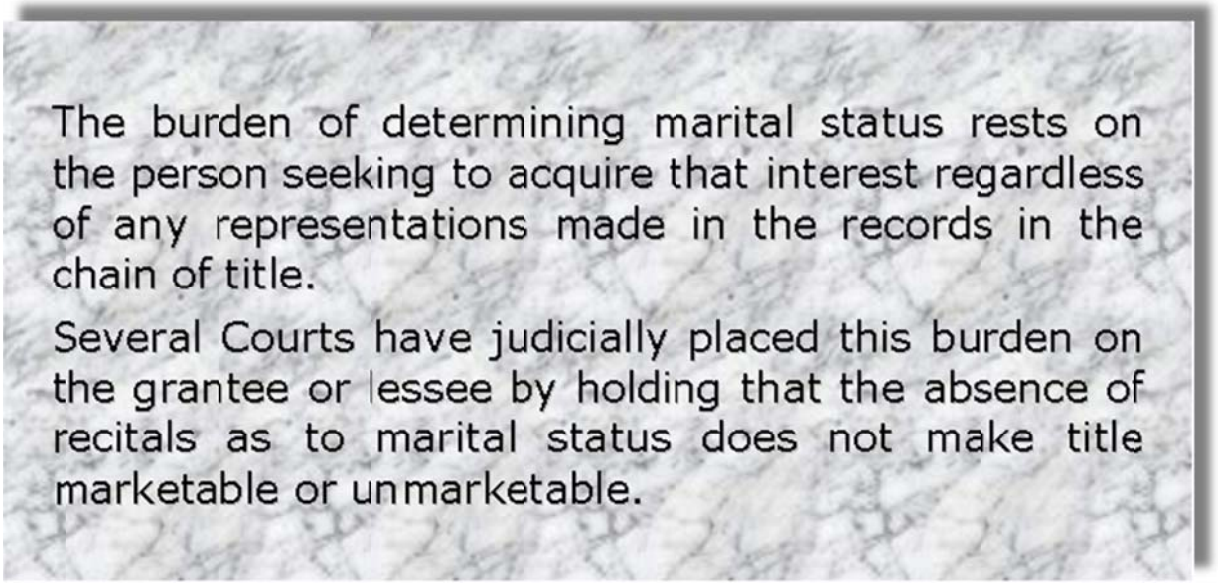
Marital Property

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 lease administrator 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 lease administrator 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.

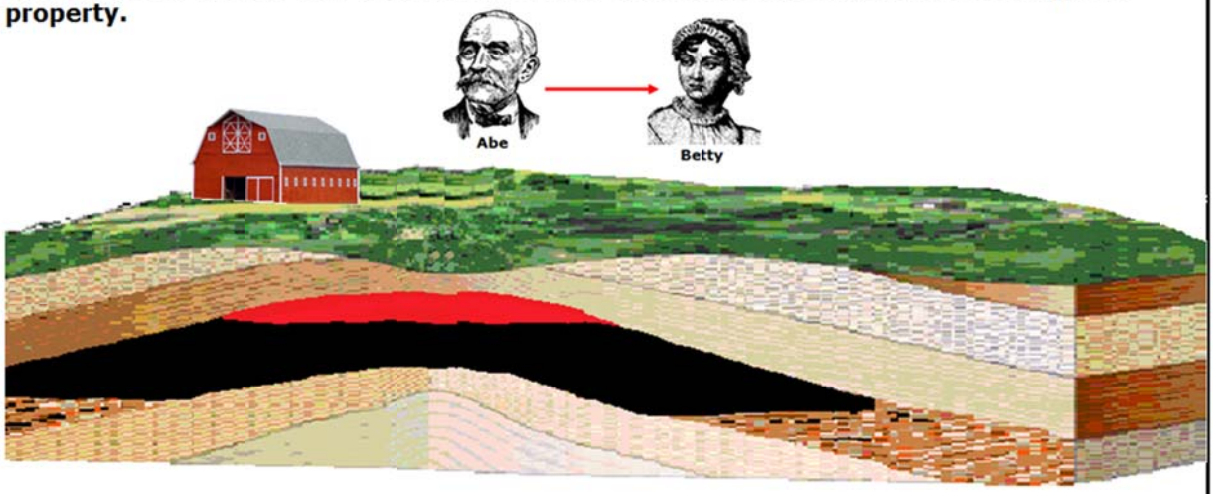
For oil and gas purposes, if the vesting title to the minerals was in *James and Martha Johnson, husband and wife,* then the oil and gas lease should be styled exactly as the vesting deed showed.

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 the laws in the state of Colorado, acquiring a lease simply from the spouse who appears to own separate property may not adequately address all of the issues.

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.

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.

Understanding the concept of curtesy and dower rights is important for the lease administrator because of how this type of ownership can impact a company's oil and gas lease asset.

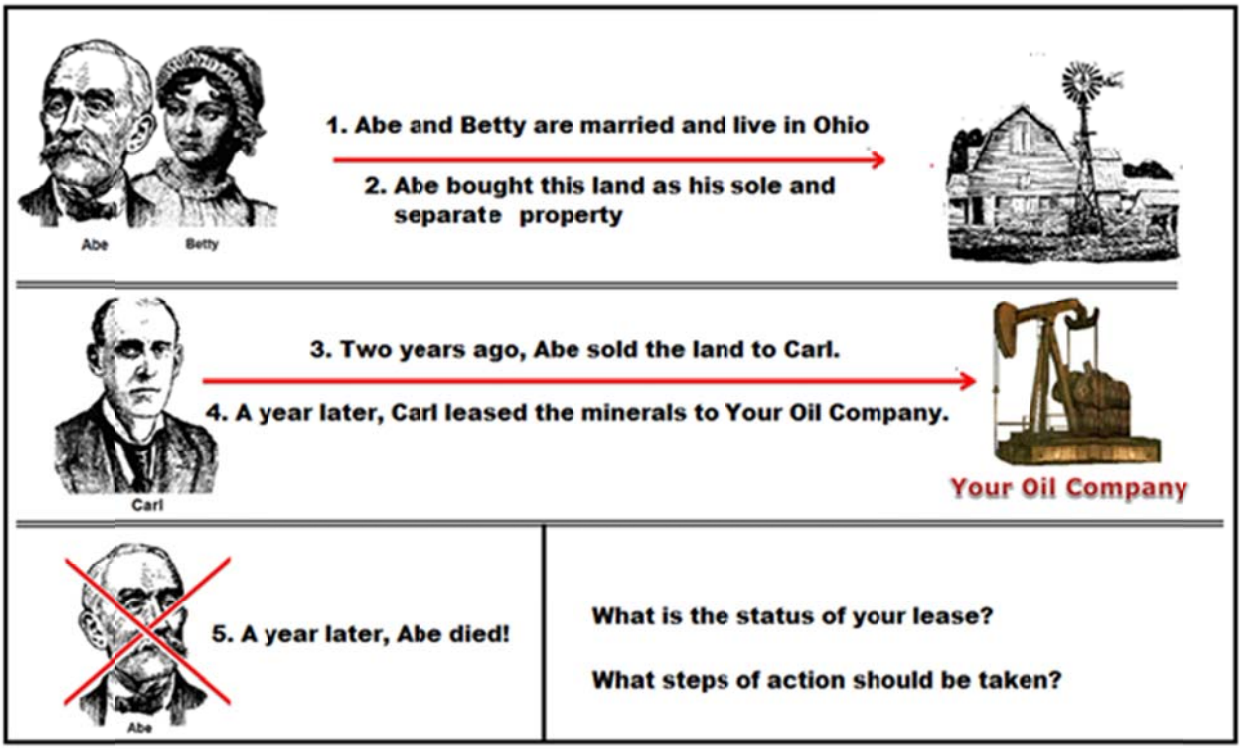
Ohio is one of the few remaining states that still recognize dower rights. Whenever a married person acquires real property in Ohio, the spouse automatically becomes the recipient of this downer interest, which is a one-third life estate interest in the real property. Termination of this dower interest 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 your oil company to have Betty ratify Carl's lease.

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.

Scenario: Read the following scenario and then review the statutes of Colorado, Michigan and Oklahoma in order to determine what proper steps should be taken in order to secure a valid oil and gas lease.

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**

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).

In the state of 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).

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.

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

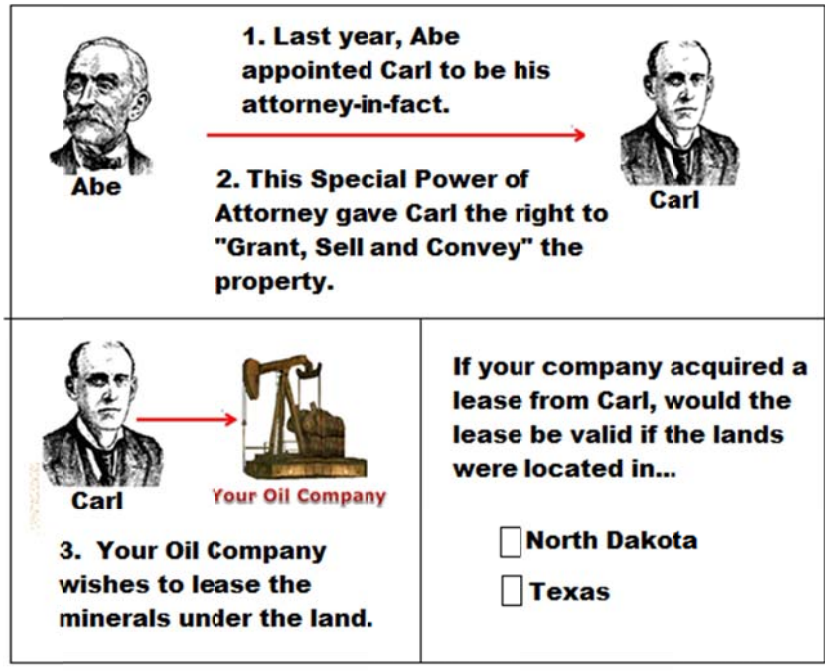
A durable power of attorney differs from a power of attorney in that it would continue the principal/agent relationship beyond the incapacitation of the principal. Prior to the creation of the durable power of attorney, the only way to deal with the affairs of an incapacitated principal was through the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

Scenario: Read the following scenario and then review the statutes of North Dakota and Texas in order to determine the status of your company's oil and gas lease.



North Dakota Title Standards 2-11 states that 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.

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.

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

Scenario: Read the following scenario and then review the statutes of North Dakota, Oklahoma and Texas in order to determine what your company must do in order to acquire the oil and gas lease.

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

- ☐ **North Dakota**
- ☐ **Oklahoma**
- ☐ **Texas**

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.

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.

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.

ANSWER: 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. In Texas, the answer will depend on the type of estate that has been established. If the estate is determined to be a *dependent* estate, the court must first give approval before an oil and gas lease can be acquired from a *dependent administrator* of an estate. 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. If the administration has been determined to be an *independent administration,* no approval process is necessary.

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.

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**

Scenario: Read the following scenario and then review the statutes of Mississippi, New Mexico and West Virginia in order to determine what your company must do in order to acquire the oil and gas lease.

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.

In 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.

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."

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.