

# **Rightly Dividing the Division of Interest**

**An Analysis of  
Correct and Proper  
Ownership Changes**

## **Section 3**

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# Introduction

Division Order Analysts carry out a vital and important function for an oil and gas company. Their tasks are many. They are called upon to calculate each owner's interest in a well to the 8<sup>th</sup> decimal place. They are often called upon to cure very complex title problems. They often handle substantial amounts of suspended funds. They speak with mineral owners, non-operators, overriding royalty owners, title attorneys and are called upon to coordinate well ownership with marketing, engineering and production. They provide correct information to the accounting department so people can get paid correctly. After a well is drilled and is producing, they become the guardians of everyone's interest in that producing well.

Many tasks are handed to the division order analyst. One task that can often be challenging is that of correctly dividing the division of interest when ownership changes are being made. Proper analysis of every conveying document or contract must be made in order to facilitate a proper outcome.

This course takes the division order analyst on a journey whereby they will look at various elements of a conveyance or contract in order to rightly divide the division of interest. The course asks the analyst to study each of these elements and then examine actual deeds and/or contracts. Several real-life scenarios are posed to the analyst. Their task is to examine the facts and documents as set out and then determine proper and correct ownership outcomes.

# Minerals, Royalty and Nonparticipating Royalty

A royalty interest is a “cost free” percentage out of the production from an oil or gas well. Cost free means that royalty owners would not pay any of the costs associated with drilling a well or any of the monthly operating costs associated with the well.

The word "royalty," as used in connection with oil and gas leases, conveyances, and reservations, has a definite meaning in its popular sense. It means a share of the products, or proceeds therefrom, reserved to the owner of land for permitting another to use the property. *McCullough v. Almach*, 188 Okla. 434 (Okla. 1941).

**The Landowner’s Royalty** – This royalty is established at the time the mineral owner negotiates the oil and gas lease and becomes the fractional percentage of production that would go to the owner. Just as an author of a bestselling novel would receive royalty checks based on the sales of his or her book, this royalty owner would receive a royalty payment based on the production of a producing well. Originally, the standard royalty rate paid the mineral owner was 1/8<sup>th</sup> of all production. Over the years, royalty rates

have increased. In some parts of the country, many landowners have negotiated very high royalties, some with sophisticated consequences.

**The Escalating royalty:** With this language, the royalty rate would, at some point, increase. In the following example, the before payout royalty would increase once the well reached payout.

“The royalties payable to the Lessor under this lease shall be on a well by well basis and on a Before Pay Out (BPO) and After Pay Out (APO) basis.” As to each and every well completed as a producer on the leased premises or on lands pooled therewith, the royalties paid to Lessor shall be one-eighth (1/8) BPO and one-fifth (1/5) APO.

**The Sliding Scale Royalty:** The North Dakota Industrial Commission (NDIC) has approved 640 acre spacing for the minimum size Bakken well. The operator, however, can apply for and receive 1,280 acre spacing for their unit sizes. Some attorneys, representing their mineral owner clients, are insisting on “sliding scale royalty” language when the spacing becomes greater than the minimum 640 permitted by the NDIC.

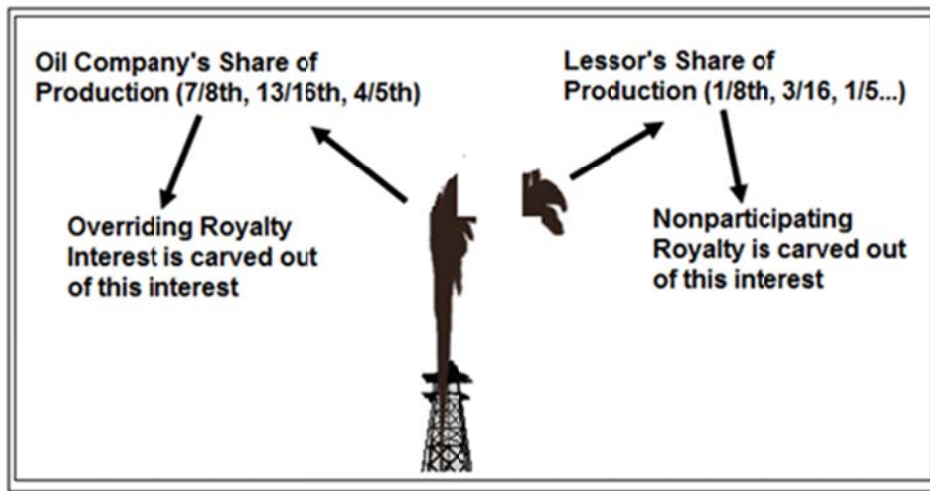
The result of such added language can be significant. For instance, assume the lessor negotiated an 18.75% royalty with a sliding scale royalty increase of 35% if the unit size increased from 640 acres to 1280 acres. The result would be (18.75% X 1.35% = 25.3125% royalty).

**Overriding Royalty** – This royalty is a cost free royalty and typically is established by the lessee who agrees to carve out a fractional portion in his share of the production and give it to a third party. Because it is carved out of the working interest owner’s leasehold interest, it will terminate when the lease terminates. An override is often created in order to compensate a party who has helped to develop a drilling project or by an oil company when they assign either all or a portion of their leases to another company.

**Nonparticipating Royalty Interest (NPRI)** – Mineral owners can convey either all or a part of their *royalty* interest in a tract of land to a non-mineral owner. It is often assumed that this transaction cannot take place prior to the creation of the oil and gas lease since no true “royalty” exists prior to the lease. Most states would reject this thought and allow a conveyance or reservation of royalty to take place before the lease has been executed. An exception to this is seen in Oklahoma courts, where a conveyance of a “royalty” interest prior to a lease is treated as a conveyance of a mineral interest unless the conveyance is stated as a specific percentage of production (1/24<sup>th</sup> or 3/16<sup>th</sup> royalty). *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

Once the royalty is severed from the mineral owner, it can be referred to as a *nonparticipating royalty* and will contain some distinguishing characteristics.

- 1) Nonparticipating owners have no right to explore for or remove the minerals from the land.
- 2) They have no ingress or egress rights.
- 3) They have no right to grant an oil and gas lease.
- 4) They have no right to share in the bonus or delay rental payments.



If the language in all deeds that created a nonparticipating royalty interest described these distinguishing characteristics similarly, there would be no confusion. However, deeds are often difficult to interpret. There have been times that a deed designated as a "mineral deed" actually conveyed royalty, and times when a deed entitled "royalty deed" actually conveyed minerals. Such royalty conveyances or reservations are often deemed to be ambiguous; therefore, the land professional must look to the intent of the parties as found on the face of the deed. *Mitchell v Hannah*, 208 P.2d 812 (MT 1949). *Stokes v Tutvet*, 328 P.2d 1096 at 1101-1104 (MT 1958) and *Proctor v Werk*, 714 P.2d 171, 173 (MT 1986).

## **What does the language in the deed mean?**

### **“Mineral,” “Mineral Interest,” or “Mineral Acres”**

At first glance, the land professional would assume that words such as “*mineral*,” “*mineral interest*,” or “*mineral acres*” would be describing a mineral interest. Under the Rules of Construction, if the conveyance or reservation used such words but later referenced other characteristics that would describe a royalty interest, these later characteristics might very well convey or reserve a royalty interest instead of a mineral interest.

### **“In, on, and under”**

When such language is used, courts have most often determined that the interest being conveyed or reserved is still *in, on, and under the land*; and therefore, would be describing a mineral interest.

### **“In, on, and under and that which may be produced”**

This language is often used to create a mineral interest, since it refers to that which is yet to be produced. According to Williams and Meyers, *Oil and Gas Law*, when this phrase stands alone, it will create a mineral interest.

### **“That which may be produced”**

According to Stan T. Ingram and Travis Conner, *Mineral vs. Royalty Distinction*, Arkansas, Kansas, and Oklahoma might see this language as creating a royalty interest.

### **“Produced and saved”**

When these words are used in a conveyance or reservation, they would be describing minerals that have been taken from the land and would, therefore, be considered a royalty interest.

### **“Royalty,” “Royalty Interest,” or “Royalty Acres”**

Generally, such words would be describing a conveyance or reservation of royalty; however, under the Rules of Construction, if the conveyance or reservation used such words but later referenced other characteristics that would describe a mineral interest, these later characteristics might very well convey or reserve a mineral interest instead of a royalty interest.

### **“The right to share in profits, a portion of all royalty, incomes, rentals”**

Most states would see this language as conveying or reserving a mineral interest.

## “The right to Nonparticipating in bonus, rentals, and executive rights”

States do not appear to be consistent when such contradictory language is used. Since the royalty owner is the party who has no right to receive bonus, rentals, or executive rights, some courts would see this language as creating a mineral interest.


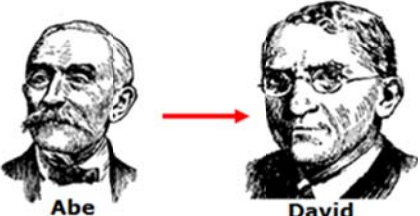
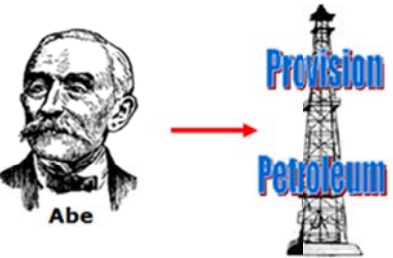
### “A 1/24<sup>th</sup> royalty interest” vs. “a 1/24<sup>th</sup> of royalty interest”

Would a deed conveying a 1/24<sup>th</sup> royalty interest convey a full 1/24<sup>th</sup> of 8/8ths of the royalty under the tract of land or a 1/24<sup>th</sup> of the royalty rate found in the oil and gas lease?

In most states, a conveyance or reservation of “1/24<sup>th</sup> royalty interest” without any additional limitation would be a full 1/24<sup>th</sup> of 8/8ths of the royalty under the tract of land.

On the other hand, a conveyance or reservation that simply added the word “of” would limit the amount being conveyed or reserved by the percentage of royalty negotiated in the lease. If the negotiated lease royalty was 1/8<sup>th</sup>, the conveyed royalty would be 1/24<sup>th</sup> of 1/8<sup>th</sup>.

### Example 1:

<p>1. Assume that Abe conveyed a 10% royalty to Betty.</p>  <p>Abe Betty</p>	<p>2. Next, assume that Abe conveyed a 1/2 of royalty to David.</p>  <p>Abe David</p>
<p>3. Next, Abe signs a lease with Provision Petroleum. He negotiates a 20% lease royalty.</p>  <p>Abe</p>	<p>4. What royalty should be paid to each of the owners?</p> <p>Abe _____ % royalty</p> <p>Betty _____ % royalty</p> <p>David _____ % royalty</p>

ANSWER: Abe negotiated a great royalty rate of 20%; however, he will receive none of that royalty. He conveyed a full 10% royalty to Betty, leaving him with 10%. When he conveyed  $\frac{1}{2}$  of royalty to David, David would have received  $\frac{1}{2}$  of the royalty negotiated in the lease, leaving Abe with nothing.

Oklahoma courts have ruled that any such conveyance made prior to an oil and gas lease, unless the conveyance is stated as a specific percentage of production ( $\frac{1}{24}$ <sup>th</sup> of  $\frac{3}{16}$ <sup>th</sup> royalty), would create a mineral interest. *John S. Lowe, Oil and Gas Law in a Nutshell* (4<sup>th</sup> ed. 2003); *H. Williams & C. Meyers, Oil and Gas Law* (13<sup>th</sup> ed. 2006).

Montana appears to draw a distinction between a royalty conveyed prior to leasing and one that was conveyed subsequent to leasing. The Montana Supreme Court ruled that a royalty conveyed prior to leasing (defined as a "nonparticipating royalty") is not reducible by a later lease royalty, and a conveyance of royalty after leasing (defined as a "landowners royalty"), is reducible by the lease royalty rate. The prior conveys a much larger share of production than the latter.

A Kentucky court ruled that when a conveyance containing a reservation of royalty, "1/16 royalty interest in all the oil and gas now being produced or which may hereafter be produced," would be a full  $\frac{1}{16}$ <sup>th</sup> royalty out of  $\frac{8}{8}$ <sup>th</sup> production and not  $\frac{1}{16}$ <sup>th</sup> of the lease royalty. They further found that this interest would be consistent on any current or future oil and gas leases. *Kavanaugh v. Clay*, 275 S.W.2d 938, 939 (Ky. Ct. App. 1955).



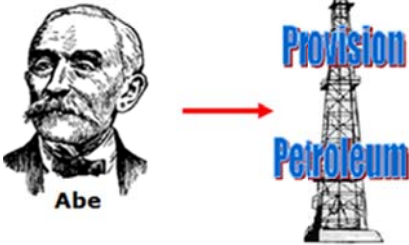
### **"A $\frac{1}{2}$ of $\frac{1}{8}$ <sup>th</sup> royalty interest"**

Assume a deed granted " $\frac{1}{2}$  of  $\frac{1}{8}$ <sup>th</sup> of the oil, gas, and other mineral royalty that may be produced from said land." Also assume that the negotiated lease royalty rate was  $\frac{1}{8}$ <sup>th</sup>. What royalty has been conveyed?

- $\frac{1}{2}$  of  $\frac{1}{8}$ <sup>th</sup>, or
- $\frac{1}{2}$  of  $\frac{1}{8}$ <sup>th</sup> of the negotiated  $\frac{1}{8}$ <sup>th</sup> royalty rate?

Several courts have ruled that the grant was  $\frac{1}{2}$  of  $\frac{1}{8}$ <sup>th</sup> of the amount negotiated in the lease or  $\frac{1}{2}$  of  $\frac{1}{8}$ <sup>th</sup> of the  $\frac{1}{8}$ <sup>th</sup> royalty rate. *Harriss v. Ritter*, 279 S.W.2d 845 (Tex.1955), *Palmer v. Lide*, 567 S.W.2d 295 (Ark.1978), *Corbin v. Moser*, 403 P.2d 800 (Kan.1065).

**Example 2:**

<p>1. Assume that Abe conveyed a 1/2 of royalty interest to Betty.</p>  <p>Abe Betty</p>	<p>2. Next, assume that Abe conveyed 1/2 of 1/8th of the oil, gas and other mineral royalty to David.</p>  <p>Abe David</p>
<p>3. Next, Abe signs a lease with Provision Petroleum. He negotiates a 20% lease royalty.</p>  <p>Abe</p>	<p>4. What royalty should be paid to each of the owners?</p> <p>Abe _____ % royalty</p> <p>Betty _____ % royalty</p> <p>David _____ % royalty</p>

ANSWER: Betty would receive a full 10% royalty or 1/2 of the negotiated 20% royalty. David would receive 1/2 of 1/8<sup>th</sup> (1/16<sup>th</sup>) of the 20% negotiated royalty or 1/2 X 1/8<sup>th</sup> X 20% = 1.25% royalty. Abe would receive what is left over or 8.75% royalty.

**“A 1/2 nonparticipating royalty interest”**

Would this language convey 1/2 of 8/8ths of all production, or 1/2 of the royalty rate found in the oil and gas lease?

Although it is possible to convey 1/2 of all royalty production, such a conveyance would become an almost impossible burden for an oil company to bear. The likelihood that the oil company would walk away is great. In an attempt to determine the intent of the instrument, a number of courts ruled that an abnormally large fraction indicated intent to convey minerals.

A Mississippi Supreme Court examined a conveyance entitled “Non-

participating Royalty” but contained the following grant:

“1/2 of the whole of any oil, gas or other minerals, on, under, or that may be produced... the royalty herein described shall be delivered or paid to purchaser out of and deducted from royalty reserved to lessor in said lease.”

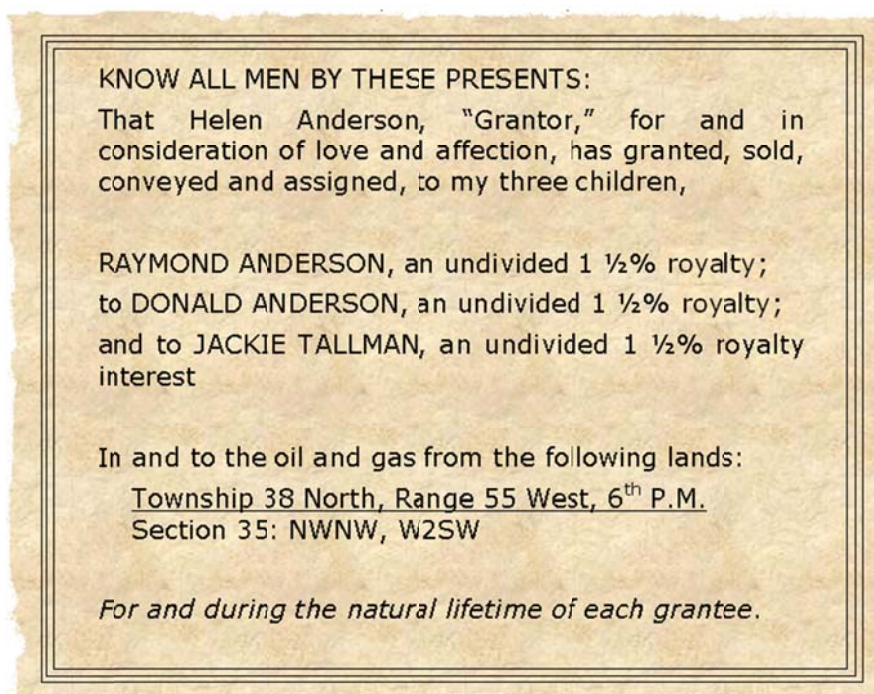
The court determined that the royalty conveyed was 50% of the lease royalty rather than a full 50% of all production. *Payne v. Campbell* 164 So.2d 780 (Miss.1964).

### **A grant of “royalties, incomes, and rentals”**

In West Virginia, such language is interpreted to grant the entire mineral estate, unless the conveyance adds clarifying intent language. *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77, 81-82 (1963).

## **The Perpetual or Non-perpetual Nature of the NPRI**

Generally, a nonparticipating royalty can be created for a certain period of time or in a perpetual manner. The following language would create a non-perpetual royalty:

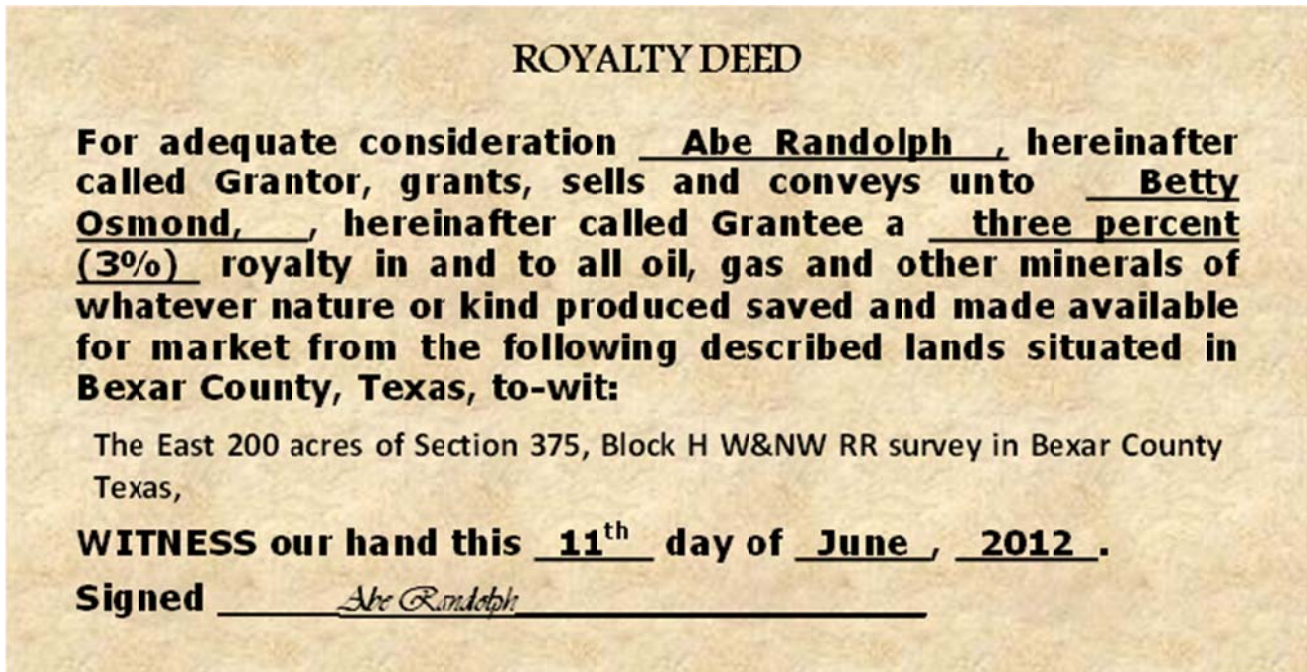


Kansas is a state where it appears impossible to create a perpetual royalty. The courts ruled that royalty “consists of a share in the oil and gas produced *under existing leases*, but a royalty interest does not consist of a perpetual interest in the oil and gas as they lie in the ground. On the expiration of the existing leases the right of the owner

of the royalty expires.” The court held that a nonparticipating royalty is a “contractual obligation.” Once the oil and gas lease terminates, the royalty obligation also terminates. *Bellport v. Harrison*, 255 P.52 (Kan.1951).

## Example 1:

Assume that Abe Randolph owned an undivided 50% of the minerals in the 200 acre tract of land located in Bexar County, Texas. He leased his mineral interest to Provision Petroleum and negotiated a 3/16<sup>th</sup> lease royalty. Subsequently, he conveyed an NPRI to Betty Osmond in the following Royalty Deed. After examining the deed determine what interest Betty is receiving?



- a full 3% NPRI
- 3% X 50% (Abe only owned 50% of the minerals in the land)
- 3% X 3/16<sup>th</sup> lease royalty
- 3% X 50% X 3/16<sup>th</sup>

ANSWER: Abe gave Betty a 3% royalty interest "from the *following described lands*." He DID NOT give her a 3% royalty out of his 50% mineral interest. This 3% would not be reduced by his royalty rate; therefore, the answer is a full 3% NPRI. Abe would receive  $(3/16^{\text{th}} \times .50) - 3\% \text{ NPRI} = 6.375 \text{ Royalty}$ .

## Example 2:

Assume that after conveying the 3% NPRI to Betty, Abe conveyed a 50% mineral interest to David Davis on the following Mineral Deed. After examining the deed, determine what royalty David should receive out of the 3/16<sup>th</sup> royalty negotiated in Abe's lease with Provision Petroleum.

### MINERAL DEED

#### KNOW ALL MEN BY THESE PRESENTS THAT

Abe Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto David Davis, hereinafter called Grantee, an undivided fifty percent (50%) interest in and to all of the oil, gas, casinghead gas, coal, clay, uranium, potash and other minerals, known or unknown, in and under and that may be produced from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10<sup>th</sup> day of August, 2012.

Signed *Abe Randolph*

- 18.75%
- 18.75% X 50% (50% of Abe's royalty)
- 18.75% X an undivided 50% interest in the lands
- 18.75% X an undivided 50% interest less a 3% NPRI

ANSWER: David received a full 50% of the mineral estate because the conveyance was granting the interest from the described lands rather than 50% of Abe's interest. The interest David received is also burdened by the previous NPRI owned by Betty; therefore, his royalty interest would be 18.75% X an undivided 50% interest in the lands less Betty's 3% NPRI.

### Example 3:

Instead of the language used in Example 2, Abe conveyed the following to David from this Mineral Deed. Prior to this deed, Abe had conveyed the 3% NPRI to Betty but HAD NOT negotiated an oil and gas lease. Six months after receiving this interest from Abe, David negotiated his own lease with Provision Petroleum and received a 3/16<sup>th</sup> royalty rate. What royalty would David be entitled to from the entire tract of land?

#### MINERAL DEED

##### KNOW ALL MEN BY THESE PRESENTS THAT

Abe Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto David Davis, hereinafter called Grantee an undivided twenty-five percent (25%) interest in and to all of the oil, gas, casinghead gas, coal, clay, uranium, potash and other minerals, known or unknown, in and under and that may be produced from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10<sup>th</sup> day of August, 2012.

Signed *Abe Randolph*

- A full 18.75%
- 18.75% X 25%
- 18.75% X 50% X 25%
- 18.75% X 25% less 3%
- 18.75% X 25% less 1.5%

ANSWER: David received a full 25% of the mineral estate. The interest David received is also burdened by the previous NPRI owned by Betty, but since David only received half of Abe's interest he is only burdened by half of the NPRI. The other half of the NPRI burdens Abe. (18.75% X 25% X 1.5%)

#### Example 4:

Assume that Sam conveyed to Dorothy a nonparticipating royalty interest in the following conveyance. Determine what interest she is being conveyed. Assume that Sam had previously negotiated an oil and gas lease with a 3/16<sup>th</sup> royalty.

### ROYALTY DEED

#### KNOW ALL MEN BY THESE PRESENTS THAT

SAM Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto Dorothy Osmond, hereinafter called Grantee 3% of royalty in and to all of the oil, gas, and other minerals produced saved and made available for market from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10<sup>th</sup> day of August, 2012.

Signed *Abe Randolph*

- 3% of Sam's 18.75 royalty
- 3% of all production from the tract of land

ANSWER: The key is found in the granting words, "3% "OF" royalty in and to all oil, gas and other minerals produced saved and made available from the following described lands." The word OF = multiplication whereas the words OUT OF = subtraction. Therefore, in this case, Sam is conveying at 3% of his 18.75% royalty.

## Example 5:

Instead of the language used in the previous example, assume that Sam conveyed to Dorothy a nonparticipating royalty interest with the following language. Determine what interest she is being conveyed. Assume that Sam had previously negotiated an oil and gas lease with a  $3/16^{\text{th}}$  royalty and that same only owns an undivided 50% minerals interest at the time of the conveyance.

### ROYALTY DEED

#### KNOW ALL MEN BY THESE PRESENTS THAT

SAM Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto Dorothy Osmond, hereinafter called Grantee 3% royalty out of the royalty interest owned by grantor in and to all of the oil, gas, and other minerals produced saved and made available for market from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10<sup>th</sup> day of August, 2012.

Signed *Abe Randolph*

- 3% of Sam's 18.75 royalty
- 3% of Sam's 50% X 18.85
- 3% of all production from the tract of land

ANSWER: The key is found in the granting words, "3% royalty "OUT OF" the interest owned by grantor in and to all oil, gas and other minerals produced saved and made available from the following described lands." The word OF = multiplication whereas the words OUT OF = subtraction. Therefore, in this case, Sam is conveying at 3% of all production from the tract of land.

Assume there is a \$100 bill. I own 50% of the \$100 and someone else owns the other 50%.



Giving you 25% "OUT OF" my 50% is different than giving you 25% "OF" my 50%. If I gave you 25% "OUT OF" by 50% it would look like this:



Giving you 25% "OF" my 50% would be to give you a 25 X 50 or 12.5% of the \$100. That would look like this.



# Scenario #11: The Duhig Rule

In Texas, the court fashioned a rule referred to as the *Duhig Rule*. Alabama, Colorado, Louisiana, Oklahoma, Mississippi, North Dakota, New Mexico, Texas, Arkansas and Wyoming are states that have adopted the Duhig rule. Utah ignores the Duhig rule.

The rule says that if one party conveys to another through a warranty deed and that party wishes to reserve minerals, then it is necessary that all prior reservations of record be set forth if the conveying party intends to retain the reserved interest. The court has found that *the granted interest on the face of the conveying deed will take priority over any reserved interest to the extent possible*.

## ***The Duhig Rule***

**The general rule, subject to a determination of the intention of the parties, is that if one party convey to another and wishes to reserve minerals, *then* it is necessary that the previous reservation(s) be set forth - if the conveying party intends to retain the reserved interest.**

**The court found that a *granted interest takes priority over a reserved interest to the extent possible*. However, the "Duhig Rule" is not followed if it can be shown that the grantee had actual notice of previously reserved interests.**

*Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940)*

## Question #1:

- Assume that Abraham received title from Karen for a certain tract of land in 1983. Karen reserved 50% of the minerals at the time of the conveyance.
- Twenty years later, through a warranty deed, Abraham sold 100% of the same tract of land to Michael and reserved 50% of the minerals. The deed made no mention of Karen's prior reservation found in the 1983 conveyance.

Although it may appear that, through the mineral reservation, Abraham would end up with 50% of the minerals, that would not be the outcome in a Duhig-rule state. With the Duhig rule, Abraham would end up with no minerals. Instead, Michael would end up with 50% of the minerals, as it appears from the latter deed.

Since the 1983 reservation was not set out, you must ask, "What interest *appears* to be granted to Michael from Abraham's reservation?" Clearly it looks like Michael is receiving 100% of the surface. If you were Michael and knew nothing about the previous 50% mineral reservation, *from the face of your deed*, what mineral interest would *appear* to be granted to you? You would think, "Since Abraham is keeping 50% of the minerals, I must be getting 50% of the minerals." That is exactly what the court decided.

Look at it this way: Assume I am selling a car on Craigslist. You see the ad, call me, come over to my house to look at the car, and are now negotiating a price. You make me an offer of \$3,000. I accept your offer but with one caveat. I tell you that I had just bought two of the tires on the car, they cost me a lot of money and I want to keep them. You agree and tell me that you will come back later to pick up the car.

When you arrive at my house, you see the car but notice that there are no tires at all on the car. You say, "What happened to the tires? You told me you were only taking two of them." I respond, "I did only take two of them, just like I said, but the other two tires still belong to the previous owner." What would you think? How would you feel?

Now put yourself in Michael's position. He just paid hundreds of thousands of dollars for the land. Abraham told him that he wanted to keep 50% of the minerals but failed to tell him that the other 50% belonged to someone else. Michael paid a large sum for that land and later finds out that he received no minerals with the land. What might he be thinking? How might he feel? Well, the courts took such a situation into account and decided that if a conveying party intends to keep minerals, that party must let the buyer know about previous reservations.

If Michael knew nothing about the previous reservation, the conveyance would appear to be granting 100% of the surface rights and 50% of the mineral rights. In this case, Abraham would receive no mineral interest in the tract of land because *the granted interest* (or purported granted interest) in the reservation language will take *priority over the reserved interest to the extent possible*.

### Question #2:

- On July 4, 1987, Rachael sold a 640-acre tract of land in a Duhig-rule state to her sister Carol. The deed contained the following provision:

***"Reserving an undivided one-half interest in and to all oil, gas and associated minerals under said lands hereby described."***

- Several years later, Carol, through a warranty deed, sold the 640-acres to Martin. Carol had forgotten all about the previous reservation and thought that she owned all of the minerals. In the deed to Martin, Carol included the following reservation language:

***"Reserving an undivided seventy-five percent (75%) interest in and to all oil, gas and associated minerals under said lands hereby described."***

Your company wishes to lease all mineral ownership in the 640-acres. Who owns what portion of the minerals? From whom do you lease?

- Rachael \_\_\_\_\_%
- Carol \_\_\_\_\_%
- Martin \_\_\_\_\_%

**Answer:** Since Carol did not make known the previous reservation, it would appear from the face of the deed that Martin is being granted 25% of the minerals and the granted interest would take priority over the reserved interest only to the extent possible. Your company should lease Rachael = 50%, Carol = 25% and Martin = 25%.

### Question #3:

- On October 27, 1997, Wallace conveyed the SE4 of Section 18 to Terry. The granting clause of the deed contained the following reservation:

***"Reserving an undivided one-half interest in and to all oil, gas and associated minerals under said lands hereby described."***

- Several years later, Terry, through a warranty deed, conveyed the same tract of land to Brent. The granting clause of the deed contained the following reservation:

***"excepting and reserving, an undivided fifty (50%) percent of all oil, gas and other minerals . . . now owned by the grantors:"***

Your company wishes to lease all mineral ownership in the 160-acres. Who owns what portion of the minerals? From whom do you lease?

- Wallace \_\_\_\_\_%
- Terry \_\_\_\_\_%
- Brent \_\_\_\_\_%

**Answer:** Although this deed did not specifically make the conveyance subject to existing reservations, it did limit the interpretation of the mineral interest being reserved to 50% of the interest then owned by the grantors. This is a form of notice. As such, Terry Timmons reserved an undivided 25% mineral interest or (50% of 50% = 25%) and that Brent Matthews acquired the surface and an undivided 25% mineral interest.

When approaching an issue like this, use caution. A title attorney might recommend that all parties enter into a stipulation of interests or, alternatively, a quiet title action to resolve any questions regarding mineral ownership.

# "Duhig Rule" Quiz



Harriet Smith

80 -acres

Harriet Smith owned 80 acres in fee simple.

In 1955 Harriet Smith sold to Ivan Tommy the tract of land and reserved an undivided 25% interest in and to all of the oil, gas and other minerals in and under said land.



Ivan Tommy

Ivan Tommy sold the 80 acres to Chester Russell in 1960 and reserved 25% of all the oil, gas minerals in and under said land. There was no mention of the Harriet Smith reservation.



Chester Russell

In 1981 Chester Russell sold the 80 acres to Orville Simpson and reserved an undivided 12.5% mineral interest in and to all of the oil, gas and other minerals in and under land. He did mention the previous mineral reservations.



Orville Simpson

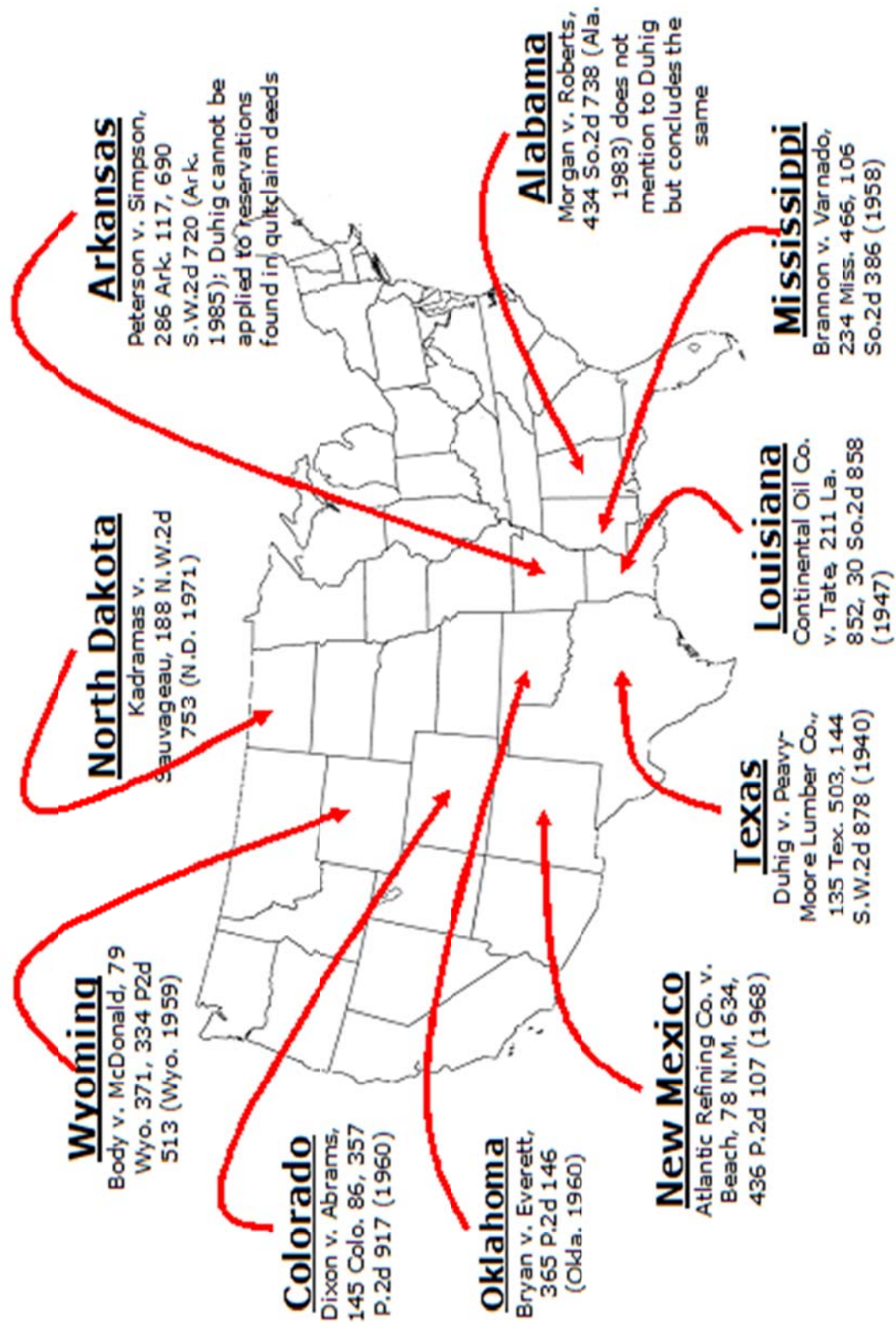


Julio Ortega

In 1991 Orville Simpson sold the 80 acres to Julio Ortega and reserved an undivided 12.5% mineral interest in and to all of the oil, gas and other minerals in and under land. He did not mention the previous mineral reservations.

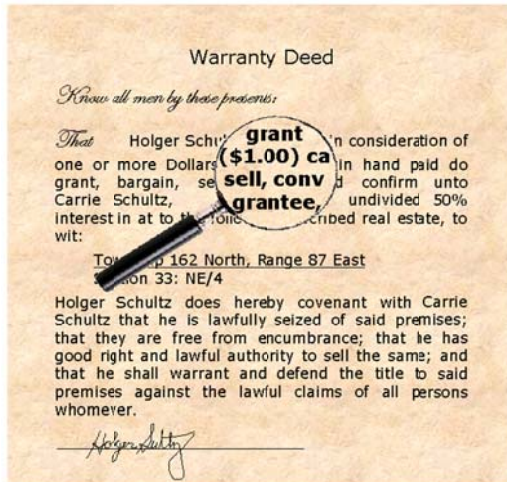
Answer: Harriet Smith - 0%, Ivan Tommy - 25%, Chester Russell - 12.5%, Orville Simpson - 0%, Julio Ortega - 0%

# States that have adopted the Duhig Rule



**States that have not adopted the Duhig Rule**  
 Pennsylvania, West Virginia, New York, Kansas, Georgia, Michigan, California, Utah has rejected the Rule and Montana follows the doctrine of "estoppel by deed" but has not adopted the Rule

## DOES THE CONVEYANCE CONTAIN PROPER WORDS OF GRANT?



In order for a conveying document to be valid and transfer title, there must be appropriate words of grant that set forth the intention of the grantor to divest from the property. These granting words may vary somewhat between states. Examples would include:

- “grant and bargain”
- “grant, bargain and sell”
- “warrant and convey”
- “transfer, set over or assign”
- “sell, convey, confirm and warrant”
- “convey and quitclaim”

A deed that contains no words of grant will convey no title.

Not all types of documents that might seem to transfer real property contain appropriate granting language. Assume a document contained the following,

*“I bequeath and devise unto ...”*

Would such language be enough to transfer real property in the United States?

Both the words “bequeath” and “devise” refer to disposing of property through a last will and testament. The term *bequeath* applies to giving personal property, while the term *devise* applies to real property. *Bequeath* is sometimes used as a synonym for *devise*.

# Scenario #12: Words of Grant

**Scenario:** Examine the following and determine if title can be passed to Carlos Mendez as a result of this mineral deed.

- Yes
- No

## MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT **Thomas Guroleck** of 146 S. Wood Street, Gamble City, South Dakota hereinafter called Grantor, for and in consideration of the sum of ten and more dollars (\$10.00) cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby offer unto Carlos Mendez hereinafter called Grantee an undivided twenty-five percent (25%) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following tract of land situated in Morgan County, South Dakota to-wit:

Township 23 North, Range 15 East  
Section 15: W2

Containing 320.00 acres more or less, together with the right of ingress and egress at all times ...

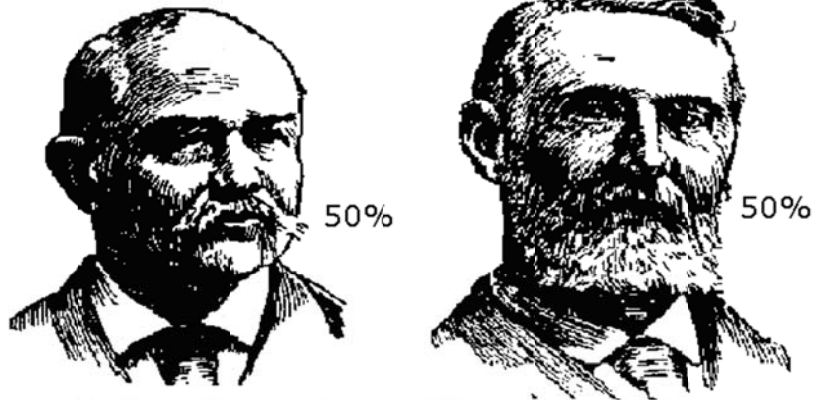
# Scenario #13: Words of Grant – After-Acquired Title

**Scenario:** In the following example, Jacob, the Grantor, covenanted to convey the property with warranty language to Elmer and Emily. Follow the storyline below and then determine what percent of the tract of land each of the parties owns.

Elmer and Emily \_\_\_\_\_%

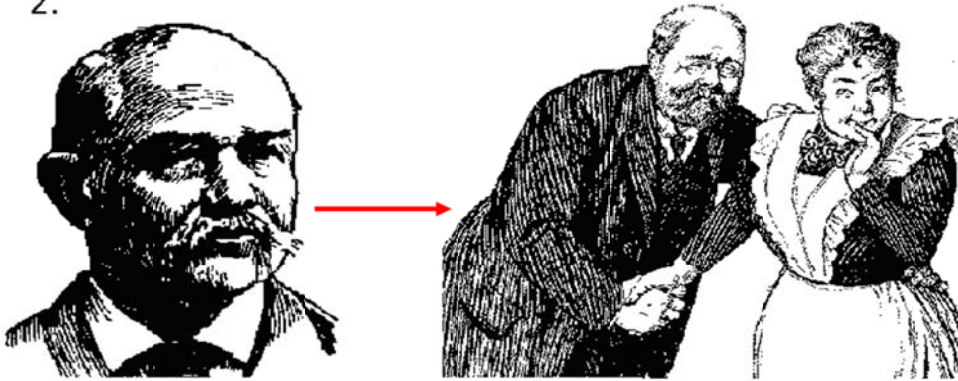
Jacob \_\_\_\_\_%

1.



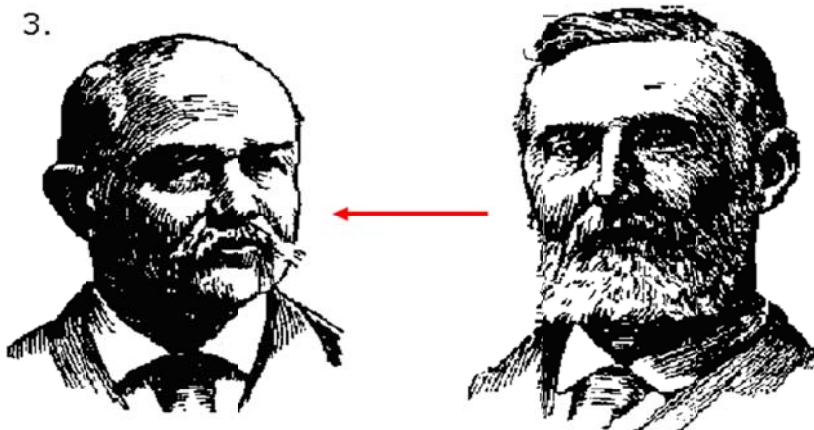
**Jacob and Earnest are brothers. They each own an undivided 50% interest in a certain tract of land.**

2.



**Through a Warranty Deed, Jacob conveyed to Elmer and Emily Berchard an undivided 75% interest in the mineral estate in the tract of land**

3.



**Ten years later, Earnest died and his entire estate passed to his brother, Jacob.**

**Answer:** Caution must always be exercised with respect to after-acquired title. Statutes vary from state to state; however, generally, since the original deed from Jacob was a *warranty deed* and Jacob *covenanted to convey title*, he had to attempt to transfer the full 75% to Elmer and Emily. If at all possible, he must make them whole. When Earnest died and Jacob inherited his brother's interest, a portion of that interest (the balance of the title that Jacob conveyed before he owned it) would automatically pass to Elmer and Emily Berchard without the need for any type of corrective instrument.

In general, only grant deeds such as Warranty Deeds and Special Warranty Deeds will transfer after-acquired interest. Quitclaim Deeds are another matter. They will pass title to any and all interest owned at the time of the conveyance. Since Quitclaim Deeds do not contain any covenant of warranty language, generally, most states hold that Quitclaim Deeds do not pass after-acquired title.

One of the exceptions is Nebraska Revised Statute, Section 76-209, which states, "such after-acquired interest shall not inure to the benefit of the original grantee or his heirs or assigns, if the deed conveying said real estate was either a *quitclaim* or *special warranty*."

Another exception is the state of North Dakota. The North Dakota Title Standards 1-05 and 1-06 makes provision for a quit claim deed. A quit claim deed can be used to convey after-acquired interests if the word "grant" is used.

Assume this land is in a state with typical laws on this issue. What should be your proper response?

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# Scenario #14: When Someone Dies

**Scenario:** Assume that you received the following items from your accounting department regarding a 160-acre tract of land belonging to a deceased party named Alcinda Sammy. She lived and died as a resident of Kansas and owned property in Oklahoma. Read the letter. Examine the Last Will and Testament, the Final Decree, and the Quit Claim Deed. Assume that all documents have been properly executed, acknowledged, and recorded where appropriate. Your accounting department is requesting that the new owners be set up on the pay decks.

After your examination of all items, determine how you should handle the .0053467 royalty interest that is currently set out for the account of Hiram Sammy, as Executor of the Estate of Alcinda Sammy, Deceased.

After a review of the items, would you transfer the interest of Alcinda Sammy into the heirs as determined by the Last Will and Testament and Final Decree from the court?

- Yes
- No

TO: Land Department

DATE: 11/16/2014

FROM Accounting Department - C. A. Cantor, Supervisor

SUBJECT: Alcinda Sammy Lease Lease #200-2-297

Murphy 1-23

Beaver County, Oklahoma

We have received information which indicates that the surface and minerals in and under the SE/4, T75N,R54W, Beaver County, Oklahoma are owned by Alcinda Sammy, who is now deceased, and that the company has been paying a royalty in the amount of .0053467 attributable to such ownership from the Murphy 1-23 well to Hiram Sammy, as Executor of the Estate of Alcinda Sammy, Deceased.

There have been submitted certified copies of the following:

1. **The Last Will and Testament of Alcinda Sammy**, dated April 11, 1992.
2. **Decree of Final Settlement** and Order of Discharge of Executor rendered in the matter of the Estate of Alcinda Sammy, Deceased, by the Probate Court of Seward County, Kansas.

The foregoing indicates that Alcinda Sammy died on March 31, 2011, a resident of Seward County, Kansas, and that by her will she devised the residue of her estate, including her interest in the captioned land, to Ira Sammy, J.H. Sammy, Hiram Sammy, and Rachel M. Owen, in equal shares.

*Please place the appropriate owners on the pay deck for the Murphy 1-23 and place in "pay" status.*

**LAST WILL AND TESTAMENT**  
OF  
ALCINDA SAMMY

KNOW ALL MEN BY THESE PRESENTS:

I, Alcinda Sammy, now residing in Seward County, Kansas, do hereby make, publish and declare this instrument as my Last Will and Testament, and I hereby revoke all former wills and codicils thereto by me at any time made.

ARTICLE I

I direct that expenses of my last illness and funeral and all my just debts be paid as soon after my death as conveniently possible.

ARTICLE II

After the payment of my just debts, funeral expenses, and expenses of last illness, I will, give, bequeath, and devise unto Ira Sammy, J.H. Sammy, Hiram Sammy, and Rachel M. Owen, in equal shares all of my property, both real and personal, that I may die seized and possessed of, in fee simple, to manage, sell, or dispose of as they may wish or see proper.

Signed Alcinda Sammy  
Dated: April 11, 1992

IN THE DISTRICT COURT OF SEWARD COUNTY

STATE OF KANSAS

IN THE MATTER OF THE ESTATE  
OF ALCINDA SAMMY, DECEASED

) Case No. P-96-743

**ORDER ALLOWING FINAL ACCOUNT OF EXECUTOR,  
ORDER FOR DISTRIBUTION, DETERMINATION  
OF HEIRS-AT-LAW AND DISCHARGE OF EXECUTOR**

This matter coming on for hearing this 31st day of July, 2013, on the Final Accounting of HIRAM SAMMY, Executor of the Estate of ALCINDA SAMMY, Deceased (hereinafter called "Executor"), and the Petition For Distribution, Determination of Heirs-at-Law and Discharge, and pursuant to an Order of this Court entered herein on the 23rd day of September, 2011, and this Court having examined the Accounting, Petition For Distribution, Determination of Heirs-at-Law and Discharge, the Court having heard the evidence and being fully advised in the premises and there being no objections,

THAT THE COURT FINDS, ORDERS, ADJUDGES AND DECREES as follows:

That the date of this hearing has been fixed and due notice thereof given as required by law and by order of this Court, and as appears more fully from the Affidavits of Publication and Mailing on file herein; that on this date this Court has full jurisdiction to hear said Accounting of Executrix, Petition for Distribution, Determination of Heir-at-Law and Discharge of Executrix.

A. That ALCINDA SAMMY is hereby determined to have been survived by the following heirs-at-law and no others, to wit:

Ira Sammy	Husband	(legal age)
J.H. Sammy	Son	(legal age)
Hiram Sammy	Son	(legal age)
Rachel M. Owen	Daughter	(legal age)

B. That Article II of the Last Will and Testament of ALCINDA SAMMY, Deceased, provides:

"I will, give, bequeath and devise unto Ira Sammy, J.H. Sammy, Hiram Sammy, and Rachel M. Owen, in equal shares all of my property, both real and personal, that I may die seized and possessed of, in fee simple, to manage, sell or dispose of as they may wish or see proper."

THE COURT, THEREFORE FINDS, ORDERS, ADJUGES AND DECREES that all real and personal property belonging to the estate of ALCINDA SAMMY shall be owned by Ira Sammy, J.H. Sammy, Hiram Sammy and Rachel M. Owen, in equal portions.

**Answer:** According to the information given, Alcinda Sammy died “testate,” and a determination of the heirs can be made from the Last Will and Testament and the Kansas Final Decree.

The question still remains: If the Division Order Professional had received only these documents, would they be enough to pass title to those designated in the will and in the Final Decree from the court?

It appears that Alcinda Sammy’s Last Will and Testament was probated in Kansas, but it has not been admitted to probate in Oklahoma.

In *Smith v. Reneau*, 188 Okla. 629, 112 P.2d 160, the Supreme Court of the State of Oklahoma held that a *foreign will* which has not been probated in Oklahoma under Oklahoma law is ineffectual to show title or interest in the person claiming title to Oklahoma realty thereunder. Therefore, the Kansas Final Decree cannot be used to transfer property located in Oklahoma.

When a decedent lives in one state and owns property in another state, the probate proceedings will take place in the state of domicile. Generally, however, that state’s disposition of the decedent’s estate will not affect property located in other states. The proceedings that must take place in the other states are referred to as ancillary probate.

- **In Texas**, an ancillary probate is generally not necessary. Usually the recording of a last will and testament and the order admitting the same to probate has the same force as does a deed of conveyance.
- **In Arkansas**, ancillary probate is not required in most cases. One must only establish the heirs at law.
- **In New Mexico**, an ancillary probate must be filed in order to establish clear title.
- **In Mississippi**, an ancillary probate must be filed in order to establish clear title.
- **In Louisiana**, an ancillary probate must be filed when the decedent was not domiciled in Louisiana.

How should the Division Order Professional respond to this issue? \_\_\_\_\_

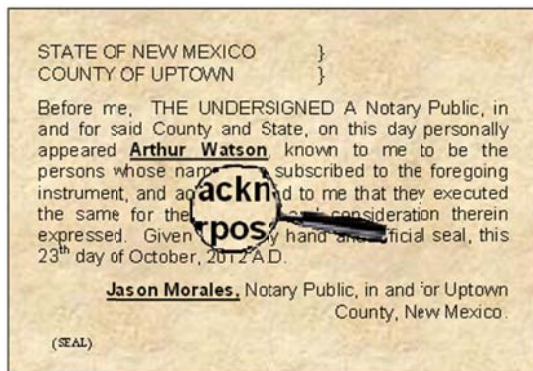
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## HAS THE CONVEYANCE BEEN PROPERLY ACKNOWLEDGED?



### Acknowledgements

For a conveyance to be recorded and placed in the public record, the execution of the conveyance must be acknowledged by a valid notary public. Acknowledgement forms vary from state to state.

### General guidelines for acknowledgements

1. The acknowledgment must be completely filled out at the time the notary public's signature and seal are affixed.
2. Documents requiring acknowledgments do not need to be signed in the Notary's presence in most states.
3. The signer must *appear before* the Notary at the time of notarization.

### The effect of a missing or defective acknowledgement

The general rule is...

1. The validity of the instrument, as between the parties, is not affected by the absence of or defect in the acknowledgement.
2. As against third parties, unacknowledged or defectively acknowledged instruments *do not serve as constructive notice* to third parties.  
*Thus, the instrument can be denied the benefit of recordation.*

In other words, even though the instrument physically appears in the real estate records, it will, as a matter of law, be treated as unrecorded.

Some states, such as Oklahoma, have placed a statute of limitation upon the invalidating effect of defective acknowledgement. In Oklahoma, if an instrument which contains a defective acknowledgement has been recorded for a period of five (5) years, the instrument is considered valid notwithstanding the omission or defect and will not impact marketability.

Texas adheres to an "ancient document" rule. A document that has been filed of record for twenty years and contains a defective or missing acknowledgment generally does not need to be cured. Tex. R. Evid. 803(16) & 901(b)(8).

Texas has also passed a revision to this rule that impacts instruments recorded on or after September 1, 2007. Any document that contains a “ministerial defect, omission, or informality in the certificate of acknowledgment that has been filed for record for longer than two years is considered to have been lawfully recorded and to be notice of the existence of the instrument on and after the date the instrument is filed.” Tex. Civ. Prac. & Rem. Code Ann. § 16.033(c). Act of June 15, 2007, 80th Leg., R.S., ch. 819, §2, 2007 Tex. Gen. Laws 1695 (nonretroactivity provision). Please note: The terms “ministerial defect, omission, or informality” are not clearly defined. Thus caution should be used in relying on this statute.

### **What defects are fatal to an acknowledgement?**

1. Failure to include acknowledging party's name in Certificate of Acknowledgement;
2. Significant variance in acknowledging party's name in the Certificate versus the instrument being acknowledged;
3. Omission of the word “acknowledged” in the Certificate;
4. Failure of officer taking acknowledgement to sign the Certificate;
5. Absence of the officer's official seal when its use is applicable;
6. Officer taking acknowledgement was disqualified, and his/her disqualification is evident on the face of the instrument.

### **How to manage a missing or defective acknowledgement**

When a missing or defective acknowledgement does NOT need to be cured.

1. If the instrument does not convey title, such as a Transfer of Lien, Assignment of Lien, Corporate Resolution, etc.;
2. If the instrument no longer affects title, for example, a recorded Deed of Trust that has been paid off and released;
3. If a sufficient amount of time has passed and the defect has been fixed by statute.

What can be done when a missing or defective acknowledgement must be cured?

1. Correction of acknowledgement by original notary public, followed by re-filing of original instrument;
2. Grantor's re-acknowledgment of original instrument before a different notary public, followed by re-filing the original instrument;
3. Filing new properly acknowledged instrument executed by the same grantor.

# Scenario #15: Defective Acknowledgment

**Scenario:** Assume that you have received the following deed from Betty B. Black. After reviewing your files, you have determined that Betty B. Black is currently set up in your system and getting paid for a royalty interest in the Black Stallion 1-27 well located in T23N,R17W, Sec. 27, Uptown County, New Mexico.

Examine the entire contents of the Warranty Deed and determine how you should handle a transfer of interest to Violet Miller, if any. Would you transfer all of Betty B. Black's interest in the Black Stallion 1-27 to Violet Miller?

- Yes
- No

Warranty Deed

Know all men by these presents

That: **Betty B. Black**, party of the first part for and in consideration of the sum of Ten and no/100 (\$10.00) cash in hand paid and other consideration, has granted, sold, transferred, assigned and conveyed unto **Violet Miller**, party of the second part, and all of my right, title and interest in and to the following described real property and premises situated in Uptown County, New Mexico to wit:

Township 23 North, Range 17 West  
Section 27: SE/4SE/4...containing 40 acres, more or less

I do hereby covenant with said Grantee that I am lawfully seized of the said premises; that they are free from all encumbrances; that I have good right and lawful authority to sell the same; and that i shall warrant and defend the title to said premises against the lawful claims of all persons whomever.

WITNESS our hand this 22<sup>nd</sup> day of October, 2012

Signed Betty B. Black

STATE OF OKLAHOMA }  
COUNTY OF PAYNE }

On this 22<sup>nd</sup> day of March, 1995, before me personally appeared Betty B. Black, who being by me duly sworn, deposes and says that she resides at 174 E. 44<sup>th</sup> Street, Carmi, Illinois 62114, that she is President for Alright Realty Corp., the corporation described in and which executed the foregoing instrument; that she knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; and that she signed her name thereto and affixed the corporate seal by order of the Board of Directors of said corporation and the said instrument is the act and deed of such corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal, at \_\_\_\_\_, Notary Public,

(SEAL)

My commission expires: 1/1/2013.

FILED FOR RECORD this 15<sup>th</sup> day of December, 2012 at 8:30 O'clock A.M. and recorded this 15<sup>th</sup> day of December, 2012 at 1:15 O'clock P.M.

**Answer:** In order for a conveyance to be recorded and placed in the public record, the execution of the conveyance must be acknowledged by a valid notary public. Acknowledgement forms vary from state to state.

In our scenario, several defects can be found in the acknowledgment including:

1. a significant variance in Betty B. Black's name in the notary block and the Deed that was being acknowledged,
2. omission of the word "acknowledged,"
3. failure of the notary to sign the Certificate,
4. absence of the notary's official seal, and
5. problematic dates on within the deed, since the date on which Betty B. Black appeared before the notary appears to pre-date her signature.

What should be your proper response?

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