

**To Probate or Not to Probate:
Mineral Interests in Estate Planning and Probate**

**Dallas Bar Association
Probate, Trusts & Estates Section**

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Presented By

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Attached Exhibits:

Exhibit A – Distribution Conveyance and Assignment of Mineral and Royalty Interests without Warranty

Exhibit B – Affidavit of Heirship

**TO PROBATE OR NOT TO PROBATE:
MINERAL INTERESTS IN ESTATE PLANNING AND PROBATE**

I. Introduction

Mineral interests can cause unique problems during estate planning and estate administration. Estate planning, probating and administering mineral interests should be conducted carefully and thoroughly. Each mineral owner's situation is unique. This presentation is intended to give a brief overview of estate planning and estate administration issues an attorney may encounter when dealing with a client or estate that owns mineral interests.

II. A Brief Overview of Mineral Interests Under Texas Law.

Real property includes land, and whatever is permanently annexed thereto.¹ Mineral interests are considered real property in Texas.² Once oil and gas is produced, it becomes personal property.³ The term "land" includes oil and minerals in place; however, an owner may also sever the mineral estate from the surface estate.⁴ A severance of the surface estate from the mineral estate occurs by a conveyance of the mineral interests or by conveying the surface and retaining the minerals.

A mineral lease upon its execution and delivery is not a mere option or executory contract, but operates as a present conveyance of the oil and gas in and under the described lands, and vests in the lessee a determinable fee in the oil and gas in place.⁵ Incidents of mineral ownership include (i) the developmental right, the right to lease, and the right to economic benefits under the lease (bonus, delay rentals, and royalty).⁶ Sometimes there will be a need to determine whether an interest in land is an interest in minerals. The current rules as to the meaning of "minerals" or "other minerals" are set forth in *Moser v. U.S. Steel Corp.*⁷ Courts

¹ *Morris Plan Bank of Fort Worth v. Ogden*, 144 S.W.2d 998, 1002 (Tex.Civ.App. 1940).

² *Renwar Oil Corp. v. Lancaster*, 276 S.W.2d 774, 776 (1955); *Toledo Society for Crippled Children v. Hickok*, 152 Tex. 578 (1953).

³ *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812 (Tex. 1974).

⁴ *Holloway's Unknown Heirs v. Whatley*, 104 S.W.2d 646, 648 (Tex.Civ.App.1937). See also Fred A. Lange & Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION (Texas Practice), 2nd ed., § 331.

⁵ Fred A. Lange & Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION (Texas Practice), 2nd ed., § 331.

⁶ Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., § II.

⁷ *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984). For a more in depth discussion, the author refers you to Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., § IV.

look to the intent of the parties from the four corners of the instrument, so that the intent of the parties is given effect.⁸ If the intent of the parties is unclear, the date of the mineral severance will determine the type of test used to define “minerals.”

If the severance occurred before June 8, 1983, the court applies the Surface Destruction Test (“SDT”) to cases. Under the SDT, minerals did not include substances which cause substantial destruction to the surface estate when removed. Surface owners in Texas ended up owning more valuable substances, which in other states would have been considered minerals.

If the severance occurred after June 8, 1983, the court applies the Ordinary and Natural Meaning Test (“O&NM”) to cases. While *Moser* does not explicitly define O&NM, the court seems to define a substance as a mineral if it is generally regarded as a mineral in the community at the time and place where the severance took place. *Moser* seems to apply a scientific definition to a substance, although there is no general acceptance of the definition of “minerals.”

A. **Some Basic Terms.** While these definitions are commonly understood by most attorneys, the author includes these terms simply for reference.

1. **Fee Simple.** It is absolute ownership of real property.
2. **Mineral Interest.** The mineral interest in oil and gas consists of the fee simple ownership of oil and gas in place under a parcel of land and the exclusive right to search for, develop and produce oil and gas from the property.
3. **Surface Interest.** The surface estate interest is what remains in the bundle of rights of land ownership after the mineral interest has been severed. Controversy often arises over whether substances belong to the mineral estate or the surface estate.
4. **The Dominant and Servient Estate Theory.** One of the incidents of mineral fee ownership is “the implied easement to use the surface and subsurface in any way reasonably necessary for exploring, drilling, production, transporting, and marketing.”⁹ In Texas, it is well- established law that the mineral fee is the dominant estate and “that the mineral estate can enjoin actions by the surface owner or lessee that interfere with the

⁸ See generally Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., § IV.

⁹ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.4.

reasonable use, operation and development of the mineral estate.”¹⁰ Disputes often occur with the surface owner as to what is reasonable use of the surface estate for development of the mineral estate. There are restrictions on a mineral owner’s right to develop the mineral estate, such as contractual, deed, and judicial restrictions.

5. **Rule of Capture.** It is the common law principle that there is no liability for drainage of oil and gas from another’s land as long as there has been no trespass or violation of relevant statutes and regulations.
6. **Drainage.** It is the “[m]igration of oil or gas in a reservoir due to pressure reduction casted by production from wells bottomed in the reservoir.”¹¹
7. **The Executive Right and Nonexecutive Interests.** The right to lease is the executive right. The executive right may be severed from the other incidents of mineral ownership. A nonexecutive interest, also sometimes referred to as participating royalty and nonparticipating mineral interest, “lacks the right to join in the execution of oil and gas leases and (probably the right to develop).”¹²
8. **Mineral Lease.** It is the most common method of creating a mineral estate. A lease may last for “three years and for so long thereafter as oil, gas and other minerals are produced.” “Three years” is just an example. Lease term duration varies on the period of time the lease was executed, the type of minerals being developed, and the geographic location of the mineral interest.
9. **Royalty Interest.** A royalty interest is a real property interest with two distinguishing characteristics: It is nonpossessory and free of production and operating expenses.¹³ Types of Royalties:

¹⁰ *Id.*

¹¹ Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., Appendix A.

¹² *Id.*

¹³ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.1[B](1).

- a. **Landowner's Royalty.** The most common transaction in which a royalty is created is probably the execution of a mineral lease.¹⁴ The landowner who executes the mineral lease retains a right to a specified amount of gross production.¹⁵ A landowner's royalty varies considerably based on the period of time the lease was executed, the type of minerals being developed, and the geographic location of the mineral interest.
 - b. **Non-Participating Royalty Interest.** The non-participating royalty owner is entitled to a free share of production without regard to the terms of the lease.¹⁶ This type of royalty is frequently created in deeds of real estate, by either grant or reservation.¹⁷
 - c. **Overriding Royalty Interest.** It is carved out of the lessee's interest under a mineral lease. Assignments of overriding royalties are commonly used to obtain financing and as a method of compensating landmen, geologists, and other individuals or entities for services provided to the oil and gas company.¹⁸
10. **Shut-in Royalty.** It is a payment by the lessee to the lessor to maintain an oil and gas lease while there is no production because a well is shut-in and incapable of production.
 11. **Net Revenue Interest.** Net revenue interest or revenue interest of the working interest partners is the revenue attributable to working interest owners for their share of the well less the royalty.
 12. **Bonus.** A payment made to a lessor to induce him or her to execute a mineral lease.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., Appendix A.

¹⁷ *Id.*

¹⁸ *Id.*

13. **Delay Rental.** A payment from the lessee to lessor to maintain an oil and gas lease during the primary term to maintain the lease during the primary term without drilling.
14. **Working Interest.** The working interest, also referred to as a leasehold interest or operating interest, is the portion attributable to the working interest partners that are responsible for all costs involved in exploration, production, and completion of a well. It is essentially the rights to the mineral interest acquired by an oil and gas lease.
15. **Depletion.**¹⁹ There is “physical depletion,” which is the exhaustion of a mine or a petroleum reservoir by extracting the minerals. “Economic depletion” is the reduction in the value of a wasting asset by removing the minerals.

III. Estate Planning for Mineral Interests.

The focus on mineral ownership rights has substantially increased with the discovery of new areas to explore and develop minerals throughout the State of Texas and other states. Mineral interests become increasingly fractionalized as those assets pass from one generation to the next. Proper estate planning can help reduce the burden on family and loved ones of identifying, locating, and maintaining mineral interests.

A. Type of Mineral Interest? Before you discuss transferring mineral interests with your client, it is important to understand what he or she owns.

- Is it the real estate that contains the minerals?
- Is the right to the minerals separate from the land itself?
- Is it an interest in a lease or royalty agreement?
- Is it a working interest that gives the client the exclusive right to develop the property for minerals at the sole risk and expense of the client?
- Is the mineral interest in fee simple, for life, or for a term of years?

Your client may own a combination of any of the above interests.

1. Issues Associated with Different Types of Mineral Interests.

Special issues may arise with some of the above mineral interests, such as:

¹⁹ Joseph Shade, PRIMER ON THE TEXAS LAW OF OIL AND GAS, 3rd ed., Appendix A.

- a. **Fractional vs. Fraction “of Royalty”**. The distinction between a fractional vs. fraction “of royalty” is important because it affects the amount of production the royalty owner takes.²⁰ Unless the word royalty is defined, a grant “of royalty” may lead to disputes regarding a royalty owner’s right to share in the interest.²¹ Fractional interests in royalties are categorized into two categories:
- Fractional Royalty Interests – e.g. 1/16 royalty
 - Fractions of Royalty – e.g. 1/4 of royalty

Construction of the Fractional Royalty Interests

With a fractional royalty interest, the owner is entitled “to the specified fractional amount stated in the deed of oil, gas, or other minerals produced from the land and remains constant regardless of the amount of royalty contained in a subsequently-negotiated oil and gas lease.”²² Some examples include:²³

- “a one-fourth royalty in all oil, gas and other minerals in and under and hereafter produced”²⁴
- “a fee royalty of 1/32 of the oil and gas”²⁵
- “an undivided one-sixteenth royalty interest of any oil, gas or minerals that may hereafter be produced”²⁶
- “one-half of the one-eighth royalty interest”²⁷

²⁰ Howard R. Williams and Charles J. Meyers, OIL AND GAS LAW § 327.

²¹ See generally Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.4[C].

²² *Range Resources Corp. v. Bradshaw*, 266 S.W.3d 490 (Tex. App.—Fort Worth, pet. denied).

²³ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.4[C].

²⁴ *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818, (Tex. Civ. App. 1957, error ref’d n.r.e.).

²⁵ *Caraway v. Owens*, 254 S.W.2d 425 (Tex. Civ. App. 1953, error ref’d).

²⁶ *Masterson v. Gulf Oil Co.*, 301 S.W.2d 486 (Tex. Civ. App. 1957, error ref’d n.r.e.).

²⁷ *Duval v. State*, 54 N.M. 27, 213 P.2d 212 (1949); *Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878 (Tex. App. 1987, error ref’d n.r.e.).

- “an undivided 1/24 of all of the oil, gas and other minerals, produced, saved, and made available for market”²⁸
- “1% royalty of all the oil and gas produced and saved”²⁹

Construction of the Fraction of Royalty Interests

With a fraction of royalty, the amount paid to the owner “is determinable upon the execution of some future lease regarding oil, gas, or other minerals and is calculated by multiplying the fraction in the royalty reservation by the royalty provided in a lease.”³⁰ If the fraction “of royalty” is 1/2 and a future oil and gas lease provides for a 1/4 royalty, the owner is entitled to a 1/8 (1/2 x 1/4) royalty payment. Some examples include:³¹

- “1/16 of all oil royalty”³²
- “The undivided 2/3 of all royalties”³³
- “One-half interest in all royalties received from any oil and gas leases”³⁴
- “An undivided one-half interest in and to all of the royalty”³⁵

²⁸ *Miller v. Speed*, 248 S.W.2d 250 (Tex. Civ. App. 1952).

²⁹ *Mitchell v. Hannah*, 123 Mont. 152, 208 P.2d 812 (1949). See also *Knox v. Krueger*, 145 N.W.2d 904, in which an assignment purported to convey “One and one-fourth percent (1 1/4% of all the) royalty, of all of the oil and of all the gas produced and saved from the hereinafter described lands.” If the parenthetical phrase is ignored, the instrument clearly conveyed a 1 1/4 percent royalty; however, giving effect to the parenthetical phrase would change the royalty to 1 1/4 percent of the 1/8 royalty. After reviewing extrinsic evidence, the court disregarded the parenthetical phrase in the grant.

³⁰ *Range Resources Corp. v. Bradshaw*, 266 S.W.3d 490 (Tex. App.—Fort Worth, pet. denied).

³¹ Ernest E. Smith and Jacqueline Lang Weaver, *TEXAS LAW OF OIL AND GAS*, 2nd ed., Chapter 2, Subsection 2.4[C].

³² *Crews v. Burke*, 309 P.2d 291 (Okla. 1957); *Caraway v. Owens*, 254 S.W.2d 425 (Tex. Civ. App. 1953, error ref'd).

³³ *Meeks v. Harmon*, 207 Okla. 459, 250 P.2d 203 (1952).

³⁴ *Federal Land Bank of Wichita v. Nicholson*, 207 Okla. 512, 251 P.2d 490 (1952).

³⁵ *State Nat. Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940).

- “One-half of one-eighth of the oil, gas and other mineral royalty that may be produced.”³⁶

It is important to observe the differences between a fractional royalty and fraction “of royalty”.³⁷ The specified amount of production to be paid to an owner is dependent on whether an interest in royalty is a fractional royalty or a fraction of royalty. In circumstances where it is difficult to ascertain whether a royalty is a fractional royalty or fraction “of royalty,” it is advisable to consult an oil and gas attorney.

- b. **Life Estate and Remaindermen.** If life tenant and remaindermen are legal interests, both the life tenant and remaindermen must execute the oil and gas lease, because the lease grants a present right, which the remaindermen cannot grant, and a future right, which the life tenant cannot grant. Under common law, a life tenant may have the authority to execute an oil and gas lease in limited circumstances to prevent drainage. In Texas, there is a statute that allows a life tenant to seek a court-appointed receiver to execute an oil and gas lease, which would bind the remaindermen.³⁸

Under Texas law, the owner of a life estate is generally only entitled to receive interest earned on bonus, royalty, and delay rentals, with the corpus being held for the remaindermen. Upon the death of the life tenant, bonus and royalties being held during the life estate are paid to the remaindermen and the mineral interest owned by the deceased life tenant would vest in the remaindermen.³⁹ There are exceptions to the above general rule:

- **Open Mine Doctrine.** This common law doctrine entitles a life tenant to all bonus payments, delay rentals, and royalties under a

³⁶ *Harriss v. Ritter*, 154 Tex. 474, 279 S.W.2d 845 (1955); *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945).

³⁷ This paper only highlights a few of the differences between fractional royalty and fraction of royalty. For a more in-depth discussion, the author refers you to the following treatises: (1) Howard R. Williams and Charles J. Meyers, OIL AND GAS LAW; and (2) Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed.

³⁷ Howard R. Williams and Charles J. Meyers, OIL AND GAS LAW § 327.

³⁸ Tex. Civ. Prac. & Rem. Code Ann. § 64.092.

³⁹ *Davis v. Bond*, 158 S.W.2d 297 (Tex. 1942).

lease in effect prior to the creation of the life estate. For example, a widow that acquires her life estate by operation of the homestead law will be able to take advantage of the open mine doctrine.⁴⁰ If an oil and gas lease in effect at the time of the creation of the life estate expires and a new lease is executed after the creation of the life estate, the open mine doctrine is inapplicable.⁴¹

- **Terms May Be Varied.** The terms of a grant of a life estate may be varied by agreement between the life tenant and the remaindermen. For example, a grant of a life estate may provide that royalties and/or bonus on leases be paid directly to the life tenant during said tenants life.
- **Equitable Interests.** Trusts are commonly used when property is divided between a life tenant and remaindermen.⁴² This type of ownership is split between an equitable estate, the life tenant, and legal estate, the remaindermen. In situations where a life tenant interest and remaindermen interest are created by a trust, the trust agreement will control who may lease and how proceeds of the lease will be divided. If the trust agreement is silent on the authority to lease, Section 113.012 of the Texas Property Code empowers the trustee to execute oil and gas leases. If the trust agreement is silent on the apportionment of lease benefits, said lease benefits are distributed in accordance with the Texas Property Code (the Texas version of the Uniform Principal & Income Act). A trustee should use extreme caution when allocating lease proceeds in the absence of language in the trust providing for allocation. Section 116.174 of the Texas Property Code includes broad language requiring the trustee to allocate the receipt equitably.⁴³ The statute leaves open the question of what is an equitable allocation of receipt between a life tenant and remaindermen.

⁴⁰ *Youngman v. Shuler*, 281 S.W.2d 373 (Tex. Civ.App.—San Antonio 1955).

⁴¹ *Moore v. Vines*, 474 S.W.2d 437 (Tex. 1971).

⁴² Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3[D](1).

⁴³ See also Tex. Prob. Code Ann. § 116.174 (Johanson 2011) (State Bar Comment and Commentary).

- c. **Term Interests.** These types of interests are fairly common in Texas. The most common term interest is “for a specified period of time, such as five years, and so long thereafter as oil, gas, or other minerals are produced from the described lands.”⁴⁴ Disputes most often arise as to what constitutes “production.” A term interest is similar to a fee simple determinable and may last indefinitely.⁴⁵ When a grantee receives a term interest, the grantor has a possibility of reverter.⁴⁶ When a grantor reserves a term interest, “the interest received by the grantee is analogous to an executory interest.”⁴⁷
- d. **Ownership in Common.** Minerals may be owned by two or more individuals as tenants in common. In Texas, surface and mineral estates may be subject to a special form of ownership pursuant to the Texas Relinquishment Act.⁴⁸ Lands subject to the Texas Relinquishment Act “have been severed, with the surface belonging to a private individual and the minerals belonging to the State of Texas.”⁴⁹ In addition, leasehold interests may also be co-owned. Co-ownership may result when investors participate in prospects under a single lease or joint operating agreement.⁵⁰

B. What is the Nature of the Mineral Interests? It is important to determine whether a particular interest is classified as a mineral interest or royalty interest. A mineral interest includes the right to develop, lease, and receive the economic benefits of leasing, while bearing the costs of exploration and development. A mineral interest is usually defined as “oil and gas on, in or under.” For example, an owner with a 1/2 mineral interest in 100 acres is able to negotiate the lease and receive bonus payments. If an oil and gas company offers the owner a bonus amount of \$1,000.00 an acre, she will be paid \$1,000.00 x 100 gross acres divided by the 1/2 mineral interest.

⁴⁴ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.5.

⁴⁵ *Id.* at Chapter 2, Subsection 2.5.[B].

⁴⁶ *Id.*

⁴⁷ *Id.* The author refers you to Chapter 2, Subsection 2.5[B] for discussion of the applicability of the rule against perpetuities to term interests.

⁴⁸ Tex. Nat. Res. Code Ann. §§ 52.172-52.190.

⁴⁹ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3.

⁵⁰ *Id.* at Chapter 2, Subsection 2.3[A].

A royalty interest owner on the other hand is not responsible for costs of exploration or development, and the royalty owner has no power to grant leases. A royalty interest is usually defined as “oil and gas produced and saved.” A royalty interest “is not fixed, but rather ‘floats’ in accordance with the size of the landowner's royalty contained in the lease and, in addition to the landowner's royalty, the fraction of non-participating royalty also shares proportionally in any overriding royalty interest reserved in the oil and gas lease.”⁵¹ For example, the owner of a 1/4 non-participating royalty interest is entitled to a 1/4 of whatever royalty is signed on an oil and gas lease. The non-participating royalty owner’s share is carved out of the royalty interest of the mineral owner. If the mineral owner negotiated a 1/4 royalty and a royalty check is cut for \$25,000.00, the non-participating royalty interest owner would be entitled to 1/4 of that \$25,000.00.

Your client may not know whether he or she owns a mineral interest or royalty. Due to ambiguous language in conveyances, it is often difficult to determine the type of interest.

C. What is the Character of the Mineral Interests of Married Clients? The separate or community character of a mineral interest is determined by marital property rules. The Texas Constitution defines separate property as “[a]ll property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent.”⁵² The Texas Family Code provides that separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during the marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss or earning capacity during the marriage.⁵³ Community property consists of the property, other than separate property, acquired by either spouse during marriage.⁵⁴ [Note: These rules may be changed by agreement between spouses, either by a pre-marital or post-marital agreement.]

⁵¹ Fred A. Lange & Aloysius A. Leopold, *LAND TITLES AND TITLE EXAMINATION (Texas Practice)*, 3rd ed., § 14.20 (citing *Range Resources Corp. v. Bradshaw*, 266 S.W.3d 490) (Tex. App.—Fort Worth, pet. denied).

⁵² Texas Const. Art. 16, §15.

⁵³ Tex. Fam. Code § 3.001.

⁵⁴ Tex. Fam. Code § 3.002.

Delay rentals of oil and gas leases constitute “personal property” and belong to the community estate.⁵⁵ The general rule in Texas is that rents and revenue of a spouse’s separate estate belong to the community. Royalties,” including a bonus paid on a Texas oil and gas lease represent proceeds from sale of land and are not considered “rents.”⁵⁶ This is because royalties “royalties” are not paid for time, but for oil and gas taken out, and represent actual removal and disposal of contents.⁵⁷ Thus, royalty income on a mineral interest that is separate property is treated as separate property because the royalty payment is for the extraction or waste of the separate property, as opposed to separate property income.⁵⁸

Production and sale of natural gas from land held as separate estate is equivalent to piecemeal sale of the separate corpus, and funds acquired through sale of separate corpus, if traced, will remain separate, not community property.⁵⁹ Community funds used to develop and produce oil do not change the character of the oil and gas from separate to community property.⁶⁰ The character of property as separate or community is determined at the time of acquisition.⁶¹

D. Location of Mineral Interests. It is important to determine the location of the mineral interests. For example, you will want to determine the jurisdiction to make sure you follow the appropriate process under applicable state law for transferring mineral interests and/or funding your client’s ownership rights into the name of a trust.

E. Transfer of Mineral Interests in Texas.

1. **Deeded Mineral Interests.** If a client owns deeded mineral interests, he or she will have to sign a new deed transferring ownership of the mineral interests to the individual, entity, or trust. You will then need to record the deed with the appropriate land records department in the state where the mineral interests are located.

⁵⁵ *McGarraugh v. McGarraugh*, 177 S.W.2d 296, (Civ.App. 1943).

⁵⁶ *C.I.R. v. Wilson*, 76 F.2d 766 (5th Cir. 1935).

⁵⁷ *Id.*

⁵⁸ *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.—Corpus Christi 1990).

⁵⁹ *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953).

⁶⁰ *Cone v. Cone*, 266 S.W.2d 480 (Tex. Civ.App.—Amarillo 1953, writ dismissed).

⁶¹ *Id.* For in-depth discussion regarding characterization, the author refers you to Mary Johanna McCurley, Brad M. Lamorgese, Ryan Kirkham, and T. Hunter Lewis, *Characterization & Tracing: An Overview*, State Bar of Texas 37th Annual Advanced Family Law Course, San Antonio, Texas, August 1-4, 2011.

There is no one specific type of deed that is used to convey minerals.⁶²
Types of deeds include:

- a. **General Warranty Deed.** The general warranty deed gives the grantee the maximum amount of protection available.⁶³ It gives the grantee the benefit of the after-acquired title doctrine⁶⁴ and supports the grantee's "status as a bona fide purchaser without notice of outstanding unrecorded interests."⁶⁵ A grantor can be held liable in damages if there is a breach of warranty and title fails.⁶⁶

Typical warranty language:

Grantor herein for himself and his heirs, executors and administrators hereby agrees to warrant and forever defend all and singular the said interest in said minerals, unto the said grantee, his or her heirs, successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.⁶⁷

Interests in third parties, interests reserved by grantor, and any outstanding oil and gas leases should be excluded from the warranty.⁶⁸

- b. **Special Warranty Deed.** If there is the existence of interests where the validity of those interests cannot be ascertained without the considerable expense of an exhaustive title search, a grantor

⁶² See the form deeds in Eugene O. Kuntz, John S. Lowe, Owen L. Anderson, Ernest E. Smith, & David E. Pierce, FORMS MANUAL TO ACCOMPANY CASES AND MATERIAL ON OIL AND GAS LAW 62-77 (3d ed. 1998).

⁶³ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 3.2[B].

⁶⁴ *Scarmendo v. Potter*, 613 S.W.2d 756 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

⁶⁵ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 3.2[B].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

will most likely not want to include a general warranty.⁶⁹ In those situations, a grantor may want to include a special warranty. A grantor of a special warranty is only liable for title failures tied to the grantor's actions.⁷⁰ Special warranty deeds are frequently used in transactions involving oil and gas interests.⁷¹

Typical special warranty language:

Grantor hereby binds himself, his heirs, executors and administrators to warrant and forever defend all and singular the premises under the said grantee, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through or under me, but not otherwise.⁷²

Interests in third parties, interests reserved by grantor, and any outstanding oil and gas leases should be excluded from the warranty.⁷³

- c. **No Warranty Deed.** A “no warranty” deed does not contain express warranties of title; however, the grantee receives the benefit of the after-acquired title doctrine⁷⁴ and supports the grantee's status as a bona fide purchaser without notice of outstanding unrecorded interests “if the deed purports to convey a specific interest in land, such as ‘my undivided half interest in the following described property.’”⁷⁵ In those situations, “a grantee

⁶⁹ *Id.* at Chapter 2, Subsection 3.2[C].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (citing *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892)).

⁷⁵ Ernest E. Smith and Jacqueline Lang Weaver, *TEXAS LAW OF OIL AND GAS*, 2nd ed., Chapter 2, Subsection 3.2[D].

will also receive the benefit of statutory warranties if the words ‘grant’ or ‘convey’ are used.”⁷⁶

- d. **Quitclaim Deed.** This type of deed is essentially not a conveyance but rather a release and assignment of all claims. A quitclaim does not contain any warranties and a grantee is unable to assert the after-acquired title doctrine in the event the grantor later acquires an interest in the land.⁷⁷ In addition, “the nature of the instrument puts the grantee on notice of the possible existence of outstanding claims to the land; the grantee cannot, therefore, claim to be a bona fide purchaser.”⁷⁸ In Texas, courts will not construe a deed as a quitclaim if there is a reasonable argument that it purports to convey a specific interest in land or to convey the land itself.⁷⁹
- e. **Possible Title Insurance Issues.** It is important to note that a transfer of mineral and/or surface interests into a revocable trust may affect title insurance coverage.⁸⁰ One possible way to address this issue is the use of a general warranty deed rather than a quitclaim deed.⁸¹ You should familiarize yourself with any existing title insurance coverage covering the property and relevant state law before executing a new deed transferring title.

2. **Non-Deeded Mineral Interests.** If a client owns non-deeded mineral interests, which is the right to the minerals that is separate from the land itself such as a lease or royalty agreement, he or she will have to assign his or her separate or lease or royalty mineral interest to the individual, entity or trust.

⁷⁶ *Id.*

⁷⁷ *Halbert v. Green*, 156 Tex. 223, 293 S.W.2d 848 (1956).

⁷⁸ *Harrison v. Boring*, 44 Tex. 255, 260 (1875); *Rodgers v. Burchard*, 34 Tex. 441 (1870); *Smith v. Morris & Co.*, 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.); *Geodyne Energy Income Production P’ship v. Newton Corp.*, 161 S.W.3d 482 (Tex. 2005).

⁷⁹ *Miles v. Martin*, 159 Tex.336, 321 S.W.2d 62 (1959); *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292 (Tex. App.—Eastland 1983, writ ref’d n.r.e.).

⁸⁰ Mickey R. Davis and Melissa J. Willms, Administration of Estates with Revocable Trusts Drafting to Head Off Pre- and Post Death Problems, State Bar of Texas 22nd Annual Estate Planning and Probate Drafting Course, Dallas, Texas, October 20-21, 2011.

⁸¹ *Id.*

3. **Transferring Mineral Interests to a Revocable Trust or Legal Entity.**

If a client has several mineral interests or has invested in mineral development, you will want to consider transferring those mineral interests to a revocable trust or legal entity for the following reasons:

- It is a desirable way to uniformly keep record title.
- It is easier to identify and locate mineral interests.
- It is a way to keep the mineral interests within the family without further fractionalizing the minerals in multiple or successive deeds.
- Provides a method from central management of royalty payments and working interests.
- Protection from creditors (with some entities).
- Liability protection with working interests (with a limited liability entity).
- Potentially reduce gift and estate taxes.

a. **Transferring Mineral Interests to a Revocable Trust.**

A revocable trust is usually ignored for federal income tax purposes, passing all income to the grantor. A revocable trust avoids probate administration of the assets owned by the estate. If a client owns mineral interests outside of the State of Texas, transferring the interest into a revocable trust will eliminate the necessity for ancillary probate of those interests in those other states upon his or her death conveying the interest to a revocable trust. It is also useful to avoid guardianship to manage minerals when an owner becomes incapacitated (and in some ways is an easier transaction than a power of attorney). It is important to note that transferring both minerals and surface into a revocable trust may affect title insurance coverage. You should familiarize yourself with the state law where the surface and mineral interest are located to determine whether a transfer into a revocable trust effects title insurance coverage.

b. **Transferring Mineral Interests to a Legal Entity.**

Various legal entities have both pros and cons for holding mineral interests. There are numerous requirements to qualify for the tax benefits associated with different legal entities that exceed the scope of this paper. Estate planners must carefully consider the tax attributes of entities in certain situations to ensure the client obtains the maximum tax benefit. It is also important to consider the tax

deductions and incentives that are available in the Internal Revenue Code to encourage investment in and development of minerals. For complex estates, it is advisable to consult with a tax attorney when transferring mineral interests to a legal entity to ensure the client obtains the maximum tax benefit from the transfer.

Estate plans involving transfers of mineral interests to legal entities usually involve one, or a combination, of the following legal entities:⁸²

Limited Liability Companies (“LLC”). An LLC can provide liability and asset protection. It is often used to obtain the same advantages of a corporation while being taxed like a partnership (for multiple members) or a sole proprietorship (for a single member). If the LLC is classified as a partnership for income tax purpose, losses incurred by the LLC will be passed through and to the extent possible, deducted by the members.

Limited Partnerships (“LP”). An LP is often used to take advantage of gift and estate tax valuation discounts and to facilitate continuous ownership of assets within a family for future generations. An LP can pool together a family's assets into one single family-owned business partnership in which family members own shares and often restrict transfers to outsiders.

C Corporations. Profits of a C Corporation are taxed separately from its owners. One layer of tax occurs first at the corporate level. When the profits are passed on to the shareholders in the form of a dividend, there is a second layer of tax, often referred to as a double tax of income. It provides liability protection but not asset protection. This type of entity can also result in tax on liquidation.

⁸² For in-depth discussion regarding choice of entity, the author refers you to Byron F. Eagon and John R. Williford, Choice of Entity Including Recent Changes to Business Organizations, Advanced Oil and Gas Short Course, Dallas, Texas, January 25-26, 2007.

S Corporations. Under this form of corporate entity, income, losses, deductions and credit through to the shareholders similar to a partnership. Shareholders report the flow-through of income and losses on their personal tax returns, thus avoiding the double taxation on corporate income. It provides liability protection but not asset protection. It is limited to a maximum of 100 shareholders and cannot be owned by non-resident aliens and some entities.

IV. Probating and Administering Mineral Interests.

When probating or administering mineral interests, it becomes necessary to identify mineral interests for purposes of preparing a probate inventory, preparing a federal estate tax return (Form 706), if applicable, and to transfer legal ownership to the distributees of the estate. An Inventory, Appraisal and List of Claims identifying the estate property, must be filed within ninety(90) days following the appointment of the Executor or Administrator, and must provide the fair market value of the various probate assets on the date of death.

A. Where is the Property? The first step is to obtain from the client sufficient information to identify the location and type of mineral interests. In many instances, the client may not have that information readily available. A few ways to determine the type and location of mineral interests is to request the following from the client:

- Mineral Deeds and Leases;
- Stubs from Royalty Checks and/or Division Orders for Producing Royalty Interests;
- Property Tax Records;
- Previous Income Tax Returns; and
- Inventory, Appraisal & List of Claims from a predecessor estate showing previously inherited mineral interests.

B. Producing vs. Non-Producing Mineral Interests. If a client can only provide where the minerals are located, such as the county, some basic research will need to be conducted. This starts with distinguishing whether the mineral interests are producing or non-producing.

1. **Producing Mineral Interests.** Producing mineral interests can be researched in the property tax records by searching the owner's name to locate the operator, or oil and gas company. For example, records may be found at the following websites: Fort Worth (www.tad.org/); Dallas (www.dallascad.org/); Callahan, Erath, Floyd, Hartley, Harrison,

Henderson, Hood, Hopkins, Knox, Lipscomb, Midland, Mills, Montague, Morris, Navarro, Palo Pinto, Parker, Reeves, Runnels, Stephens, Somervell, Van Zandt and Wise (<http://southwestdata.com/corp/>); and small counties (<http://appraisaldistrict.net/>). The operator, along with the name of the well and unit, is usually listed on the tax statement. With this information, you can contact the operator to obtain copies of mineral deeds, assignments, conveyances, or unit designations. You may also research the Railroad Commission of Texas records online at <http://www.rrc.state.tx.us/> to obtain additional information. It is advisable to contact the operator before contacting the Railroad Commission because the information the operator provides you will be more detailed.

2. **Non-Producing Mineral Interests.** Non-producing mineral interests can be researched in real property records by the grantor/grantee name. Many local county websites allow you to search records for free, such as Dallas County (<http://roamdallaspropertyrecords.com/ailis/search.do>); Collin County (<http://countyclerkrecords.co.collin.tx.us/webinquiry>); and Tarrant County (<https://ccrecordse.tarrantcountytexas.gov/RealEstate/SearchEntry.aspx?e=newSession>). You may also research records for a fee at www.texaslandrecords.com. However, most small county real property records are not accessible via the Internet. Even many large county real property records only go back to the late 1980s on the Internet. In those situations, you can contact the county clerk and request a record search of the grantor/grantee indices for a particular name and time period for a nominal fee. In some cases, it may be necessary to hire a landman to locate mineral interests; however, this method can be costly (especially if mineral interests are located in numerous counties).

C. **Leasehold and Working Interests.** An estate may include working interests or leasehold interests. Care should be taken to distinguish between a working interest and a leasehold interest.⁸³ The leasehold refers to a specific lease or specific part of a lease, whereas the working interest is a share of gross production subject to the risk and expense of exploration and production. An overriding royalty interest is an interest in the oil and gas produced at the surface that is carved out of the working interest.

⁸³ See generally Roger E. Beecham, Assigning Oil and Gas Leases, 27th Annual Advanced Oil, Gas and Energy Resources Law Course, Houston, Texas, October 8-9, 2009.

D. Valuation of Mineral Interests.⁸⁴ Mineral interests must be described and valued at fair market value on an estate inventory and its estate tax return. Fair market value is the price that a willing buyer and a willing seller would pay for the property. Time of valuation for the inventory and estate tax return is date of death.⁸⁵ A rule of thumb with respect to royalty interest is that the fair market value of minerals is three times the cash flow from the twelve months preceding the date of a decedent's death.⁸⁶ Again, this is just a rule of thumb and is not binding upon the IRS. If production is declining, there has been trouble with the well(s), or there are other adverse factors, the rate can be reduced.⁸⁷ An appraisal by a petroleum engineer is probably the best evidence of value, especially when dealing with overriding royalty interests, working interests, and non-producing mineral interests.⁸⁸

E. Leasing Minerals. The situation often arises where a personal representative or an executor is approached to execute a lease on behalf of an estate.

- 1. Dependent Administration.** Section 367(b) of the Texas Probate Code provides:

Personal representatives of the estate of decedents, appointed and qualified under the laws of this State, and acting solely under orders of court, may be authorized by the court in which the probate proceedings on such estates are pending to make, execute, and deliver leases, with or without unitization clauses or pooling provisions, providing for the exploration for, and development and production of, oil, other liquid hydrocarbons, gas (including all liquid hydrocarbons in the gaseous phase), metals, and other solid minerals, and other minerals, or any of such minerals in place, belonging to such estates.

The personal representative must file an application with the court that:
(a) describes the property fully enough by reference to the amount of

⁸⁴ For an in-depth discussion regarding valuation of mineral interests, the author refers you to Alan B. Harp, Estate Planning with Mineral Interests: Valuation Issues, Fort Worth Club, Fort Worth, Texas, September 23, 2010.

⁸⁵ For federal estate tax purposes, there is an alternate valuation option. All assets may be valued on the date of death that is six months after the date of any distribution, sale, exchange, or disposition, whichever is earlier. *See* IRC, Section 2032.

⁸⁶ James E. Brill, Editor and Project Director, TEXAS PROBATE SYSTEM, State Bar of Texas, 3rd ed, Worksheet 7.

⁸⁷ *Id.*

⁸⁸ *Id.*

acreage, the survey name or number, or abstract number, or other description adequately identifying the property and its location in the county in which situated; (b) specify the interest thought to be owned by the estate, if less than the whole, but ask for authority to include all interest owned by the estate, if that be the intention; and (c) set out the reasons why such particular property of the estate should be leased.⁸⁹ Neither the name of any proposed lessee, nor the terms, provisions, or form of any desired lease, need be set out or suggested in any such application for authority to lease for mineral development.⁹⁰

At the hearing on the application to lease, the Judge will require proof as to the necessity or advisability of leasing for mineral development the property described in the application and in the notice.⁹¹ The order authorizing leasing must include:

- a. the name of the lessee;
- b. the actual cash consideration, if any, to be paid by the lessee;
- c. a finding that the personal representative is exempted by law from giving bond, if that be the fact and not a fact, then a finding as to whether or not the representative's general bond on file is sufficient to protect the personal property on hand, inclusive of any cash bonus to be paid, if any; and
- d. a complete exhibit copy, either written or printed, of each lease thus authorized to be made, shall either be set out in the order or attached thereto and incorporated by reference in said order and made a part thereof.⁹²

The authorized primary term shall not exceed five (5) years, subject to the terms and provisions of the lease extending it beyond the primary term by paying production, by bona fide drilling or reworking operations, whether in or on the same or additional well or wells, with no cessation of operations more than sixty (60) consecutive days before production has been restored or obtained or by the provisions of the lease relating to a

⁸⁹ Tex. Prob. Code § 367(c)(1).

⁹⁰ *Id.*

⁹¹ Tex. Prob. Code § 367(c)(5).

⁹² *Id.*

shut-in gas well.⁹³ Section 367 of the Texas Probate Code may only be used for dependent administration and not independent administration.

2. **Independent Administration.** A will often contains language authorizing an independent executor to execute oil and gas leases. If the will does not include language authorizing the independent executor to execute an oil and gas lease, it is believed that unless restrained by language in the will, an independent executor has the power to execute oil and gas leases that will bind the decedent's devisees after the estate has been closed."⁹⁴ The authority to execute an oil and gas lease "seems unassailable when exercised in connection with paying the estate's or descendant's debts, setting aside exempt property or dividing property among the distributees."⁹⁵ It has been "argued that because section 367 grants the probate court power to enter an order allowing a personal representative to execute oil and gas leases, that section is a source of similar power for independent executors."⁹⁶ Even if section 367 is a source of similar power for independent executors, it "still leaves open the possibility that an oil and gas lease can be validly executed only when necessary for the 'settlement' of the estate, and that a lease entered into for the estate's 'preservation' would be beyond the power of the independent executor."⁹⁷ The practical reason for arguing that an oil and gas lease can be validly executed when necessary for the "preservation" of the estate is to "protect the estate's land against drainage."⁹⁸

In *Lowrance v. Whitfield*, the court held:

...[U]nder the particular circumstances present here, the independent executor does have authority to execute an oil and gas or mineral lease during an independent administration of an estate for the purpose of preserving and protecting the assets of the estate. To hold otherwise could subject an independent executor to

⁹³ Tex. Prob. Code § 367(c)(7).

⁹⁴ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3[D](2)(b).

⁹⁵ *Id.*

⁹⁶ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3[D](2)(b). *See also* M.K. WOODWARD, *Some Developments in the Law of Independent Administrations*, 37 TEX. L. REV. 828, 839 (1959).

⁹⁷ *Id.*

⁹⁸ *Id.*

potential liability for nonfeasance in preserving the assets of the estate.⁹⁹

Note that *Lowrance v. Whitfield* is a fact specific case and does not remove all doubt as to an independent executor's authority to execute an oil and gas lease in the absence of express language in the will authorizing the independent executor to execute an oil and gas lease.¹⁰⁰

It is important to carefully consider all the circumstances involved in a given fact situation before an independent executor executes an oil and gas lease on behalf of the estate. In certain circumstances, an independent executor's actions on behalf of the estate executing an oil and gas lease may be challenged.¹⁰¹

F. Transferring Title.

There are several methods available for transferring title to minerals depending on the circumstances.

1. **No Administration.** If there is no administration of the estate, such as a muniment of title or small estate affidavit, certified copies of the will and order in a muniment of title case or the affidavit in the case of a small estate affidavit should be recorded with the county clerk in all the counties where the mineral interests are located.
2. **Appointed Personal Representative.** For estates where an administrator or executor has been appointed, the personal representative can execute a mineral deed or assignment¹⁰² conveying the mineral interests to beneficiaries. If you do not have sufficient information to describe the location and type of mineral interests, the administrator or executor can execute a general blanket deed to transfer ownership. An example of a general blanket deed is attached as Exhibit A, hereto. Even though you may have very little information to describe the mineral interests, you will

⁹⁹ 752 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

¹⁰⁰ Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3[D](2)(b).

¹⁰¹ For a more in-depth discussion, the author refers you to Ernest E. Smith and Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS, 2nd ed., Chapter 2, Subsection 2.3[D](2)(b).

¹⁰² Different rules apply to assignments of oil and gas leases and overriding royalty interests. For further analysis of the rules and issues associated with assignments, the author refers you to Roger E. Beecham, Assigning Oil and Gas Leases, 27th Annual Advanced Oil, Gas and Energy Resources Law Course, Houston, Texas, October 8-9, 2009.

want to include as much property identification information as possible in the deed. Deeds executed by an administrator or executor should be recorded with the county clerk in all the counties where mineral interests are located. With a general blanket deed, you will want to record the deed in all counties where you have identified that decedent may have owned mineral interests.¹⁰³

3. **Power of Sale.** If a will does not include a power of sale provision, the recent legislative change to Section 145A of the Texas Probate Code permits distributees to agree to give the independent executor or administrator the power of sale. The consent needs to be authorized in the order to show the power of sale exists. The change to Section 145A applies to individuals that died on or after September 1, 2011.

4. **Affidavit of Heirship.** If a person dies without will (intestate), an Affidavit of Heirship may be used to establish heirship of persons that have title to property. An Affidavit of Heirship is a statement of facts concerning the family history, genealogy, marital status, or the identity of the heirs of a decedent. Affidavits of Heirship are also used in a proceeding to declare heirship or in a suit involving title to real or personal property.¹⁰⁴ Probate Code Sec. 52A provides a form for an Affidavit of Heirship, although this form is only a guideline. A copy of this form is attached as Exhibit B, hereto. The next step after preparation of the Affidavit of Heirship, is a deed that usually conveys title into a single heir who may then keep the property or sell it. A special warranty deed or deed without warranties, but not a quitclaim deed, is usually used to convey title. Title companies generally do not insure property conveyed by quitclaim deeds. All heirs named in the Affidavit of Heirship must sign the a conveyance to a single heir. Both Affidavit of Heirship and deed are filed in the real property records in the county in which the property is located - the affidavit first, and then the deed. Most title companies and oil landmen have traditionally relied on Affidavits of Heirship to clear

¹⁰³ Careful drafting is required for a blanket conveyance. In *J. Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005), the Court concluded that the combination of the ambiguous specific grant when read with the general grant in the legal description rendered the deed itself ambiguous. For in-depth discussion on the importance of language used in legal descriptions, the author refers you to George Snell, III, and Ana Maria Marsland – Griffith, Legal Descriptions – A Little Background and A Few New Issues, State Bar of Texas Oil, Gas and Energy Resources Law Section Report, March 2011.

¹⁰⁴ Tex. Prob. Code § 52.

gaps in title (unless there is some reason to suspect an Affidavit of Heirship's authenticity).¹⁰⁵

G. Getting the Money. In the case of an estate involving producing mineral interests, you will need to contact the operator, or oil and gas company,¹⁰⁶ to request a new division order be prepared. The division order is the document that is signed by the owner (the beneficiary) that reflects new ownership as to how royalty payments are to be distributed. Depending on the type of administration, the operator usually requires evidence as to probate or the administration of the estate. You will want to verify with the operator what type of documentation it requires to issue a new division order. A new division order does not transfer title.

V. Conclusion.

There are numerous issues involved with estate planning, probating and administering mineral interests. To endeavor to explain all the different situations to consider when advising a client with mineral interests is beyond the scope of this paper. Hopefully, this paper provides a reference point for possible estate planning and estate administration problems that may be encountered with a client who owns mineral interests.

¹⁰⁵ Tex. Prob. Code Ann. § 52 (Johanson 2011) (Commentary).

¹⁰⁶ A list of oil and gas companies, along with contact information, may be found at the National Association of Division Order Analysts website (<http://www.nadoa.org/publications.html>, click on the "Royalty Owner Relations" link under the Merger and Acquisitions Directory).

EXHIBIT A

WHEN RECORDED, RETURN TO:

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

DISTRIBUTION CONVEYANCE AND ASSIGNMENT OF
MINERAL AND ROYALTY INTERESTS WITHOUT WARRANTY

STATE OF TEXAS §
 § KNOW ALL MEN BY THESE PRESENTS, THAT:
COUNTY OF _____ §

THAT, the undersigned, _____, acting as Independent Executor of the Estate of _____, Deceased (the "Grantor and Assignor"), pursuant to Cause No. _____ in the _____ Court of _____ County, Texas, for and in consideration of Ten Dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and as distribution from the Estate of _____, Deceased, pursuant to his Last Will and Testament dated _____, does hereby GRANT, BARGAIN, SELL, CONVEY, ASSIGN, and DELIVER unto _____, whose address is _____, (hereinafter called the "Grantee and Assignee"), subject to the matters stated below, ALL (100%) OF GRANTOR'S AND ASSIGNOR'S RIGHTS, TITLES, CLAIMS AND INTERESTS, OF ANY AND EVERY KIND, NATURE AND/OR CHARACTER, IN AND TO ALL OF THE FOLLOWING:

A. all of the oil, gas, and other minerals in, and under, and that may be produced, saved, sold and/or marketed from ANY AND ALL LANDS LOCATED IN _____, _____, and _____ COUNTIES TEXAS, OWNED OR CLAIMED BY, OR STANDING OF RECORD IN THE NAME OF GRANTOR AND ASSIGNOR, including but not limited to the properties described in Exhibit "A" attached hereto and made a part hereof, effective as of the date hereof, which lands are hereinafter referred to collectively as the "Lands," including all mineral interests, royalty interests, overriding royalty interests, working interests, production payment interests, oil, gas, and mineral leasehold estate interests, and all of Grantor's and Assignor's rights, titles, claims and interests in and to the following described units:

(1) County of _____, Texas
Units:

(2) County of _____, Texas
Unit:

(3) County of _____, Texas
Units:

B. For the same consideration, Grantor and Assignor also sell, transfer, assign, and convey to Grantee and Assignee all of Grantor's and Assignor's rights (i) of ingress, egress and possession at all times to mine, drill and explore the Lands for oil, gas or other minerals, and to produce, store, dehydrate, compress, treat, process, transport, market, and remove all or any of them from the Lands, and to exercise all other rights lawfully belonging or pertaining thereto; (ii) to each valid and subsisting oil, gas, and/or other mineral lease (the "Lease," whether one or more), if any, evidenced in the public records of the above-named counties, insofar as each Lease covers any of the Lands (and this instrument is made subject to each such Lease, insofar as it covers any of the Lands), together with all bonus, rents, royalties, shut-in royalties, delay rentals paid to extend the term within which operations may be conducted on any of the Lands, and other rights and interests under each such Lease, insofar as it covers any of the Lands; (iii) to all bonus, rents, royalties, revenues, payments, accounts, proceeds, suspended funds, refunds, interest on overdue payments and other things of value, if any, payable by any lease, operator, purchaser of production, seller of production, governmental agency and/or tribunal or other person, entity, tribunal or party with respect to any oil, gas and/or other minerals produced from, or attributable to, any of the Lands before, on or after the date of this instrument (including all such production currently in any tank, rail car or pipeline, if any, and all liens and security interests securing the payment of such sums, if any, and all rights, claims, and causes of action of Grantor and Assignor with respect to such sums, including claims for the underpayment of past royalties, if any); (iv) to all claims, demands, suits, causes of action, obligations and damages, of whatsoever kind or character, known or unknown, that are owned or unknown, that are owned or claimed by

Grantor and Assignor or to which Grantor and Assignor are otherwise entitled, and any proceeds, settlements and distributions relating thereto, which are attributable or relate to: (a) the interests in the Lands conveyed hereby; (b) Grantor's and Assignor's prior ownership of Grantor's and Assignor's interests in the Lands conveyed hereby; (c) the oil, gas, or other minerals produced from the interests in the Lands conveyed hereby; or (d) the oil, gas or other minerals which could have been produced from the interests in the Lands conveyed hereby, whether arising or accruing before, on or after the date of this conveyance. All of the foregoing matters described in items (i) through (iv), inclusive above, being hereinafter referred to collectively as the "Interests."

- C. Grantor and Assignor acknowledge that because this is a conveyance of Lands and Interests in numerous counties as identified herein there may be other Lands and Interests not particularly described above. Grantor and Assignor, therefore, agree to execute such other and further written instruments deemed by Grantee and Assignee, or Grantee's and Assignee's heirs or successors and assigns, as being necessary, advisable or appropriate to carry out the purposes of this instrument, without limitation, those instruments necessary to vest title to the Lands and Interests in Grantee and Assignee.
- D. In this instrument, the term "other minerals" covers/includes coal, lignite, uranium, sulphur, iron ore and every other "mineral" now or hereafter recognized as such under the laws of the State of Texas.
- E. Unless otherwise stated to the contrary herein, this instrument does not cover any interest of Grantor and Assignor in the surface estate of any of the Lands.

TO HAVE AND TO HOLD the herein conveyed and assigned rights unto Grantee and Assignee, their successors and assigns, subject to the following terms and conditions:

This Distribution Conveyance and Assignment of Mineral and Royalty Interests is delivered by Grantor and Assignor without express or implied warranty. All warranties that might arise by common law as well as the warranties in Section 5.023 of the Texas Property Code (or its successor) are excluded.

Grantee and Assignee shall have, receive, and enjoy the interest in all bonus, rents, royalties, and other benefits which may accrue to the Lands and Interests conveyed by this Distribution Conveyance and Assignment of Mineral and Royalty Interests, from and after the

execution date, as if Grantee and Assignee had been, at the date of making any currently and subsisting lease, the owner of the conveyed Lands and Interests.

This Distribution Conveyance and Assignment of Mineral and Royalty Interests is subject to all instruments of record affecting the Lands and Interests.

EXECUTED this _____ day of _____, 2011.

Independent Executor of the
Estate of _____, Deceased

STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instruments, and acknowledged to me that she executed the same for the purposes and considerations therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this ____ day of _____, 2011.

Notary Public, State of Texas

My Commission Expires: _____

EXHIBIT B

NO. _____

IN RE ESTATE OF

_____ ,

DECEASED

§
§
§
§
§

IN THE PROBATE COURT

NO. ____ OF

_____ COUNTY, TEXAS

AFFIDAVIT OF HEIRSHIP – STATUTORY FORM

Affidavit of Facts Concerning the Identity of Heirs

Before me, the undersigned authority, on this day personally appeared _____ (“Affiant”) (insert name of affiant) who, being first duly sworn, upon his/her oath states:

1. My name is _____ (insert name of affiant), and I live at _____ (insert address of affiant’s residence). I am personally familiar with the family and marital history of _____ (“Decedent”) (insert name of decedent), and I have personal knowledge of the facts stated in this affidavit.

2. I knew decedent from _____ (insert date) until _____ (insert date). Decedent died on _____ (insert date of death). Decedent’s place of death was (insert place of death). At the time of decedent’s death, decedent’s residence was _____ (insert address of decedent’s residence).

3. Decedent’s marital history was as follows: _____ (insert marital history and, if decedent’s spouse is deceased, insert date and place of spouse’s death).

4. Decedent had the following children: _____ (insert name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child).

5. Decedent did not have or adopt any other children and did not take any other children into decedent's home or raise any other children, except: _____ (insert name of child or names of children, or state "none").

6. (Include if decedent was not survived by descendants.) Decedent's mother was: _____ (insert name, birth date, and current address or date of death of mother, as applicable).

7. (Include if decedent was not survived by descendants.) Decedent's father was: _____ (insert name, birth date, and current address or date of death of father, as applicable).

8. (Include if decedent was not survived by descendants or by both mother and father.) Decedent had the following siblings: _____ (insert name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none").

9. (Optional.) The following persons have knowledge regarding the decedent, the identify of decedent's children, if any, parents, or siblings, if any: _____ (insert names of persons with knowledge, or state "none").

10. Decedent died without leaving a written will. (Modify statement if decedent left a written will.)

11. There has been no administration of decedent's estate. (Modify statement if there has been administration of decedent's estate.)

12. Decedent left no debts that are unpaid, except: _____ (insert list of debts, or state "none").

13. There are no unpaid estate or inheritance taxes, except: _____ (insert list of unpaid taxes, or state "none").

14. To the best of my knowledge, decedent owned an interest in the following real property: _____ (insert list of real property in which decedent owned an interest, or state "none").

15. (Optional.) The following were the heirs of decedent: _____ (insert names of heirs).

16. (Insert additional information as appropriate, such as size of the decedent's estate.)

Signed this _____ day of _____, 20__.

(signature of affiant)

STATE OF TEXAS §
 §
COUNTY OF _____ §

Sworn to and subscribed to before me on _____ (date) by
_____ (insert name of affiant).

Notary Public, State of Texas

My Commission Expires:

(print Notary's name)