

**TITLE RESEARCH AND SELECTED PROBLEMATIC AREAS
IN OIL, GAS AND MINERAL TITLE**



**MICHAEL S. BROWNING
BURLESON LLP
112 E. PECAN STREET, SUITE 700
SAN ANTONIO, TEXAS 78205
Phone: (210)-870-2604
Fax: (210)-870-2626
Website: www.burlesonllp.com
E-mail: mbrowning@burlesonllp.com**

**HOUSTON BAR ASSOCIATION
Oil, Gas and Mineral Law Section
November 15, 2011**

BIOGRAPHY

Michael S. Browning (Managing Partner, San Antonio Office Burleson LLP)

Practice Areas:

Oil, Gas and Mineral Law

Admitted to the State Bar of Texas
Board Certified, Oil, Gas and Mineral Law
Texas Board of Legal Specialization

Education:

J.D., South Texas College of Law, 2001
B.A., Political Science (Honors) and B.A., Psychology (Honors),
Texas A&M University Kingsville, 1995

Profile:

Michael S. Browning was born in Alice, Texas, graduating from Alice High School with honors. Michael attended the University of Texas at Austin majoring in Chemical Engineering prior to transferring to and graduating from Texas A&M University-Kingsville with degrees in Political Science (Pre-Law emphasis) with honors and Psychology with honors in 1995. In 2001, Michael received his J.D. from South Texas College of Law. While at South Texas College of Law, he interned at the Texas First Court of Appeals for Justice Terry Jennings and was assigned to the panel of then-Chief Justice and former Texas Supreme Court Justice, Michael Schneider, as well as Justice Wilson and Justice Jennings.

Prior to law school, Michael gained extensive experience in the Oil & Gas industry working with both equipment and instrumentation companies. Michael is knowledgeable of the entire South Texas and Gulf Coast region having traveled and worked throughout these areas. Michael's contacts within the Oil and Gas Industry augment his legal abilities to the benefit of the Firm's clients.

Michael practices Oil, Gas and Mineral Law, is a member of the State Bar of Texas and is active in the Oil and Gas, Natural Resource Section of the State Bar of Texas. He has rendered numerous title opinions in all areas of the State of Texas.

Affiliations:

State Bar of Texas: Oil, Gas and Energy Resources Section
San Antonio Bar Association: Natural Resources Section
Member of the College of the State Bar of Texas
Delta Theta Phi - a National Legal Fraternity
San Antonio Association of Professional Landmen

TABLE OF CONTENTS

<u>LEASE CHECKS</u>	4
<u>BUILDING RUNSHEETS</u>	4
<u>SELECTED PROBLEMATIC ISSUES IN OIL, GAS AND MINERAL TITLE</u>	7
<u>COMMUNITY LEASES</u>	7
<u>STRIPS AND GORES</u>	9
<u>RIGHT-OF-WAY V. FEE</u>	10
<u>PROPER LESSOR OF STREETS AND ROADS</u>	11
<u>DEDICATION BY PLAT V. DEDICATION BY DEED</u>	12
<u>INTESTATE DESCENT AND DISTRIBUTION</u>	13
<u>LANDS DESCRIBED V. LANDS CONVEYED</u>	14
<u>RESERVATION TO A THIRD PARTY STRANGER</u>	15
<u>COMMUNITY AND SEPARATE PROPERTY ISSUES</u>	16
<u>LIFE ESTATES AND THE OPEN MINE DOCTRINE</u>	17
<u>POOLING AND UNLEASED INTERESTS</u>	21
<u>EXHIBIT</u>	25

Lease Checks

1. Lease checks from only the Mineral Tax Rolls will most likely not yield the best results as the Tax Assessor/Collector Offices, in most instances, do not have the resources to continuously update mineral ownership. In fact as long as the taxes are paid, the Tax Assessor/Collector Offices will usually not question from whom they received the money.

Instead, the better approach is to run the records back for at least twenty-five (25) years or so, then confirm by the Mineral Tax Rolls.

2. If an entity (Corporation, LLP, LLC, etc.) is found to be an interest owner, check with the Secretary of State to ensure such entity is still in existence.

Building Runsheets

If an abstract plant is to be utilized it is usually best to obtain client approval due to the fees/expenses charged. Further, if an abstract plant is to be utilized for runsheet construction, the County and District Clerks' records must be checked in addition to any abstract plant title materials.

1. Runsheets should begin at sovereignty and never at some arbitrary point such as the turn of the century, a foreclosure or a Sheriff's Deed, as early gaps in the chain of title can open the door for Dual-chain/Adverse Possession lawsuits.
2. Minimum information required:
 - a) Recording Reference (Volume/Page/Records)
 - b) Type of Instrument
 - c) Instrument Execution Date (Runsheets should be constructed chronologically by execution date from oldest to most recent)
 - d) Effective Date (if different from execution date)
 - e) Filing date
 - f) Grantor/Grantee
 - g) interest conveyed
3. Additional information that is helpful to the Examiner:
 - a) Property description
 - b) Mineral or Royalty reservations (fee or term)
 - c) Note defects such as faulty acknowledgments, property description errors, etc.)

4. Patents, early title and other instruments may be in the seminal county from which your county was carved out. For example, Jim Wells County was carved out of Nueces County.
5. Check recitals of references to prior instruments for the effect, if any, on the particular chain of title.
6. Probate listings should include: the Application with the Date of Death of the deceased; the Last Will and Testament of the deceased; and the Order Admitting the Will to Probate. If the date of death of decedent is within 10 years of present, include copies of State and Federal Tax Receipts reflecting all inheritance taxes for the estate of the decedent paid in full. If the Probate proceedings are Administrative only for someone who died intestate, the Probate should include any Heirship information included with the Probate, if any. Additionally, Probate listings in the runsheet should be included chronologically by the date of death of the deceased.
7. Affidavits of Heirship should be listed in the runsheet by the Date of Death of deceased person about whom the Affidavit is being given.
8. Any Rights-of-Way should be listed in the runsheet, including road rights-of-way.
9. Run Oil and Gas indices, Deed of Trust indices, Probate indices, marriage records, etc. separately.
10. Run Lessee in mechanics and materialman's liens, and deed of trust indices.
11. Run term royalty or other term interests at least five years beyond the term.
12. All names should be "run-out" for at least a 10 year period after the person(s)/entity conveys their interest.
13. Fully "run-out" current Leasehold Estate, including any overriding royalty.
14. All time-expired Oil and Gas Leases should be listed in the runsheet and prior Leasehold within 10 years should be "run-out." To illustrate with an example, a recent catastrophic title bust occurred where an Oil Company drilled several wells on lands held by production because the runsheets covering the Oil Company's subject tract did not "go back" far enough to reveal that their subject tract was at one time part of a larger tract, which remained held by production by a single

well a considerable distance from the Oil Company's subject tract. The runsheet provided did not begin at sovereignty but at a date subsequent to production being obtained in the County.

15. Old Deeds of Trust should not be discounted and should be listed in the runsheet as Liens from the Federal Land Bank are valid for 50 years and could have been renewed and extended so that they could burden the subject land for a much longer time period. Additionally, old Deeds of Trust should be utilized to fill gaps in the chain of title.
16. Check mineral tax rolls.
17. Miscellaneous Records, Marriage Records and Death Records should not be neglected as many times these are the only records which may cure gaps in the chain of title, for example a widow who has remarried.
18. Obtain Tax Certificates (costs money) or Tax Statements (usually free of charge).
19. Community Lease, if due to NPRI/NPMI, non-executive interest owners should be "run-out."
20. The District Court Records should always be completely "run-out." (Cases filed in District Court Records such as civil lawsuits or divorce proceedings not filed in the County Clerk Records do not provide constructive notice.)
21. Provide (at a minimum) two (2) copies of a Tobin type plat (one copy with captioned lands highlighted and one clean copy for examining attorney) and if applicable: Appraisal District plat; subdivision plat; surveys recorded or attached to recorded instruments.
22. Include copies of current Oil and Gas Leases with the runsheet and any Amendments, Assignments, or Partial Releases thereof.
23. Do not forget to check the "day sheets" for any new instruments which may have been recently filed but not yet added to the records.
24. Inquire with County Clerk as to the closing dates of ALL the records researched and the "day sheets."
25. Include a Runsheet Certification Letter listing all the records researched and containing a closing date of the research examination period.

SELECTED PROBLEMATIC ISSUES IN OIL, GAS AND MINERAL TITLE

COMMUNITY LEASES

What is a Community Lease?

A Community Lease exists when separately owned tracts of land are included by the owners, as lessors in a single oil and gas lease. The separate tracts and all mineral and royalty interests within them are treated as pooled, on a surface acreage basis, for the duration of the lease as a matter of law, in the absence of an express provision to the contrary. *Parker v. Parker*, 144 S.W.2d 303 (Tex. Civ. App. 1940, error ref'd); *French v. George*, 159 S.W.2d 566 (Tex. Civ. App. 1942; *Southland Royalty Co. v. Humble Oil and Refining Co.*, 249 S.W.2d 914 (Tex. 1952).

What about non-executive interests burdening one of the tracts of a Community Lease?

Where the lessors are the owners of (or are otherwise authorized to commit) the tracts and all mineral and royalty interest within such tracts [executive rights owners], the act of granting a community lease with respect to the separately owned tracts results by implication as a matter of law in the pooling of the mineral and royalty interests in those tracts. However, such pooling by a community lease cannot be effective as to a non-participating royalty owner(s) in one of the tracts without the joinder or consent of the owner of such interest. *Montgomery v. Rittersbacher*, 424 S.W.2d 210 (Tex. 1968). [emphasis added].

The "implied offer to pool" under *Montgomery* places the non-executive interest owner in the "driver's seat" when deciding to ratify the community lease or not. To illustrate by example, a 1/2 of the royalty NPRI owner in a 20 acre tract is included in a 100 acre community lease. If it appears that for whatever reason no well will be drilled on the 20 acre tract, the NPRI owner will want to ratify the community lease in order to obtain a share of the production. On the other hand, if it appears that a well will be drilled on his specific 20 acre tract, the NPRI owner will likely not ratify because then his interest in production would be diluted. See Lynch "Problems Caused By Nonexecutive Interests Under Multi-Tract Leases: *Brown v. Smith to London v. Merriman*" State Bar Section Report Section 12-1990 at 3.

What if my Lease contains an "anti-entireties" clause or "anti-communitization" clause?

Many Texas Oil and Gas Leases contain "anti-entireties" clauses or "anti-communitization" clauses similar to:

If this lease now or hereafter covers separate tracts, no pooling or unitization of royalty interests as between any such tracts is intended or shall be implied or result merely from inclusion of such separate tracts within this Lease, but lessee shall nevertheless have the right to pool or unitize as provided above, with consequent allocation of production as provided above. As used in this paragraph, the words "separate tract" mean any tract with royalty ownership differing, now or hereafter, either as to parties or amounts, from that as to any other part of the leased premises.

In *Verble v. Coffman*, 680 S.W.2d 69 (Tex. Civ. App.-Austin 1984, no writ) and *London v. Merriman*, 756 S.W.2d 736 (Tex. Civ. App.-Corpus Christi 1988, writ denied) the Courts allowed a non-executive whose interest had been dedicated to a multi-tract lease to share in benefits accruing to lease tracts other than their own, irrespective of the fact that in both cases: (1) there had been no actual pooling of the non-executive's tract, either with other tracts covered by the lease or with external acreage; and (2) the executive rights owners and their lessee had inserted an "anti-entireties" clause or "anti-communitization" clause in the leases expressly providing that there was to be no apportionment of royalties among the separate tracts. See Lynch "Problems Caused By Nonexecutive Interests Under Multi-Tract Leases: *Brown v. Smith to London v. Merriman*" State Bar Section Report Section 12-1990 at 4.

The holdings in *Verble* and *London* reveal that Texas courts do not favor "anti-entireties" or "anti-communitization" clauses. Texas courts have suggested that anti-communitization can be obtained by expressly excluding the mineral estate of the "other" interest owners from the lease or by executing separate leases with regard to the tracts involved. See *Standard Oil Company v. Donald*, 321 S.W.2d 602, 606 (Tex. Civ. App.-Fort Worth 1959, writ ref'd n.r.e.). To be sure, there is substantial doubt as to whether anti-communitization may be achieved by relying on creative drafting measures because it may very well be that the holder of the executive right is precluded from excluding the non-executive's interest from a pooled unit without the non-executive's consent, failing which the executive may be exposed to liability. See Smith, "Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right", 64 Tex.L.Rev. 371 (1985).

STRIPS AND GORES

Example:

By Deed dated January, 7 1970, recorded in Volume 111, Page 55, Deed Records, Hypothetical County, John Smith & Company conveyed to the State of Texas, the surface only of 10.25 acres, A-1, for highway purposes.

Subsequently, by Warranty Deed with Vendor's Lien, dated April 1, 1972, recorded in Volume 333, Page 100, Deed Records, Hypothetical County, John Smith & Company conveyed 55.95 acres, A-1, directly adjacent to such 10.25 acres, A-1, to XYZ Corporation, described by metes and bounds as extending to the edge of the above described 10.25 acres, without reservation of the oil, gas and minerals, and without a specific reservation of the fee under such 10.25 acres, A-1.

The 10.25 acres, A-1, is entirely under State Highway 5.

Who owns the oil, gas and minerals in and under the 10.25 acres?

Under the Strips and Gores Doctrine, unless the grantor explicitly reserves with plain and specific language in a deed the fee in a narrow strip of land adjoining the conveyed land, it is presumed that a grantor had no intention of reserving the fee in such narrow, adjoining strip of land when the strip ceases to be of any use by virtue of the conveyance. *Cantly v. Gulf Production Co.*, 143 S.W.2d 912 (1940); *Cox v. Campbell*, 143 S.W.2d 361 (1940). According to well-established law in Texas, when a deed conveys land abutting a street, highway, or railroad right-of-way, title to the street, public highway, or railroad right-of-way also passes by the deed. See *State v. Fuller*, 407 S.W.2d 215 (Tex. 1966); See *Cox v. Campbell* 143 S.W.2d 361 (1940); See *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080 (1932); See *Reagan v. Marathon Oil Company*, 50 S.W.3d 70 (Tex. App.-Waco 2001, no pet'n). This presumption is not overcome by the fact that the deed describes the abutting land by metes and bounds extending to the edge of the highway. *State v. Williams*, 335 S.W.2d 834, 836 (Tex. 1960); *Cox v. Campbell* 143 S.W.2d 361, 366 (1940); *Bitulithic Co. v. Warwick*, 293 S.W. 160, 162 (Tex. Comm'n App. 1927, judgm't adopted). Nor is the presumption overcome by phrases such as "save and except" or "not including the road." See *Haines v. Mclean*, 276 S.W.2d 777, 782 (1955); *Lewis v. East Tex. Fin. Co.* 146 S.W.2d 977, 981 (1941).

While the cases cited above concern rights-of-way created by easements, the same rule applies to a mineral estate lying beneath a public highway in which the State holds a fee in the surface estate.

See *Krenek v. Texstar N. Am., Inc.*, 787 S.W.2d 566, at 567-69 (Tex. App.-Corpus Christi 1990, writ denied); *Melton v. Davis*, 443 S.W.2d 605, 610 (Tex. Civ. App.-Tyler 1969. writ ref'd n.r.e.).

The above presumptions do not apply if the strip is larger and more valuable than the conveyed tract. *Angelo v. Biscamp*, 441 S.W.2d, 524, 527 (Tex. 1969). [emphasis added].

RIGHT-OF-WAY V. FEE

Where an instrument conveys the land and not a "right-of-way, privilege or easement over the land", the conveyance is in fee simple as opposed to a mere easement, even though such instrument may contain the subsequent attempt to limit the use of land conveyed for a street or other recited purpose. 4 Fred A. Lange & Aloysius A. Leopold, *Land Title and Title Examination* § 382 (Texas Practice 2d ed. 1992).

There are two (2) lines of authority as to whether an instrument conveys only an easement or conveys a strip of land in fee, one represented by *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.* 157 SW 737 (1913) and the second represented by *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453 (1890) and *Brightwell v. International-Great Northern R. Co.* 121 Tex. 338, 49 S.W.2d 437, 84 A.L.R. 265. The first line of cases, as in *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, hold that a deed (which by the terms of the granting clause grants, sells, and conveys to the grantee a "right-of-way" in or over a tract of land) conveys only an easement. The second line of cases, as in *Calcasieu Lumber Co. v. Harris*, and *Brightwell v. International-Great Northern R. Co.*, hold that a deed in which the granting clause grants, sells and conveys a tract or a strip of land conveys the title in fee, even though in a subsequent clause or paragraph of the deed, the land conveyed is referred to as a right-of-way. 4 Fred A. Lange & Aloysius A. Leopold, *Land Title and Title Examination* § 382 (Texas Practice 2d ed. 1992).

Further, subsequent recitals as to use do not operate to limit the grant to a mere easement if the granting clause conveys the land in fee. The Texas Supreme Court held in *Texas Elec. Ry. Co. v. Neale*, 252 S.W.2d 451 (1952) that where the granting clause described the property and a subsequent paragraph provided that the grantee should, "...establish a stop on the right-of-way heretofore conveyed..." and "...this deed is made as a right-of-way deed..." that such quoted words did not define or limit the estate conveyed or have the effect of reducing to an easement the fee title conveyed by the granting clause. *Id.*

PROPER LESSOR OF STREETS AND ROADS

If you have determined that that the road traversing your tract was conveyed in fee to a governmental entity or municipality, who is the proper Lessor?

COUNTY ROADS:

Public Roads belong to the State, and that the State has full control and authority over same is now well settled. *State v. Hale* 146 S.W.2d 731 (Tex. 1941). Additionally, the State owns the roads and highways irrespective of the manner in which the deed is made, making no difference that the legal title was conveyed to one as County Judge of a particular county. *Travis County v. Trogden*, 31 S.W. 358 (1895); *Boone v. Clark*, 214 S.W. 607 (Tex. Civ. App.-Fort Worth 1919, writ refused); *Robbins v. Limestone County* 268 S.W. 915 (1925).

When an opportunity to execute an Oil, Gas and Mineral Lease covering a strip of land arises, the question then presents itself as to whether the State or the county is the proper party to execute the Lease as Lessor. It has been held that the State and not the county owns the roads and highways, irrespective of the manner in which the deed is made, making no difference that the legal title was conveyed to one as county judge of a particular county.

"When the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and people thereof."

The Texas Attorney General in an opinion dated July 5, 1960, stated that the State would be the proper Lessor in a Oil, Gas and Mineral Lease covering road strips, saying further that former Article 5421p concerning the leasing of lands of political subdivisions would not be applicable, and that such statute by its specific terms would apply only to such lands as may be owned by a political subdivision.

LEASING AND POOLING OF STATE HIGHWAY TRACTS.

A previous statutory provision that prohibited leasing highway tracts within "producing areas" has been eliminated. Currently, Texas Natural Resource Code § 32.002(c) specifically provides that "...oil and gas underlying land not located within a producing area or that is leased for the specific purpose of drilling a horizontal well may be leased under the provisions of § 32.201 of this code." The statute also authorizes pooling of leased highway tracts within

a producing area. Texas Natural Resource Code § 32.002 (A-1). The leasing process is initiated by written application to the General Land Office including a plat depicting the boundaries of the highway tract proposed for lease. Names and addresses of adjacent mineral owners should be provided for notice purposes, and adjacent mineral owners have a preferential right to lease the right-of-way adjoining their mineral interest. If adjacent lands to such highway tract are leased, the proposed Oil and Gas Lease must be on the most favorable lease terms of any adjacent lands. If no such leases on lands adjacent to such highway tract exist, the School Land Board will set the terms of the lease. The Oil and Gas Lease issued by the General Land Office will authorize pooling.

HOW TO POOL A HIGHWAY TRACT WITHOUT LEASING.

The School Land Board has long had the authority to pool unleased riverbeds and channels on terms that approximate the terms of an adjacent tract that is leased and pooled. Effective September 1, 2009, the School Land Board now has this same authority to pool unleased highway tracts using the same procedure. The Texas General Land Office staff takes the position that a pooling applicant under this statute, Texas Natural Resource Code § 32.207, need not notify or obtain waivers from other persons who may have a preferential right to lease the highway under Texas Natural Resource Code Chapter 32 in order to pool under the statute. This little known provision to pool without leasing can save significant time compared to the normal leasing and then pooling procedure for highway tracts.

DEDICATION BY PLAT V. DEDICATION BY DEED

Is there a difference between a Dedication of roads listed on a Survey Plat and a Dedication made by instrument such as a Dedication Deed?

Texas Courts have held that a dedication made on a plat creates only an easement. *Humble Oil & Refining, Co. v. Blankenburg*, 235 S.W.2d 891, 893 (1951).

For example:

A Subdivision Plat of the G.O. Newman Subdivision of Hidalgo County School Lands Survey, dated September 1926, recorded in Volume 4, Page 3, Map Records, Hidalgo County, Texas, whereby G.O. Newman, on December 9, 1926, dedicates to the public the roadways depicted on the aforementioned Subdivision Plat.

Since the public only obtained an easement in the land dedicated for its use, the minerals underlying the adjacent county roads adjoining tracts within the G.O. Newman Subdivision are owned to the centerline of the roads by the adjacent land owners.

Conversely, for a dedication made via an instrument such as a Dedication Deed, use of the words "dedicate" or "dedication", rather than "grant" or "convey", fail to establish, as a matter of law, the grantor's intent to convey only an easement. *Russell v. City of Bryan*, 919 S.W.2d 698, 702-703 (Tex. App.-Houston [14th Dist.] 1996, writ denied). A dedication includes, but is not limited to, a restrictive covenant, permanent easement and fee simple donation. 31 TEX. ADMIN. CODE § 15.2 (1995). Dedication is defined as, "...the appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." BLACK'S LAW DICTIONARY 412 (6th ed. 1990). Thus, Courts have held that the extent of the estate conveyed in a dedication by deed is determined by the grantor's intent. *Russell*, 919 S.W.2d at 703.

So what do you look for to determine the grantor's intent?

Texas Courts have indicated that the following are some evidence of the grantor's intent to convey fee simple, to wit:

- A. The instrument contains a habendum clause and warranty of title.
- B. The dedication instrument never used the term "easement."
- C. The dedication instrument describes the property as "all that certain tract..." [emphasis added].
- D. The dedication instrument contains a revisionary clause indicating "...the aforesaid described tract of land shall revert..." rather than merely terminating an easement or stating that the "use" of the land shall cease. *Russell*, 919 S.W.2d at 705.

INTESTATE DESCENT AND DISTRIBUTION

SEE ATTACHED EXHIBITS "A-1" AND "A-2" FOR DESCENT
AND DISTRIBUTION SHEET

For the community property of an intestate decedent who died prior to September 1, 1993 and was married and had children, the decedent's surviving spouse retains his/her one-half of the

community property and the decedent's children inherit the decedent's one-half of the community property. TEX. PROB. CODE § 38.

For the separate property of an intestate decedent, if the decedent was survived by a spouse and by children, the decedent's surviving spouse inherits a life estate in one-third (1/3) of the decedent's separate property with remainder to the decedent's children, and the children inherit two-thirds (2/3) of the decedent's separate property. *Id.*

For the separate property of an intestate decedent, if the decedent had no surviving spouse but had children, the decedent's children inherit all of the decedent's separate property. *Id.*

For the separate property of an intestate decedent, if the decedent was survived by a spouse but had no children, the decedent's surviving spouse inherits one-half (1/2) of the decedent's separate property and the decedent's father inherits one-fourth (1/4) of the decedent's separate property and the decedent's mother inherits one-fourth (1/4) of the decedent's separate property. *Id.*

For the separate property of an intestate decedent, if only one parent survives the decedent, that parent inherits one-fourth (1/4) of the decedent's separate property and the decedent's brothers and sisters and/or their decedents, per stirpes, inherit the other one-fourth (1/4) of the decedent's separate property. *Id.*

For the separate property of an intestate decedent, if only one parent survives the decedent and the decedent had no brothers and sisters, then the surviving parent inherits one-half (1/2) of the decedent's separate property. *Id.*

For the separate property of an intestate decedent, if the decedent had no surviving parent, the decedent's brothers and sisters inherit one-half (1/2) of the decedent's separate property. *Id.*

LANDS DESCRIBED V. LANDS CONVEYED

What are the ramifications of and distinctions between "Lands Herein Described" and "Lands Herein Conveyed"?

In *Hooks v. Neil*, 21 S.W.2d 532 (Tex. Civ. App.-Galveston 1929, writ ref'd), the grantors owned an undivided 1/2 interest in land that they conveyed, reserving 1/32 "of all oil on and under the said land and premises herein described and conveyed." In their lawsuit they argued that they had reserved a full 1/32 of oil produced from the entire tract. Focusing on the term "conveyed," the court of appeals, however, felt that by using the word "conveyed" the grantors

reserved only a 1/64 interest because the mathematical equation was a 1/32 reserved interest in the 1/2 of the land "conveyed." Nickum, "Mineral and Royalty Conveyances - A Set of Forms With Commentary" 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004.

In *King v. First National Bank*, 192 S.W.2d 260 (Tex. 1946) the grantor owned an undivided 1/2 interest in land which he conveyed, reserving "an undivided one eighth of the usual and customary one eighth royalty...in oil and gas and other minerals that may be produced from the hereinabove described land." The court distinguished "described" from "conveyed" in holding that the grantor retained a 1/64 royalty under the entire tract "described" in the deed. Nickum, "Mineral and Royalty Conveyances - A Set of Forms With Commentary" 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004.

Under the doctrine enunciated in *Ayert v. Grande, Inc.* 717 S.W.2d 891 (Tex. 1986); *Middleton v. Broussard*, 504 S.W. 2d 839, (Tex. 1974); *King v. First National Bank*, 192 S.W.2d 260 (Tex. 1946); and *Hooks v. Neil*, 21 S.W.2d 532 (Tex. Civ. App.-Galveston 1929, writ ref'd), when a grantor who owns less than 100% of the minerals in lands ties a grant or reservation of an undivided part of the minerals or royalty to the words "the lands described herein" or "the lands conveyed" a different fraction of interest may result from the phrase selected. Where a fraction granted or reserved in a deed is stated to be an interest in the land described in the deed, the fraction is to be calculated upon the entire mineral interest in the lands described. Conversely, where a fraction granted or reserved in a deed is stated to be an interest in the land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest. Nickum, "Mineral and Royalty Conveyances - A Set of Forms With Commentary" 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004.

RESERVATION TO A THIRD PARTY STRANGER

There can be no other recipient of a reservation other than the Grantor. A reservation of minerals or royalty may not be made in favor of third parties who are strangers to the transaction. *Little v. Linder*, 651 S.W. 2d 895 (Tex. App.-Tyler 1983, writ ref'd n.r.e.); *Joiner v. Sullivan*, 260 S.W.2d 439, 440 (Tex. Civ. App.-Texarkana, 1953, writ ref'd); See also *Jackson v. McKenney*, 602 S.W.2d 124, 126 (Tex. Civ. App.-Eastland 1980, writ ref'd n.r.e.). Examples of reservations which are inoperative:

1. There is reserved unto Grantors and their seven children.
2. There is reserved unto the children of the Grantor.

3. There is reserved unto my brother, John Jones.
4. Save and except, and there is reserved unto Grantor and his wife.

To further illustrate an inoperative reservation unto a Grantor and his wife is the example set forth below:

The Last Will and Testament of Janey Doe Smith, Deceased, recorded as Probate Cause No. 1111, Probate Records, Hypothetical County devised an undivided 1/2 interest in Blackacre to her son, Johnny Smith, Jr.

The undivided 1/2 interest of Johnny Smith, Jr. devised to him under the Last Will and Testament of Janey Doe Smith recorded as Probate Cause No. 1111 Probate Records, Hypothetical County, is the separate property of Johnny Smith, Jr.

By Warranty Deed, dated May 1, 2008 recorded in Volume 465, Page 143, Official Records, Johnny Smith, Jr. conveyed to James Doe an undivided 1/2 interest in Blackacre, reserving unto Johnny Smith, Jr. and wife, Susan Smith, an undivided 1/32 Non-Participating Royalty Interest.

When a husband conveys separate property, reserving an interest in minerals and or royalty to himself and his wife, the reservation vests no interest in the wife. *Canter v. Lindsey*, 575 S.W.2d 331, 335 (Tex. Civ. App.-El Paso 1978, writ ref'd n.r.e.); *Woldert v. Skelley Oil Co.*, 202 S.W.2d 706, 709 (Tex. Civ. App.-Texarkana 1947, writ ref'd n.r.e.).

The corollary to the rule that a reservation in a deed cannot be made in favor of a stranger is that a recital within a reservation will convey nothing to a stranger. An example of a remainder reservation which is inoperative:

Save and except, and there is reserved unto the Grantor for life an undivided one-third of the minerals in and under and that may be produced from the premises, with remainder to Grantor's brother, Bob Smith. Nickum, "*Mineral and Royalty Conveyances - A Set of Forms With Commentary*" 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004.

COMMUNITY AND SEPARATE PROPERTY ISSUES

Under Tex. Fam. Code Ann. § 3.001, separate property consists of only that property acquired before marriage and that acquired during marriage by gift, devise or descent or as recovery for personal injuries. The character of property as separate or community is

determined and becomes fixed at the time of acquisition. *Smith v. Buss*, 144 S.W.2d 529, 532 (Tex. 1940); *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898).

In many instances deeds to a grantee will list the husband only and will not include the name of the wife. As a consequence, if the grantee is married at the time of the conveyance, the wife's one-half (1/2) community property interest could be overlooked.

For example:

By Warranty Deed, dated June 1, 1941, recorded in Volume 111, Page 200, Deed Records, Hypothetical County, James B. Johnston conveyed Blackacre to Joe Smith.

Joe Smith and Alice Smith were married on February 18, 1930.

Joe Smith died testate on January 17, 1963, devising his 1/2 community property interest in all lands in Hypothetical County, Texas, including Blackacre, to Mary Smith as Trustee of the Testamentary Trust under the Last Will and Testament of Joe Smith.

Alice Smith who owned a 1/2 community property interest in a portion of the captioned lands died intestate on November 7, 1964, leaving Mary Smith and Carrie Smith as her sole heirs.

By Warranty Deed, dated September 7, 1981, recorded in Volume 655, Page 824, Deed Records, Hypothetical County, Carrie Smith conveyed all right, title and interest in Blackacre to Mary Smith, Testamentary Trustee, under the Will of Joe Smith.

By Warranty Deed, dated September 16, 1981 recorded in Volume 655, Page 828, Deed Records, Mary Smith, Independent Executor and Testamentary Trustee under the Will of Joe Smith, Deceased, conveyed Blackacre to Rob Roy.

Mary Smith did not execute the above Warranty Deed recorded in Volume 655, Page 828, Deed Records, in her Individual capacity but only as Independent Executor and Testamentary Trustee under the Will of Joe Smith. Mary Smith would be credited with an undivided one-half (1/2) of one-half (1/2) interest in Blackacre, inherited from her mother, Alice Smith.

LIFE ESTATES AND THE OPEN MINE DOCTRINE

Is there a difference between life estates created by will, by intestacy, by virtue of homestead rights, and by trust?

All life estates are the same regardless of how they are created. Life estates created by voluntary agreement, such as by will or Deed, are called conventional life estates. Those created by operation of law, such as by intestacy or by virtue of homestead rights, are called legal life estates. Both conventional and legal life tenants are under the duty to not commit waste by producing oil or gas. See *Davis v. Bond*, 138 Tex. 206, 158 S.W.2d 297 (1942). In determining whether the "open mine" doctrine applies, there is no distinction between a legal and conventional life estate. See *Youngman v. Shular*, 155 Tex. 437, 288 S.W.2d 495 (1956). One holding land by virtue of homestead rights is regarded as a life tenant. See *Youngman*, 288 S.W.2d at 496 citing *Petrus v. Cage Bros.*, 128 S.W.2d 537 (Tex. Civ. App.—San Antonio 1939, writ ref'd). An important distinction between conventional and legal life estates is that with a conventional life estate the instrument creating the life estate may give the life tenant rights to execute leases and receive and use royalties. *Glass v. Skelly Oil Company*, 469 S.W.2d 237 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

The "Open Mine Doctrine" which entitles the life tenant to treat all proceeds payable during the life tenant's lifetime as income and dispose of such proceeds accordingly, applies when the property is leased for oil and gas, prior to the creation of the life estate, even if production has not commenced at the time the life estate is created. See *Youngman v. Shular*, 288 S.W.2d 495 (Tex. 1956). The *Youngman* Court followed the theory that by leasing the land, the former owner had dedicated the land to mineral development, thus "opening" the mine. As such, the life tenant is entitled to all proceeds from the sale of production from wells drilled under the terms of the lease in effect at the creation of the life estate.

Can you safely drill a well if you have a lease signed by the life tenant but not the remainderman?

What if the lease is signed by the remainderman but not the life tenant?

The life tenant is prohibited from committing waste, and the remainderman does not have the present right to possession. Neither the life tenant nor the remainderman can develop, produce or sell oil and gas, or lease the land to others for that purpose without the joinder of the other. See *Kemp v. Hughes*, 557 S.W.2d 139 (Tex.

Civ. App.-Eastland, 1977, no writ). The life tenant's right of present use and enjoyment of the land does not include the right to consume or waste the corpus by selling the minerals. See *Davis v. Bond*, 138 Tex. 206, 158 S.W.2d 297 (1942). The execution of a lease constitutes the sale of a fee simple determinable interest in the mineral estate, and the life tenant may not sell any portion of the fee. The production and sale of minerals likewise are considered a sale of a portion of the fee or corpus. The remainderman does not have the right to use or possess the property until the death of the life tenant, and thus cannot lease the property for the development of minerals. Bredthauer, at 4.

If a life tenant and the remainderman join in the execution of an oil and gas lease, how should the typical lease benefits such as bonus, rentals, and royalty be paid?

The life tenant is entitled to income and other benefits generated from the use of land during the life tenancy such as farming or ranching income or rental payments, but a life tenant may not sell any portion of the corpus. The life tenant is entitled to keep delay rentals because they are considered as rents or income from the land. See *Texas Co. v. Parks*, 247 S.W.2d. 179 (Tex. Civ. App.-Fort Worth, 1952, writ ref'd n.r.e.) Lease bonuses are considered payment for the sale of the fee simple determinable estate and are therefore considered principal. See *Andrews v. Brown*, 283 S.W. 288 (Tex. Civ. App.-Austin, 1926), aff'd, 10 S.W.2d 707 (Tex. Comm'n. App. 1928). Royalties are payments for the sale of the portion of the mineral estate produced and are considered as principal. See *Davis V. Bond*, 138 Tex. 106, 158 S.W.2d 297 (1942). Bredthauer, at 4.

While it would be prudent to pay royalties or bonus payments jointly to the life tenant and the remainderman or to secure their joint instructions as to how the payments are made, it is not required. Even if the lease is jointly executed by the life tenant and the remainderman, a purchaser of production may make royalty payments directly to the life tenant. See *Enserch Exploration, Inc. v. Wimmer*, 718 S.W.2d 308 (Tex. App.-Amarillo 1986, writ ref'd n.r.e.). Bonus and royalty payments are considered corpus, and the life tenant is entitled to the use and enjoyment of the payments for life, but he may not consume the corpus which must be retained for the remainderman. See *Clyde v. Hamilton*, 414 S.W.2d 434 (Tex. 1967). The life tenant's right to use and possession of the corpus includes a duty to manage it prudently, to appropriate only the income from it, and to invest the proceeds in such a manner as to not diminish the corpus. See *Wagnon v. Wagnon*, 16 S.W.2d 366 (Tex. Civ. App.-Austin 1929, writ ref'd), *overruled on other grounds*, *Magids v. American Title Insurance Co.*, 473 S.W.2d 460, 466 (Tex.

1971). The life tenant is only entitled to the interest earned on invested bonuses and royalties. If the life tenant is violating this duty and wasting the corpus, a remainderman may be able to obtain a receivership or require the posting of a bond. See *Enserch Exploration, Inc. v. Wimmer*, 718 S.W.2d at 312 and *Ramirez v. Flag Oil Corp.*, 266 S.W.2d 270 (Tex. Civ. App.-San Antonio 1954, no writ). Bredthauer, at 4.

What if a lease is signed by a life tenant or a remainderman, but not both?

Suppose a life tenant executes a lease to Company A and then later, the life tenant, joined by the remainderman, executes a lease to Company B, can either Company A, under the lease executed solely by the life tenant, or Company B, under the joint lease safely develop the property?

These questions were addressed by the court in *MCZ, Inc. v. Smith*, 707 S.W.2d 672 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). The holders of the joint lease, Company B, argued that the lease to Company A, signed by only the life tenant, was ineffective because the remainderman did not join in the lease. The court rejected the argument reasoning that although neither a life tenant nor a remainderman may execute a valid mineral lease without the joinder of the other, that is not the equivalent of holding that a lease by just one and not the other is totally ineffective. The court then held that neither lease was considered a nullity and, in effect, the execution of a lease by either the life tenant or the remainderman affects a transfer to the lessee of the veto power of the lessor over the development by the other. See *MCZ, Inc.*, 707 S.W.2d at 679. The lease to Company A was effective to convey the life tenant's right to lease her life tenancy interest. The lease to Company B was not effective as to the life tenant because the life tenant had already transferred her rights to Company A. The lease to Company B was considered the same as if it had been executed by only the remainderman and was effective as a transfer of the remainderman's rights, subject to the terms of the lease. Neither Company A nor Company B acquired the right to develop the land by virtue of the leases. Bredthauer, at 4.

Suppose a life estate is created in just the mineral interest in a tract of land and, at the time the life estate is created, the land was under lease but the lease subsequently expired. Would the life tenant have the right to execute leases after the expiration of the lease in effect at the time the life estate is created?

Under the common law, if a mine had been opened on a tract of land prior to the creation of the life estate, the life tenant would be entitled to the production and income from the mine as opposed to just the interest income from the investment of the proceeds from the sale of the minerals as is the case absent the application of the doctrine. See *R.W. Hemingway, The Law of Oil and Gas*, § 5.2 at Page 239 (3rd ed. 1991).

A compelling argument could be made that in a situation where a life estate is created in just the mineral interest in a tract of land, the life estate would be worthless unless the life tenant was entitled to lease the property without the required joinder of the remainderman. Otherwise, what use could the life tenant make of the mineral estate in the land? This issue was before the court in *Bergendahl v. Blanco Oil Company*, 440 S.W.2d 81 (Tex. Civ. App.-Eastland 1969, writ ref'd n.r.e.). There, the Court held that the open mine doctrine did not apply even though the life estate was created in only a mineral interest. If the leases which were in effect when the life estate was created subsequently terminate, the open mine doctrine would not apply to future leases. Bredthauer, at 5.

POOLING AND UNLEASED INTERESTS

What if you have an unleased interest in the drill-site tract?

The unleased mineral owner within the drill-site tract is simply an unleased mineral co-tenant who would be entitled to receive his proportionate share of production from the drill-site tract after the operator has recovered reasonable and necessary costs of drilling, producing and marketing the production. *Cox v. Davison*, 397 S.W.2d 200 (Tex. 1965); *White v. Smythe*, 214 S.W.2d 967 (Tex. 1948). Ellis, "Pooling And Unitization: Issues Arising From Unpooled or Unleased Interests" Advanced Oil, Gas & Energy Resources Law Course, State Bar of Texas 2002 at 3.

O.K., so what if you have an unleased interest in a Non-drillsite tract?

The general rule with respect to unpooled interest in non-drillsite tracts is that the unpooled interest owner is not entitled to participate in unit production. Ellis, "Pooling And Unitization: Issues Arising From Unpooled or Unleased Interests" Advanced Oil, Gas & Energy Resources Law Course, State Bar of Texas 2002 at 4.

In the case of Superior Oil Company v. Roberts, 398 S.W.2d 276 (Tex. 1965), the Plaintiffs [Roberts] owned an undivided 1/2 interest in 6 town lots. Craven and Todd owned the remaining interest and later executed an oil and gas lease with Superior Oil Company purporting to cover all interests in the 6 lots. Superior then included the 6 lots in a unit, and production was obtained from the unit but no wells were drilled on the 6 lots in which the Plaintiffs held an interest. Superior paid royalties only to Craven and Todd based on 100% ownership of the 6 lots. There was no evidence that Superior prevented Roberts from developing the minerals in the lots. Roberts then sued for an accounting. Ellis at 4.

Roberts argued "the pooling of the lots and obtaining production from unitized area [was the same as] actual production from such town lots." Superior, 398 S.W.2d at 277. The Texas Supreme Court rejected this theory, and responded that "had Superior produced from the town lots in which the Roberts have an undivided 1/2 interest, it would have to account to Plaintiffs for their share of the minerals less the necessary and reasonable costs of producing and marketing the same." The Roberts also asserted they were entitled to 1/2 of Superior's working interest, but the Texas Supreme Court stated at Page 278:

We cannot agree with this argument. Obviously any move taken by Superior acting in connection with [Craven and Todd] could not operate to place Plaintiffs' property under lease or make it a part of a unitized area without Plaintiffs' consent or acquiescence. No minerals were produced from their property. They had no contractual relationship with Superior or the owners of interests in the unitized lands which would give them rights in and to minerals produced from the unit but not produced from their lands. Ellis at 4.

Other cases have followed the rule of Superior v. Roberts. In Donnan v. Atlantic Richfield, 732 S.W.2d 715, (Tex. App.-Corpus Christi, 1987, writ denied), Huisache and Atlantic Richfield acquired several leases in San Patricio County and executed a unit designation covering 329.66 acres. The Donnan Plaintiffs owned an undivided interest in a 38 acre tract and an 8 acre tract, both of which were

within the boundaries of the pooled unit. Neither Huisache nor Atlantic Richfield leased the Donnan Plaintiffs' interest, and there was no evidence of any attempt to lease the interest. *Id.* At 716. Huisache and Atlantic drilled a producing gas well on the unit which was not located on the Donnan Plaintiffs' property. Ellis at 4-5.

The Donnan Plaintiffs sued in an attempt to recover a proportionate part of the production from the unit. The trial court granted summary judgment in favor of the operator, and the Appellate Court affirmed, stating:

Because no minerals were produced from the property and because they had no contractual relationship with Atlantic, Huisache, or any of the owners of interest in the unitized lands, Plaintiffs had no rights to minerals produced from the unit without the boundaries of their land. The trial court properly granted summary judgment since Plaintiffs failed to state a cause of action upon which they could recover damages. *Id.* at 717.

The rule announced in *Superior Oil Company v. Roberts* has been followed by other later cases, including *Hunt Oil Company v. Moore*, 656 S.W.2d 634 (Tex. App.-Tyler 1990, writ ref'd n.r.e.) and *Sun Exploration & Production Company v. Pitzer*, 822 S.W.2d 294 (Tex. App.-Eastland 1991, writ denied). Ellis at 5.

In light of the foregoing case law regarding unleased interests in non-drillsite tracts, there appear to be four possible strategies available to the operator:

1. The operator may affirmatively seek a ratification of its unit or lease from the unleased mineral owner and amend the unit designation to include the unpooled owner's interest or lease;
2. The operator may hold in escrow funds attributable to the royalty interest that would be due the unpooled owner in the event the unpooled owner should later ratify or bring suit;
3. The operator may calculate royalty on a surface acre basis and retain any unpaid royalties as a part of its net revenue interest;
4. The operator may seek to calculate royalties on a net mineral acre basis and effectively exclude the unpooled mineral owner. Ellis at 7-8.

Each of the above strategies presents advantages and disadvantages and has varying degrees of support in the case law or other authorities. Ellis at 8.

HELPFUL RESEARCH LINKS

- I. www.oilgas.org/DrawOnePage.aspx?PageID=14 (Title Standards)
- II. The Texas Railroad Commission: www.rrc.state.tx.us
- III. The Texas Secretary of State: www.sos.state.tx.us
- IV. The Texas General Land Office: www.glo.state.tx.us
- V. Hidalgo County Clerk's Office: www.hidalgo.tx.us.landata.com
- VI. Webb County Clerk's Office: <http://www.webb.tx.us.landdata.com>
- VII. Tarrant County Clerk's Office:
www.tarrantcounty.com/eCountyClerk/site/default.asp
- VIII. Dallas County Clerk's Office:
www.realestate.countyclerk.dallascounty.org
- IX. The State Bar of Texas Oil And Gas Resources Section:
www.oilgas.org
- X. The State Bar of Texas: www.texasbar.com
- XI. Public Records Search: <http://proagency.tripod.com/tx-pr.html>
- XII. Texas Appraisal Districts:
<http://home.austin.rr.com/graf/index.html>
- XIII. Link to vital statistics: www.vitalsearch-worldwide.com
- XIV. Nation-wide Telephone Book: www.whitepages.com
- XV. Drilling Information: www.info.drillinginfo.com

Thank You!

Should anyone have any questions, comments or concerns, please do not hesitate to contact me at mbrowning@burlesonllp.com.

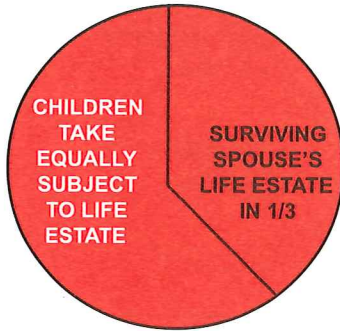
EXHIBIT "A-1"

TEXAS DESCENT AND DISTRIBUTION

(THE LEGAL EFFECT OF NOT HAVING A WILL)

MARRIED PERSON WITH CHILD[REN]

A. SEPARATE PROPERTY REAL ESTATE



ALL REALTY IS OWNED BY DECEDENT'S CHILD[REN] WHEN SURVIVING SPOUSE DIES.

ALL OTHER PROPERTY



B. COMMUNITY PROPERTY REAL ESTATE



ONLY APPLIES IF

ALL SURVIVING CHILD[REN] AND DESCENDANTS OF DECEDENT ARE ALSO CHILD[REN] OR DESCENDANTS OF SURVIVING SPOUSE.

ALL OTHER PROPERTY



B. COMMUNITY PROPERTY REAL ESTATE



ONLY APPLIES IF

THERE ARE CHILDREN FROM OUTSIDE OF THE EXISTING MARRIAGE ON THE DATE OF DEATH OF THE DECEASED. CHILD[REN] OF DECEASED CHILD[REN] TAKE THEIR PARENT'S SHARE SUBJECT TO ADVANCEMENTS.

ALL OTHER PROPERTY

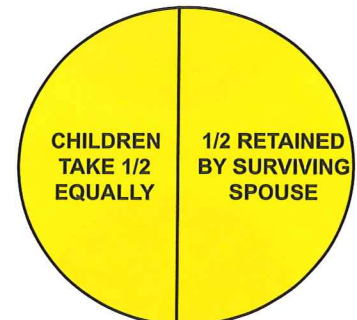
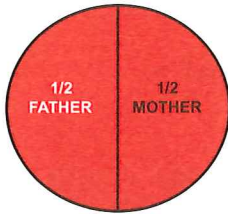


EXHIBIT "A-2"

SINGLE OR WIDOWED PERSON

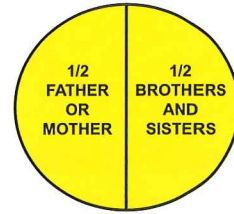
FATHER AND MOTHER SURVIVING ONLY



WITH NO CHILD[REN]

ENTIRE ESTATE GOES TO PARENT IF NO SIBLINGS OR THEIR DESCENDANTS SURVIVE DECEDENT.

PARENT AND SIBLINGS SURVIVE



REAL ESTATE



WIDOW[ER] WITH CHILD[REN]

ANY CHILD[REN] TAKE THEIR SHARE SUBJECT TO ADVANCEMENTS.

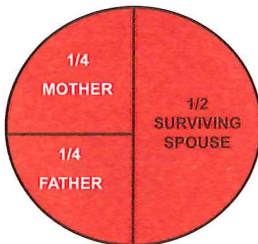
ALL OTHER PROPERTY



A. SEPARATE PROPERTY

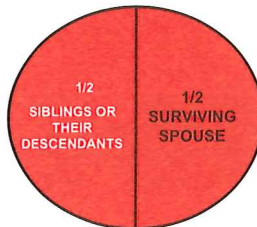
REAL ESTATE

1. PARENTS SURVIVE



MARRIED PERSON WITH NO CHILD[REN]

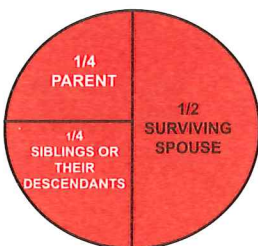
4. NO SURVIVING PARENT



ALL OTHER PROPERTY



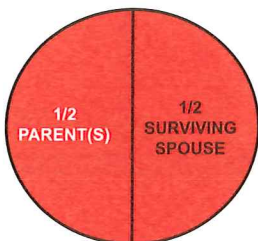
2. ONE PARENT SURVIVES



5. NO SIBLINGS [DESCENDANTS] OR PARENTS



3. NO SIBLINGS OR THEIR DESCENDANTS



B. COMMUNITY PROPERTY: ALL REAL AND PERSONAL PROPERTY IS TAKEN BY SURVIVING SPOUSE

Caveat: See, Texas Probate Code §42, Inheritance Rights of Illegitimate Children; and, §47(a), Heirs Required Survival by 120 Hours.