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ARKANSAS TITLE 101 -
A 30 MINUTE PRIMER ON
ARKANSAS CONVEYANCE
LAW

William C. Warren, Jr.

ARKANSAS TITLES 101

A 30 MINUTE PRIMER ON ARKANSAS CONVEYANCING LAW

WHO IS GIVING AND WHO IS GETTING?

GRANTORS

There isn't much to say about grantors. You take them as you find them. However, there are a couple of things you need to keep in mind. If the grantor is married their spouse must also sign the document in order to release the spouse's dower or curtesy rights. If one or more of the grantors live on the property to be conveyed their spouse(s) must convey their homestead rights.

Dower and Curtesy (Std. 7.5¹) – the provision the law makes for a widow or widower out of the lands of the deceased spouse for the support of the surviving spouse and the children. In Arkansas how much of the decedent's estate is subject to dower and curtesy depends on who the surviving heirs are and whether the property is a new acquisition or ancestral property.

1. If a decedent leaves a surviving spouse and a child or children, the surviving spouse gets 1/3 of all lands for life without regard as to how the lands were acquired (A.C.A. 28-11-301).
2. If a decedent leaves a surviving spouse and no children, the surviving spouse gets 1/2 of the lands in fee simple that were not ancestral and is entitled to a life estate in 1/2 of ancestral lands (A.C.A. 28-11-307).

Dower and curtesy may be released by execution of the same instrument or by execution of a separate instrument. Prior to March 25, 1981 this rule applied only to dower interests. Before then a married woman who held property in her own name could convey without the husband's signature, eliminating any curtesy rights the husband had (A.C.A. 28-11-201). Specific language releasing dower and curtesy is common in Arkansas forms but not necessary.

Homestead (Std. 7.5) - In Arkansas homestead is defined by A.C.A. 16-66-210 as:

1. Domicile of an individual or family, **not within any city, town or village**, may consist of not more than 160 acres of land if less than \$2,500 in value, or 80 acres of land without regard to value.
2. Domicile of an individual or family **within any city, town or village**, may consist of not more than one acre of land unless the equity value exceeds the sum of \$2,500 or up to 1/4 acre without regard to value.

¹ All references to "Std." refer to the Title Standard set out in the 2000 Edition of the Standards for Examination of Real Estate Titles in Arkansas published by the Arkansas Bar Association.

3. Any homestead outside any city, town, or village, owned and occupied as a residence, which is annexed to or made part of an incorporated city or town within the State of Arkansas, shall retain its exemption under subdivision (c)(1) of this section as long as the land on which it is located remains rural in nature and has a significant agricultural use.

Once property has been designated as a homestead it will not be considered abandoned if the owner temporarily lives elsewhere. Abandonment is largely a question of intent, Monroe v. Monroe, 250 Ark. 434, 465 S.W.2d 347 (1971). Before August 13, 1993 homestead rights could only be released by a single instrument signed by both spouses, Blackford v. Dickey, 302 Ark. 261, 789 S.W.2d 445 (1990). This was changed by A.C.A. 18-12-403.

GRANTEES

Husband and Wife (Std. 7.2)

Any conveyance to a husband and wife creates a tenancy by the entirety unless otherwise stated, Black v. Black, 199 Ark. 609, 135 S.W.2d 837 (1940). This is true even if the document does not state that the parties are husband and wife. As with any other joint tenancy upon the death of one spouse the property passes to the survivor. Also, as in other joint tenancies, a conveyance by one spouse does not destroy an estate by the entirety. It merely conveys any possessory rights and rights to income and profits. The last one living still gets property, Branch v. Polk, 61 Ark. 388, 33 S.W. 424. A divorce however, may destroy the tenancy by entirety, depending on when it occurred.

Before March 28, 1947 – a Court could only destroy a tenancy by the entirety with the consent of the parties since vested interests could not be affected retroactively.

Between March 29, 1947 and March 7, 1975 – A.S.A. 34-1215 (1947) gave Courts the power to dissolve a tenancy by entirety. However, there was no dissolution unless the Court specifically said so. Tenancies created prior to March 28, 1947 still could not be destroyed since they were vested interests and the statute was not retroactive, Jenkins v. Jenkins, 219 Ark. 219, 242 S.W.2d 124 (1951).

After March 8, 1975, a divorce decree automatically dissolves a tenancy by entirety unless specifically stated otherwise (A.C.A. 9-12-317).

Joint Tenants (Std. 8.1.3) - Before July 15, 1991 if the intent of the conveyance as determined by “the four corners of the deed” was to create a joint tenancy with right of survivorship then one was created, even without express wording (A.C.A. 18-12-106). After July 15, 1991 a conveyance must contain language expressly creating a joint tenancy or it will be a tenancy in common (A.C.A. 18-12-603).

Trusts (Std. 4.7.1 & 4.7.2) – It is unclear whether a trust can hold title to real property in Arkansas. There are no statutes and no case law. When conveying to a trust it is safer to put title into a trustee, i.e. James T. Kirk, Trustee of the James T. Kirk Interstellar Galactic Trust.

Even though title is actually going to the trustee it is vitally important to include the trust as part of the name of the grantee. A conveyance to James T. Kirk, Trustee, without mention of the trust conveys title to James T. Kirk, individually, not the trust (A.C.A. 18-12-604). The only exception to this rule is that property may be transferred to a trust by a Beneficiary Deed, which will be discussed later on (A.C.A. 18-12-608).

WHAT IS BEING GIVEN?

DESCRIPTIONS – (Std. 21)

We have all seen descriptions in a deed, mortgage or lease that make us wonder what in the world the preparer was smoking that day. The description may not close, it may not have a good point of beginning, it may be overly broad or it may just make no sense at all. If the description is truly indefinite then the document does not convey any title.

In general a conveyance must only describe the land with sufficient certainty to identify the land by any reasonable construction, Snyder v. Bridewell, 167 Ark. 8, 267 S.W. 561 (1924). If descriptive words within the document furnish a key to identification of the property, nothing more is required, Gibson v. Pickett, 256 Ark. 1035, 512 S.W.2d 532 (1974); Miller v. Best, 235 Ark. 737, 361 S.W.2d 737 (1962); Burns v. Meadors, 225 Ark. 1009, 287 S.W.2d 893 (1956); Turrentine v. Thompson, 193 Ark. 253, 99 S.W.2d 585 (1936). What does all this mean? Set out below are some examples provided by the Arkansas Supreme Court of valid and invalid descriptions that may be helpful.

1. The use of the word “part” invalidates a description unless the description goes on to specifically describe the part, Browning v. Hicks, 243 Ark. 394, 420 S.W.2d 545 (1967). However, the phrase "It is my intention to convey all of real estate belonging to me" has been held to be a sufficient key to identify the lands intended to be conveyed even though the abbreviation for part was used in the description. Example: Pt. E/2 NW/4 of Sec. 12-17N-4W was held valid since the phrase quoted above was included in the description, Ketchum v. Cook, 220 Ark. 320, 247 S.W.2d 1002 (1952).
2. If a description does not close it is defective making the instrument voidable. Thus a court could correct the defect in a suit for reformation.
3. If a description has an uncertain point of beginning it is void, Mode v. Henley, 227 Ark. 875, 302 S.W.2d 73 (1957) and cannot be reformed.
4. A description of “All property owned in County” is valid, Snyder v. Bridewell, 167 Ark.8, 267 SW 561 (1924).
5. An incorrect statement of acreage does not affect the validity of the description, Wyatt v. Wycough, 232 Ark. 760, 341 S.W.2d 18 (1960). If the deed calls for 100 acres but the tract actually described contains 253.93 acres the entire tract is conveyed, Scott v. Dunckel Box & Lumber Co., 106 Ark. 83, 152 S.W. 1025 (1912).

6. A legal description does not have to contain the name of the county if it contains the correct section, township and range, Stephens v. Ledgerwood, 216 Ark. 404, 226 S.W. 2d 587 (1950).

RIGHTS OF WAY

It is not uncommon to see a call in a description that either excepts a right of way or goes to the boundary line of a right of way, such as “the North right of way of Hwy. 96”. In either case, when a right-of-way is still in use there is a presumption that the conveyance extends to the center of the right-of-way unless a contrary intention is clearly stated, and this presumption applies to private and public roads and railroad rights-of-way, Abbott v. Pearson, 257 Ark. 694, 520 S.W.2d 204 (1975). A grantee takes to the center of an abandoned easement only when the grantor explicitly expresses that intention, Abbott, supra.

LIFE ESTATES

A life estate may be created through the operation of dower and curtesy, by reservation or by conveyance. I have set out below some items to keep in mind if you are dealing with a life estate or wish to create one.

1. Probably the life tenant and the remainderman have to execute an oil and gas lease or leases before you have an effective lease. There is no case law on this point but it makes sense that you need a commitment from both parties.
2. Bonus, delay rental and interest on royalty are income and are payable to the life tenant.
3. Royalty itself is considered part of the corpus and is reserved for the remainderman unless the Open Mine doctrine applies in which case the life tenant is entitled to the royalty. A lease alone is enough to open the mine, Warren v. Martin, 168 Ark. 682, 276 S.W. 367 (1925). As a practical matter most oil and gas companies obtain a payment directive from the parties directing them as to how to make payments.
4. If a life estate consists of the dower or curtesy of the surviving spouse, the life tenant is entitled to his or her fraction of the royalty (A.C.A. 28-11-304).
5. You cannot create a life estate in a stranger to the title by reservation, Rye v. Bauman, 231 Ark. 278, 329 S.W.2d 161 (1959). If Oliver Douglas owns Hooterville Farms you cannot reserve a life estate in Hooterville Farms in “Oliver **and** Lisa Douglas”. Such a reservation would create a life estate in Oliver only which could lead to you getting slapped by Lisa should you ever see her out on the street.

MINERAL RESERVATIONS AND CONVEYANCES

Strohacker Doctrine (Std. 19.5) - In Arkansas minerals have been traded, reserved, conveyed and bantered about since it became a state. Oil and natural gas however, have only been included in this horse trading for a little over a century. Why the late entry into the fray for oil and natural gas? A wonderful piece of legalese called the Strohacker Doctrine. The Strohacker Doctrine says that “A reservation or grant of “minerals” or “mineral rights” without specific reference to any specific mineral includes only those that were commonly known and recognized by legal or commercial usage in the area where the land is situated at the time the instrument was executed”, Ahne v. Reinhart & Donovan Company, 240 Ark. 691, 401 S.W.2d 565 (1966); Missouri Pacific Railroad Co. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557 (1941).

The rule itself is simple enough and logical. However the devil is in the details as they say or in this case the actual application of the rule to different geographical areas. Keep in mind that the deeds where Strohacker is applicable were executed around the turn of the 20th century. There are very few hard and fast dates for a person trying to interpret a generic mineral reservation to hang his or her hat on. However, the Arkansas Supreme Court has ruled on a few specific dates in a handful of counties.

Miller County – 1892 & 1893 – Oil and gas not included in “all coal and mineral deposits”, Missouri Pacific Railroad Co., supra.

Union County – 1900 – Oil and gas not included in “mineral interest”, Stegall v. Bugh, 228 Ark. 632, 310 S.W.2d 251 (1958).

Logan County – 1905 – Gas included in “all of the coal, oil and mineral”, Ahne, supra.

For areas other than those cited above a general rule used by most landmen and title attorneys is that if the reservation was before 1900 oil and gas were not included. If the reservation was after 1905 oil and gas were included. In between is a gray area in which the correct answer is a question of fact. The earliest oil and gas leases recorded in the area and the earliest drilling activity in the area are facts that could sway a court one way or the other.

Duhig Rule - a grantor may not purport to convey and warrant an interest and then attempt to reserve a portion of that interest, thus breaching his warranty, consequently, if full effect cannot be given to both the grant and the reservation, priority will be accorded the grant prior to attempting to fulfill the reservation, A Survey of Recent Cases, Legislation & Rules Pertaining to Arkansas Oil & Gas Interests by Kevin S. Vaught. In Arkansas the Duhig rule only applies to the construction of a reservation in a **warranty deed** when the immediate parties to the deed are not the parties to the lawsuit, Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985). In cases involving a dispute between the original grantor and grantee the courts attempt to determine their intent. Although I have not found any ruling to support this view I believe the Duhig Rule would also be applied to a Mineral Deed if it contains a warranty clause.

The best method to determine whether the Duhig Rule applies that I have heard was put forth by an Oklahoma attorney whose name I cannot come up with and therefore cannot credit.

I apologize to you, whoever you might be. If the following items are present, then Duhig applies, if they are not it does not:

1. The instrument is a warranty or mineral deed that contains a warranty clause.
2. Less than the entire mineral ownership is being transferred (i.e., grantor is reserving part of the mineral interest).
3. The grantor owns less than the entire mineral interest at the time of conveyance.
4. Nowhere in the deed does the grantor indicate that he is excepting from the warranty any prior reservations or conveyances of record.

Actually applying the Duhig Rule could be the subject of a longer paper than this one so I am not going to go there.

ACKNOWLEDGMENTS

There isn't really anything unique or unusual about the Arkansas acknowledgment form. The various forms for different entities may be found in the Arkansas statutes and Arkansas will accept any acknowledgement form that is legal in another state if the document was executed in that state. One thing that I did not know until researching this paper is that an acknowledgment by telephone is valid if the party executing the document is known to the Notary Public and the Notary can recognize the voice of the executing party, Stallings v. Poteete, 17 Ark. App. 62, 702 S.W.2d 831 (1986). This should make a lot of field landmen sleep a little better.

Anyone that has examined title for any length of time knows that many mistakes are made both in drawing up an acknowledgment and in filling in the blanks. Thankfully Arkansas has a curative statute that saves us from ourselves. A.C.A. 18-12-208 states that any instruments in writing are binding and effective despite the following defects:

1. Failure of a spouse's signature on an instrument affecting title to the homestead to be properly acknowledged.
2. Omission of words required by law in the certificate of acknowledgment by the officer certifying the acknowledgment.
3. Failure of the officer to attach his seal to the certificate.
4. Attachment of a seal to the certificate that does not bear the words and devices required by law.
5. Certification by an officer who was (a) a mayor of a city or an incorporated town and was not authorized to certify the acknowledgment, or (b) the deputy of an official who was authorized by law to take acknowledgments but the deputy was not so authorized.

6. Failure of the officer to state the date or the correct date of the expiration of his commission on the certificate.
7. Failure of the officer to correctly date the certificate of acknowledgment or state the county wherein the acknowledgment was taken.
8. Certification in any county of the state by a person holding an unexpired commission as notary public who had, at the time of the certification, ceased to be a resident of the county within and in which he or she was commissioned.

WHERE TO RECORD THE DOCUMENT THAT YOU HAVE CREATED

In most counties it is easy to determine where to record a document. You go to the county seat, locate the county courthouse and find the Circuit Clerk's office. However, there are 10 Arkansas counties that are divided into two judicial districts, meaning there are two county seats, two courthouses and two sets of records. This came about back in the horse and buggy days when it may have taken a person 3 to 4 days by horseback to ride from one side of a county to the other. In some counties travel was blocked by mountains or other rugged terrain while others had a river blocking the paths of would be travelers. Of course the original county seat was not conveniently located in the middle of the county. In order to minimize travel problems it was decided to create two county seats, each operating like its own little fiefdom. While the travel problems have been reduced to a manageable scale the dual county seat system remains with us.

A county judicial district has been defined as that portion of the specified county in which the real estate under examination is located and in which there is maintained a permanent set of records pertaining to such real estate (Std. 1.5). You must be very careful to file any instrument effecting title to real estate in the proper county judicial district. If a document is not filed in the correct county judicial district there is no constructive notice and any statutory requirements such as those dealing with foreclosure may not be satisfied, Henson v. Fleet Mortgage Co., 319 Ark. 491, 892 S.W.2d 250 (1995). What does this mean to you? It means that if you filed that oil and gas lease you took from Jethro Bodine in Paris and the lands described in the lease are in the Southern District of Logan County (Booneville) the next landman that comes down the pike can pretend Jethro didn't tell him or her that they had already leased the land to you, take another lease from Jethro, record it at the courthouse in Booneville and pat himself on the back for a job well done. Now you have to explain to Jethro, and perhaps your client, that you want your lease bonus back or you will sue him in his hometown, where the jury panel will largely consist of Jethro's neighbors, cousins, uncles, aunts and hunting buddies, not to mention his ciphering partner in the Sixth Grade Math Skills Competition. Good luck with that.

Currently the 10 counties that have 2 judicial districts are Arkansas, Carroll, Clay, Craighead, Franklin, Logan, Mississippi, Prairie, Sebastian and Yell. Most circuit clerks or assessors can provide you with a map or listing of the lands within each district.

If that isn't confusing enough, effective January 1, 2001 Sebastian County decided to move the recording duties from the Circuit Clerk to the County Clerk.

ODDS AND ENDS

MINERAL TAX FORFEITURES (Std. 19.3)

Prior to April 15, 1985 the law in Arkansas concerning mineral tax deeds was clear and unambiguous. A deed for minerals that had been forfeited for taxes was void unless the mineral assessment was subjoined to the surface assessment, Sorkin v. Myers, 216 Ark. 908, 227 S.W.2d 958 (1950). Subjoined means that the severed mineral assessment must appear immediately below the surface assessment for the same property. At that time, to the best of my knowledge, there was not a county in Arkansas that subjoined the surface and mineral assessments and had oil or gas production.

After April 15, 1985, A.C.A. 26-26-1112 provided that County Assessors may maintain separate records for severed mineral interests if they are maintained by legal description in the same manner as the surface. Most Arkansas title attorneys are of the opinion that this had the effect of making mineral tax deeds voidable, rather than void due to the great potential for defects in both the assessment and forfeiture procedures.

There is another statute that must be mentioned when talking about mineral tax deeds, that is A.C.A. 26-37-314, which purports to breathe life into all mineral tax forfeitures, even those that occurred before April 15, 1985. The purpose of the statute is to allow surface owners an opportunity to redeem severed minerals that have been forfeited for nonpayment of taxes. In an effort to get around the ruling in Sorkin v. Meyers, *supra* the legislature inserted Paragraph (e) which states:

(e)(1) No deed issued under this section shall be void or voidable on the ground that the assessment of the property taxes on the severed mineral interest was not subjoined to the assessment of the property taxes on the surface realty.

(e)(2) This subsection shall be retroactive to all certifications of delinquent mineral interests in the records of the office of the Commissioner of State Lands.

A.C.A. 26-37-314 (e)(1) and (2) appear to breathe life into the old mineral tax deeds I told you were void earlier. However, Section 17 of Article 2 of the Arkansas State Constitution prohibits the legislature from passing an ex post facto law or any law impairing the obligation of contracts. An ex post facto law is one that is “passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed”, Black’s Law Dictionary, Revised Fourth Edition. Sound familiar. To sum it up Paragraph (e) is an ex post facto law that also impairs the obligations of contracts. A double whammy if you will. As such it is extremely doubtful that it would withstand a judicial challenge.

There are many other problems with mineral tax deeds. Some of the more common that could cause a mineral tax deed to be voided by a court of law are: Many counties still don’t assess minerals in the manner required under A.C.A. 26-26-1112.

1. Legal descriptions contained on the assessments and the tax deeds are often incomplete or inaccurate.
2. Lack of adequate notice to the mineral owner that the tax was owed (See Conway County in particular).
3. The procedures for forfeiture are often not followed to the letter.

The problem when presented with a mineral tax deed for minerals assessed after April 15, 1985 is that an examiner has no way to determine from the record if any of the above defects exist. So be wary of mineral tax deeds. To make sure they are valid requires research into the method of assessment and the forfeiture and sale procedures.

STATUTORY PUGH CLAUSE

A.C.A. 15-73-201 created a statutory pugh clause for all oil and gas leases executed on or after July 4, 1983. It has generally been interpreted to mean that an oil and gas lease will hold lands outside a producing unit for one year after the end of the primary term. However, in an article titled “And for so Long Thereafter – Paying Quantities, Shutting-in, and Other Legal Problems of the Secondary Term” by Thomas A. Daily the rather ambiguous language of the statute has also been interpreted by some authors to mean:

1. If all drilling activity occurs during the primary terms of the lease, then acreage outside producing units will cease to be leased one year after the expiration of the primary term.
2. If a well is commenced within one year after the expiration of the primary term, acreage outside producing units will not expire until one year after that well’s completion.
3. Successive one year extensions can be obtained by the lessee if he continues to commence new wells within the previous “one year from completion”.
4. As long as the lessee commences a well somewhere on the leasehold within one year from the previous completion he need never drill on all the lands covered by the lease.

It has yet to be decided by the Arkansas Supreme Court, but we all know what the Legislature meant, or so we think.

BENEFICIARY DEED

As defined by A.C.A. 18-12-608, a beneficiary deed conveys an interest in real property, including any debt secured by a lien on real property, to a grantee designated by the owner and expressly states that the deed is not to take effect until the death of the owner. Perfectly clear, right? While there are many questions that will have to wait for the Supreme Court to rule on here is what we know from reading the statute.

1. No legal or equitable interest shall vest in the grantee until the death of the owner prior to the revocation of the beneficiary deed.
2. A beneficiary deed transfers the interest to the designated grantee beneficiary upon the death of the owner, subject to any mortgages, oil and gas leases, security pledges or other encumbrances made by the owner whether the encumbrance was made **before or after** the execution of the beneficiary deed.
3. The owner may designate a successor grantee beneficiary.
4. The owner may place conditions that must occur before the successor grantee is vested with any interest.
5. A beneficiary deed may be used to transfer property to a trust.
6. A beneficiary deed may be revoked by the owner at any time prior to his or her death.
7. The revocation has to be executed and recorded before the death of the owner.
8. If an owner executes more than one beneficiary deed concerning the same real property, the recorded beneficiary deed that is signed last is the one that is effective.
9. Any third party that owes an obligation to the grantee beneficiary may require that person to provide reasonable evidence that the owner is deceased and that he or she did not revoke the deed prior to his or her death.

There are other nuances that concern taxes and medicare eligibility and multiple owners and multiple grantees that are beyond the scope of this paper. If one comes across your desk or you run into it at the courthouse remember that title does not transfer until the death of the owner. You will have to look beyond the records to determine who the real owner is. If you feel the need to prepare a beneficiary deed I urge you to take a long walk around the block and reconsider. If you still feel the need the statute contains a form for the beneficiary deed and for a revocation.

CONCLUSION

Now you know everything necessary to prepare a proper and valid instrument of conveyance in the State of Arkansas. So if you screw something up it is your fault. As always, be kind to the land owners out there. If you are in the business very long you will have to deal with the same ones more than once, and if you don't the rest of us will and we prefer they not be angry.