Issues in Oil and Gas Title Examination

Kenneth P. Dougherty

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ISSUES IN OIL AND GAS TITLE EXAMINATION

Kenneth P. Dougherty
SELECTED TITLE ISSUES IN TITLE EXAMINATION
(TEXAS)

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2001 Natural Resources Institute
Arlington Hotel
Hot Springs, Arkansas
February 21-24, 2001
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**APPENDIX I**
I. TEXAS PROPERTY 101

(A) Separate Property

Section 3.001 of the Texas Family Code provides that:

A spouse's separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise or descent; and, (3) the recovery for personal injury sustained by the spouse during marriage, except any recovery for lose of earning capacity during marriage.

Each spouse has the sole management, control and disposition of his or her separate property. See Section 3.101 of the Texas Family Code.

(B) Community Property

Section 3.002 of the Texas Family Code provides that:

Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. The degree of proof necessary to establish that property is separate property is clear and convincing evidence. See Section 3.003 of the Texas Family Code.

While these definitions appear simple, they have given rise to a lot of litigation. The annotations contained in the code alone are about 150 pages.

Generally, income from separate property is community property. But royalty income is held to be a sale of the property, that is a sale of the corpus and is not income. Royalties from separate property is separate property. The same is true for lease bonuses. However, delay rentals are likened to rent and is community property.
(C) Inception of Title

Under this rule, Texas courts determine the separate or community nature of property at the time of acquisition. Inception of title occurs when a party first has the right of claim to property by virtue of which title is finally vested. *Weirzchula v. Weirzchula*, 623 S.W.2d 730 (Tex.App. 1981).

It is well established that a claim to real property can arise before the legal title or evidence of title has been attained. *Welder v. Lambert*, 91 Tex. 510 44 S.W.2d 281 (Tex. 1898). In other words, if you acquire a contract giving you the right to acquire land before you are married, the property will be your separate property even if the condition of the contract is not met until during marriage. In the *Lambert* case, the earnest money date was prior to the date of marriage and the court held that the claim of right to the property occurred before marriage and therefore, was the separate property of the person to whom the land was conveyed.

If land is conveyed to you under a vendor's lien deed in which you pay part of the money down with the remainder to be paid over a number of years and you subsequently get married and community property funds are used to pay off the mortgage, the land would still be your separate property.

A presumption that property is community estate arises when the note is signed after the marriage. This is because a debt acquired by either spouse during marriage is presumptively a community debt. However, this presumption is also rebuttable. If the lender agrees only to look to the separate property of one of the spouses for the security of the debt, the proof will rebut the presumption.

(D) Management, Control And Disposition of Marital Property

Section 3.102 of the Texas Family Code provides as follows:

(a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:

(1) personal earnings;

(2) revenue from separate property;

(3) recoveries for personal injuries; and,
(4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.

(b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

(c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement.

(E) Protection of Third Persons

Section 3.104 of the Texas Family Code provides as follows:

(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership.

(b) A third party dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:

1. the property is presumed to be subject to the sole management, control, and disposition of the spouse; and,

2. the person dealing with the spouse:

A. is not a party to a fraud upon the other spouse or another person; and,
B. does not have actual or constructive notice of the spouse's lack of authority.

For example, if a deed names one person as the grantee and that person is married, as to third parties, the property is presumed to be subject to the sole management, control and disposition of the spouse whose name appears as the grantee in the deed. In such a case, a third party, such as a lessee, is entitled to rely on the spouse's authority as long as the third party is not a party to a fraud upon the other spouse or another person and does not have actual or constructive notice of the spouse's lack of authority.

What constitutes actual or constructive notice of the spouse's lack of authority has not been the subject of a lot of litigation. However, it has been held that where a bank president had actual knowledge that the wife had refused to sign a note and a deed of trust covering lands acquired as community property but held only in the husband's name, this was sufficient to put the bank on notice of the husband's lack of authority to encumber the wife's interest in the tract. Williams v. Portland State Bank (Civ.App. 1974) 514 S.W.2d 124 error granted, dismissed.

However, the mere fact that the third party knew that the person was married does not, of itself, overcome this sole management presumption. See Johnson v. Cumming, 616 F2d 1069 (1979). Further, even if the spouse in whose name the deed was not executed joins in subsequent instruments affecting the title, such as executing deeds of trust or mechanic's liens, this is insufficient to show joint management. See Fajkus v. First National Bank of Giddings, 735 S.W.2d 882 (Tex.App.-Austin, 1987) and Thomas v. Rhodes, 701 S.W.2d 943 (Tex.App.-1986, writ ref'd, n.r.e.) cert. denied, 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 1987.

(F) Homestead

What can constitute constructive notice that property is not subject to the sole management and control of the spouse in whose name the deed appears? The most obvious example which comes to mind is when the husband and wife are occupying the property as homestead. Homesteads in Texas are vigorously protected and have a special place in the law.

Prior to January 1, 1998, Article 16, Section 50 of the Texas State Constitution provided as follows:
Sec. 50. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.

Effectively, the only liens which were valid on a homestead were:

1. Purchase money mortgages or liens;
2. Liens for taxes due on the homestead; or,
3. Mechanic's liens for constructing improvements on the homestead but only if these latter liens were in writing with the consent of both spouses.

Effective January 1, 1998, the Texas Constitution was amended to provide that in certain circumstances, liens created under a partition or for refinancing are effective against homesteads if the terms of the constitution are complied with.

As stated in the interpretive commentary to this Article, the homestead exemption was a Texas creation. The direct cause of the law was the United States Panic of 1837 and the ensuing depression during which numerous families lost homes and farms through foreclosures. In the Republic of Texas, business became stagnant, money scarce and credit unobtainable. Most Texans were in debt. The homestead exemption was looked upon as a necessary measure to offset the economic danger to Texans and Texas. It had a three-fold purpose:
(1) To preserve the integrity of the family as the basic element of social organization, and, incidentally, to encourage colonization for in a frontier society each pioneer family was of definite value to the community;

(2) To provide the debtor with a home for his family and some means to support them and to recoup his economic losses so as to prevent the family from becoming a burdensome charge upon the public; and,

(3) To retain in pioneers the feeling of freedom and sense of independence which was deemed necessary to the continued existence of democratic institutions.

Section 5.001 in Texas Family Code provides as follows:

Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey or encumber it without the joinder of the other spouse except as provided in this subchapter or by other rules of law.

The exceptions provided in Chapter 5 of the Family Code include the following:

(1) If the homestead is the separate property of a spouse, that spouse may file a sworn petition that gives a description of the property, states the facts that make it desirable for the spouse to sell, convey or encumber the homestead without the joinder of the other spouse and alleges that the other spouse:

(a) is incapacitated, whether judicially declared incapacitated or not;

(b) disappears and his or her location remains unknown to the petitioning spouse;

(c) permanently abandons the homestead and the petitioning spouse; or,
(d) permanently abandons the homestead and the spouses are permanently separated, or has been reported by an executive department of the United States to be a prisoner of war or missing on public service of the United States

(2) This exceptions require a court order and the provisions of Chapter 5 of the Family Code must be complied with.

If you obtain an oil and gas lease covering homestead property from only the spouse who is presumed to have the sole management and control thereof or from the spouse who owns the property as his or her sole property, the lease will be inoperative as long as the property remains the homestead of the lessors unless the other spouse ratifies the lease or is otherwise estopped from denying its validity. See *Grissom v. Anderson* 79 S.W.2d 619 (Tex. 1935).

In the *Grissom* case, eight brothers and sisters, who were the joint owners of a tract of land, executed an oil and gas lease. Two of the joint owners, Frank and Taylor occupied the land as their homestead with their wives and families. The interest of Frank and Taylor was their separate property. The wives did not join in the execution of this lease even though they knew all about the lease and were willing to execute it if the parties thought it was necessary to make it effective.

The court in that case held that it was unquestioned that the lease was valid and binding on all parties signing same except Taylor and Frank and their wives. Without the signatures of the wives of Taylor and Frank, the mineral lease was inoperative as long as the land constituted their homestead. Under the law, the power to make it operative as to their interest rested exclusively with them.

However, the court noted that after the execution of the lease, Taylor and Frank and their wives had executed various royalty deeds which stated that the deeds were subject to the lease. The Texas Supreme Court held that by their acts in executing the royalty deeds, they gave the lease life. In other words, their acts in executing the royalty deed and making the deed subject to the lease constituted a ratification of the lease.

In order to effectuate a ratification, the Texas courts have held that there must be a writing duly acknowledged by the non-joining spouse. The acceptance of royalty proceeds under a lease does not effect the ratification or, considered alone, constitute an estoppel. See *Crews v. General Crude Oil Company* (Civ.App. 1956) 287 S.W.2d 243.
In the Crews case, supra, the wife had signed a lease but argued that her signature was not properly acknowledged. Her testimony, in essence, was that the landman had come to her house, she had signed the lease and the landman had then taken it elsewhere for the acknowledgment. The landman and the notary both testified that they went together to the wife's house and that she signed the lease there and then acknowledged her execution of the lease as the law requires. The jury believed the wife and found that her signature was not acknowledged.

Two years after the execution of the lease, the lessee's successors drilled a well and some 22 months after the well was drilled, suit was filled in a trespass to try title.

The court stated that by acceptance of the royalties, the wife was not estopped to deny the validity of the lease. Further, the mere inaction and silence on her part in watching the well drilled without any affirmative representations or suppression of facts was not of itself enough to hold the wife was estopped from denying the validity of the lease.

However, the evidence showed that the lessees had fenced off the area where the well was located with a locked gate to which the husband and wife had no access. As to that part of the lease which had been so fenced off, the court found that the husband and wife had abandoned that portion as their homestead. However, the lease was not abandoned as to that portion of the lands covered by the lease which were outside this fenced area. All facts determine the outcome.

At the time the Crews case, supra, was decided, Texas law required that in order to be a valid acknowledgment of the wife, a notary would have to take the wife apart from her husband and, in private, fully explain the document to the wife. The wife would then have to acknowledge her signature to the document, declare she had willingly signed it for the purposes and consideration expressed in the document and that she did not wise to retract it. If a spouse does not sign a lease (or other instrument) covering a homestead, it will be ineffective. In this case, you will be forced to look to other factors and prove the document is binding on the non-signatory spouse.

In sum, when dealing with community property, it always better to have a husband and wife both execute a lease regardless of how record title stands. This is imperative where the property is the homestead of the husband and wife. Anytime you are leasing a person's mineral interest and that person owns the surface, or an interest therein, you should check to see if the property is a homestead of that person. However, if the property is not the homestead of the husband and wife and
the land was conveyed to only one spouse, then a lease taken from that spouse will be valid to bind the entire community interest unless you are a party to a fraud or have actual or constructive notice that said property is not subject to sole management and control of the spouse in whose name the deed appears.

In addition, even if property is separate property of one spouse, if the land is homestead property, both spouses must sign the lease.

II. THE EFFECTS OF RECORDING OR, SHOULD I RECORD ON A LEASE BY LEASE BASIS OR WAIT UNTIL MY AREA IS SECURE AND FILE THEM ALL AT ONCE?

Texas Property Code §13.001 states that:

(a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved, and filed for record as required by law.

(b) The unrecorded instrument is binding upon a party to the instrument, upon the party's heirs and upon a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

Company landmen prefer to acquire substantial blocks of acreage and record the leases all at once in order to preclude competitors from identifying their area of interest as long as possible. Occasionally, a lessor from whom a company landman has obtained a lease will execute a subsequent lease to a different company and this different company will claim the status of a bona fide purchaser and assert the protection offered in the statute quoted above, regardless of which lease is filed first.

The plain language of the statute, assuming the fact intensive elements of a bona fide purchaser are present, supports the second lessor's position, regardless of filing date. It appears our statute is a pure "notice" statute. In other words, if the first purchaser does not record before the sale to the second purchaser, the second purchaser prevails (assuming he is an innocent purchaser for value) regardless of who filed their instrument first and even if the second purchaser never files his instrument. This is based on the theory that the first purchaser could prevent his loss by promptly recording his instrument and is at fault for not doing so.
The existing case law supports the pure notice interpretation. In *Penny v. Adams*, 420 S.W.2d 820 (Crt. Civ. App. - Tyler, 1967, writ ref'd), the facts were essentially as follows:

1. A owned the lands.

2. By Royalty Deed dated September 19, 1945, A conveyed to "B" a 1/2 non-participating royalty for 20 years and as long thereafter as production was had. This deed was not filed for record until February 6, 1954.

3. By Deed dated February 11, 1954, A conveyed all her undivided interest in the lands to "C". This deed was not filed until February 24, 1954.

4. "B" brings suit against "C" and his successors to recover the royalty interest conveyed to him in the Deed dated September 19, 1945, referenced above. There was apparently a producing well on this property which would have perpetuated the term royalty interest.

At the trial court level, it was found that "C" had paid a valuable consideration for the Deed executed on February 1, 1954, and had no notice of the prior Deed from "A" to "B" dated September 19, 1945. The trial court found "C" was an innocent purchaser for value and rendered judgment that "B" take nothing.

While "B's" point of appeal was that the deed to "C" was a quitclaim deed (because it was only of "A's" undivided interest) and that "C" could not claim being an innocent purchaser, the Tyler Appellate Court found that "C" was protected as a bona fide purchaser and that "C" was an innocent purchaser for value. The trial court's judgment was sustained.

In another Tyler appellate case, *Reposa v. Johnson*, 693 S.W.2d 43 (Tex. Civ. App. - Tyler, 1985, writ ref'd, n.r.e.), the facts were essentially the same as above. While the Appellate Court held in this case that "C", the second purchaser, did not sustain his burden of showing he was an innocent purchaser for value, the Court did state that, if an affirmative finding had been made that "C" had paid a valuable consideration without notice of the instrument vesting "B" with her title, it would mean the conveyance to "C" would not have been affected by "B's" instrument and "C" would have prevailed.
A somewhat recent case re-visits the definition of a bona fide purchaser, *Colvin v. Alta Mesa Resources, Inc.*, 920 S.W.2d 688 (Tex. App. - Houston, First District, 1996). A bona fide purchaser is one who makes a good faith purchase of real property for a valuable consideration without actual or constructive notice of an outstanding equity or an adverse interest or title. The elements essential to a bona fide purchaser purchase are (1) payment of valuable consideration; (2) absence of notice; and (3) good faith. All of these elements are fact intensive and the failure of any one will defeat the claim. We could talk for days about the disputes that have arisen under this statute because of the fact-intensive nature of these elements.

Most company landmen, when questioned by management over the failure of a lease due to this statute, will respond that occasional loss of an oil and gas lease to a bona fide purchaser under this statute is preferable to recording leases immediately and letting the registry readers compete from the date the first lease is filed.

III. OIL AND GAS LEASES FROM PARTIES IN REPRESENTATIVE CAPACITIES

(A) Receivership

(i) Mineral Interests

In Texas, a person owning or claiming an undivided mineral interest in land, or an undivided leasehold interest in land, can bring an action to appoint a receiver to lease the mineral interest of a person who owns or claims an undivided mineral interest in the same property. The defendant for whom the receiver is sought must be a person whose residence or identity is unknown and has not paid taxes on their interest during the five year period preceding the filing of the action. See Section 64.091, Texas Civil Practice and Remedies Code.

The plaintiff in this action must allege and prove that he has made a diligent but unsuccessful effort to locate the defendant and will suffer substantial damage or injury unless a receiver is appointed.

Notice of the lawsuit must be served on the defendant by publication in accordance with the Texas Rules of Civil Procedure. Neither the applicant nor the receiver is required to post bond.
As ordered by the court, the receiver can execute and deliver to the lessee a mineral lease on the outstanding undivided mineral interest, execute an assignment of the outstanding undivided leasehold interest and enter into a unitization agreement authorized by the Texas Railroad Commission. Leases can contain pooling clauses of no more than 160 acres for an oil well or 640 acres for a gas well, each with a 10% tolerance, or into a unit that substantially conforms to a larger unit prescribed or permitted by governmental rule. The money consideration paid for the lease or assignment is paid into the registry of the District Clerk’s Office before the receiver executes the instrument. The money is applied to the costs accruing in the case and the balance, if any, is retained for the use and benefit of the defendant.

(ii) Royalty Interests

Effective August 30, 1999, a receiver can be appointed for a royalty interest owned by a non-resident or absent defendant in a tract of land. See Section 64.093 of the Texas Civil Practice and Remedies Code. This statute is similar to Section 64.091 discussed above but applies to a royalty interest. The Receiver under this statute, as ordered by the court, can ratify a mineral lease executed by a person owning an undivided mineral interest in the property, ratify a pooling agreement executed by a person owning an undivided mineral or leasehold interest in the property or enter into a unitization agreement authorized by the Railroad Commission of Texas.

(B) Independent Administration

Texas Probate Code, Section 145, et seq, provides for the independent administration of estates. The personal representative of the estate, known as the Independent Executor, is generally free of court control. Independent administration normally is found in estates where the decedent died testate but provisions in Section 145 are made for those who died intestate.

Title is immediately vested in the devisees under a will or the heirs at law of someone who dies intestate at the time of death; subject, however, to the payment of the debts of the deceased and the payment of court-ordered child support payments. Texas Probate Code, Section 37. However, the Independent Executor has the authority to sell the property of the decedent to pay debts of the estate, even without express authority in the will. Rowland v. Moore, 174 S.W.2d 248 (Tex. 1943). An oil and gas lease creates a determinable fee interest in the lessee and has long been held by the Texas courts to be a sale of an interest in land. Cherokee Water Co. v. Forderhause, 641 S.W.2d 522 (Tex. 1982).
A question arises as to whether an Independent Executor has the authority to execute an oil and gas lease which binds the estate after all debts had been paid. Under the case of *Dallas Services v. Broadmoor*, 634 S.W.2d 572 (Tex.Civ.App. - Dallas, 1982, ref'd n.r.e.) and Section 188 of the Texas Probate Code, a lessee who is an innocent purchaser, in good faith for a valuable consideration and without notice of any illegality in the title, of an oil and gas lease from an Independent Executor during an administration is protected so long as the estate has not been closed.

(C) Dependent Administration

Sections 367 and 368 of the Texas Probate Code give the procedures for obtaining an oil and gas lease subject to a dependent administration. This is the usual situation where someone dies intestate and there is an administration had on their estate.

(i) **Section 367**

An oil and gas lease can be obtained from a personal representative of an estate after an application has been filed as provided for in Section 367(c)1. Upon the filing of the application, the clerk is required to immediately call the filing of same to the court and the judge shall designate the time and place for hearing of the application. The personal representative, and not the county clerk, shall give notice in writing of the time designated by the Judge for the hearing on the application. The requirements of this notice are contained in Section 367(c)3(a). The personal representative shall give at least 10 days notice, exclusive of the date of notice and of the date set for hearing, by publication in one issue of a newspaper of general circulation in a county where the proceeding is pending. The above steps are mandatory in any order entered in the absence of these requirements is null and void. A hearing is then held and an appropriate order must be entered by the court.

Section 367 of the Texas Probate Code is rarely used because of Section 368.

(ii) **Section 368**

Provides that the court may authorize the making of an oil and gas lease at private sale (without public notice or advertising) if the court is of the opinion that sufficient facts are set out in the application to show that it would be more advantageous to the estate that a lease be made privately and without compliance of the mandatory requirements referenced above.
At any time after the expiration of 5 days, and prior to expiration of 10 days from the date of filing the application, and without an order setting the time and place for a hearing, the court shall hear the application to lease. If it is satisfied the lease will be made for a fair and sufficient consideration and on fair terms, and that it will be made in conformity with law, the court shall enter an order authorizing the execution of such lease without the necessity of advertising, notice or citation. No order confirming the lease made at private sale need be issued. However, the lease will not be valid until the increased order additional bond required by the court, if any, has been approved by the court or filed with the clerk of the court.

Any lease authorized under either Section 367 or 368 of the Texas Probate Code shall have a primary term of no more than 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 of more than 60 consecutive days before production is restored or obtained, or by the provisions of the lease relating to a shut-in gas well.

(D) Sale of Property of a Minor by a Parent Without Guardianship

When the net value of a minor's interest in real or personal property in an estate does not exceed $50,000.00, a natural or adoptive parent, or the managing conservator, of a minor who is not a ward, may apply to the court for an order to sell the real property of a minor in an estate without being appointed guardian. Section 889 of the Texas Probate Code.

The contents of the application are set forth in Section 889(b). On receipt of the application, the court shall set the application for hearing at a date not earlier than 5 days from the date of the filing of the application. If the court is satisfied that the sale is in the best interest of the minor, the court shall order the sale of the property. The proceeds of the sale belonging to the minor are deposited in the court registry.

Section 890 of the Texas Probate Code governs the sale of property of a ward who has a guardian of the person but not a guardian of an estate. The requirements are substantially similar to Section 889.
(E) Trustees

Unless the terms of the trust provide otherwise, Section 113.012 of the Texas Property Code (and a part of the Texas Trust Code) sets out a broad range of mineral transactions the trustee is authorized to enter into. This includes the power to make oil and gas leases, with pooling and unitization clauses, including the right to execute such a lease extending beyond the term of the trust.

If a conveyance is to a blind trustee with no identification of the trust or disclosure of the beneficiaries, the person designated as Trustee can convey the property without subsequent question by a person who claims to be a beneficiary of the trust. See Section 101.001 and Section 114.082 of the Texas Property Code.

(F) Attorney-in-Facts under Power of Attorneys

Section 490 of the Texas Probate Code sets out a statutory durable power of attorney form. This form is attached and is the form in effect since September 1, 1997. If no power listed is crossed out, it is interpreted as a general power of attorney. Section 492 deals with construction of powers relating to real property transactions. These specifically include the power to enter into an oil and gas lease and making pooling and unitization agreements. Prior to September 1, 1997, the statute authorizing real estate transactions was valid for a conveyance of real property and authorized agents to otherwise “grant options concerning ... or otherwise dispose of an estate or interest in real property ....” A question existed as to whether the form authorized oil and gas transactions, especially if the form was executed to only grant specific powers and was not a general power of attorney.

It should be noted that a non-durable power of attorney or a durable power of attorney that does not substantially conform to this form, does not benefit from this provision. These forms should be looked at carefully to determine if they allow authority to execute oil and gas leases, with pooling provisions. We do have an early case of Bean v. Bean, 79 S.W.2d 652 (Tex.Civ.App. - Texarkana 1935, writ ref'd) which held that a power of attorney which gave authority to "sell" land did not include the power to convey minerals by either a deed or lease.

Section 489 of the Probate Code requires that a durable power of attorney requiring the execution of an instrument to be recorded, including an oil and gas lease, shall be recorded in the County Clerk’s Office where the land is located.
IV. LIMITATIONS

Most, if not all states, have statutes which can be utilized in curing title defects or eliminating title requirements. These statutes are a practical necessity. The curative statutes regularly utilized by title examiners in Texas include the following:

(A) Section 16.033 of the Texas Civil Practice and Remedies Code

Technical Defects in Instruments

(i) A person with a right of action for the recovery of real property conveyed by an instrument with one of the following defects must bring suit not later than four years after the day the instrument was recorded with the county clerk of the county where the real property is located:

(a) lack of the signature of a proper corporate officer, partner, or company officer, manager, or member;

(b) lack of a corporate seal;

(c) failure of the record to show the corporate seal used;

(d) failure of the record to show authority of the board of directors or stockholders of a corporation, partners of a partnership, or officers, managers or members of a company;

(e) execution and delivery of the instrument by a corporation, partnership, or other company that had been dissolved, whose charter had expired, or whose franchise had been canceled, withdrawn or forfeited;

(f) acknowledgment of the instrument in an individual, rather than a representative or official, capacity;

(g) execution of the instrument by a trustee without record of the authority of the trustee or proof of the facts recited in the instrument;
(h) failure of the record or instrument to show an acknowledgment or jurat that complies with applicable law; or,

(i) wording of the stated consideration that may or might create an implied lien in favor of the grantor.

(ii) This section does not apply to a forged instrument.

(B) Section 160.35 of The Texas Civil Practice And Remedies Code

Lien on Real Property

(i) A person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues.

(ii) A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues.

(iii) The running of the statute of limitations is not suspended against a bona fide purchaser for value, a lienholder, or a lessee who has no notice or knowledge of the suspension of the limitations period and who acquires an interest in the property when a cause of action on an outstanding real property lien has accrued for more than four years, except as provided by:

(1) Section 16.062, providing for suspension in the event of death; and,

(2) Section 16.036, providing for recorded extensions of real property liens.

(iv) On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the real property lien become void.
(v) If a series of notes or obligations of a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment.

(vi) The limitations period under this section is not affected by Section 3.118, Business & Commerce Code.

(vii) In this section, "real property lien" means:

1. a superior title retained by a vendor in a deed of conveyance or a purchase money note; or

2. a vendor's lien, a mortgage, a deed of trust, a voluntary mechanic's lien, or a voluntary materialman's lien on real estate, securing a note or other written obligation.

The foregoing limitation statute can be suspended by a proper written agreement. The maturity date in the original instrument or the extension is the conclusive evidence of the maturity date of the debt or obligation.

V. LIENS

A very common problem encountered in determining mineral ownership in a tract of land concerns the issue of whether a lien foreclosure has wiped out intervening or prior mineral sales.

(A) Deed of Trust Foreclosure

The most common situation concerns the deed of trust foreclosure. For example, say "A" owns Blackacre and executes a valid deed of trust covering this land to "B". "A" then conveys an undivided 1/2 mineral interest in Blackacre to "C". If "B" forecloses under the deed of trust in accordance with law, a sale of this type does eliminate the intervening mineral sale.

However, say "A" owns fee simple title to Blackacre. "A" then executes a deed of trust covering said land to "B". Subsequently, "A" conveys an undivided 1/2 mineral interest in Blackacre to "C". Subsequently, "A" determines that he cannot pay the mortgage and conveys Blackacre to "B" for the stated consideration of satisfaction of the original debt. Note that this is not a foreclosure under a deed of trust but a deed executed in extinguishment of the debt. In this situation, the Texas
courts holds that such a deed does not wipe out the intervening mineral sale to “C”. See *Flag-Redfern Oil Company v. Humble Exploration Company, Inc.*, 774 S.W.2d 6 (Tex. 1987). In the *Flag-Redfern* case, *supra*, the Court noted that Texas had always followed the lien theory of mortgages. In other words, when a mortgagor executes a deed of trust, the legal and equitable estates in the property are severed. The mortgagor retains the legal title and the mortgagee holds the equitable title. After the deed of trust, “A” would still be vested with the legal title and “B” would be vested with the equitable title. When “A” conveyed the undivided 1/2 mineral interest to “C”, it conveyed in fee simple the legal estate to an undivided 1/2 of the minerals. When “A” subsequently conveyed the property to “B”, the Court held that “A” did not hold the legal title to the 1/2 mineral interest as it had conveyed that estate to “C” and therefore, could not convey this legal title in 1/2 of them minerals back to “B”.

The Supreme Court held that the Court of Appeals had erred in labeling the “A” to “C” deed a “deed in lieu of foreclosure” and that there is no such deed as a deed in lieu of foreclosure. It held that the deed was a warranty deed with the stated consideration being the cancellation and delivery of the note held by “C”.

**(B) Vendor’s Lien And Recission**

Vendor’s lien and recission cases can present a very sticky problem. You have to get all your facts straight in order to know exactly where you stand.

Let us assume “A” owns Blackacre in fee simple and sells the land to “B” for $10.00 and receives $5.00 in cash and a $5.00 vendor’s lien note. The deed recites that the vendor’s lien is retained to secure the payment of the debt. The Texas courts basically hold that this is an executory contract that ripens into title in the grantee when the remaining money has been paid. “B” then sells an undivided 1/2 mineral interest to “C”. Later, it is determined that “B” cannot pay the vendor’s lien note and he reconveys the land to “A” in cancellation of the vendor’s lien note. The courts hold that this is a recission and “C”’s mineral interest is wiped out by the deed. See *Whiteside v. Bell*, 347 S.W.2d 568 (Tex. 1961).

If “A” was not able to obtain a reconveyance from “B” but had to bring a lawsuit against “B” to foreclose his lien and get his title back, is “C” a necessary party to the suit? No. If “A” brings suit only against “B” and obtains the land back, “C”’s mineral interest is again wiped out because he is not a necessary party. I want to emphasize that this must be a vendor’s lien transaction because it involves an executory transaction and superior legal title remains in “A”.

SELECTED TITLE ISSUES IN TITLE EXAMINATION PAGE 19
One thing you should be aware of is that the mineral buyer, "C", is not left without a remedy in a situation where “B” reconveys the land back to “A” under a vendor’s lien situation. “C” has an equitable right of redemption and he can go back to the original landowner, tender the amount due and recover the title provided that he acts within a reasonable length of time. The only case I could find as to what was a reasonable time was the Whiteside case, supra, wherein the mineral buyer came back 27 years later. The court held that he did not come in within a reasonable amount of time and was barred by the operation of laches from redeeming his mineral interest.
APPENDIX I

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, (insert your name and address), appoint (insert the name and address of the person appointed), as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;

Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

Retirement plan transactions;

Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

____________________________________________________________________
____________________________________________________________________
____________________________________________________________________

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.
CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT
THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or
incapacity.

(B) This power of attorney becomes effective upon my disability or
incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF
ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT
YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not
contained in this power of attorney, I shall be considered disabled or incapacitated
for purposes of this power of attorney if a physician certifies in writing at a date later
than the date this power of attorney is executed that, based on the physician's
medical examination of me, I am mentally incapable of managing my financial
affairs. I authorize the physician who examines me for this purpose to disclose my
physical or mental condition to another person for purposes of this power of attorney.
A third party who accepts this power of attorney is fully protected from any action
taken under this power of attorney that is based on the determination made by a
physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act
under it. Revocation of the durable power of attorney is not effective as to a third
party until the third party receives actual notice of the revocation. I agree to
indemnify the third party for any claims that arise against the third party because of
reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses
to act, I name the following (each to act alone and successively, in the order named)
as successor(s) to that agent: ________________________________
Signed this _____ day of __________________, 2001.

STATE OF TEXAS §
COUNTY OF §

This document was acknowledged before me on the ___ day of __________, 2001, by

Notary Public, State of Texas

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.