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## Highways, Freemasons, and Graveyards, Oh My! Solving Uncommon Leasing Problems

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# Highways, Freemasons, and Graveyards, Oh My! Solving Uncommon Leasing Problems

By

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## I. Introduction

This paper is a collection of uncommon leasing situations based on the most frequent questions placed to the author by field landmen and attorneys. There is no common thread through these topics other than their infrequent occurrence and their attending need for consultation or research when they arise. In order to guide the reader, the following table presents the topics of interest by section and page.

Topic	Section	Page
Interests of Minors	II	2
Interests of Incompetent Persons	III	3
Interests of Unincorporated Associations	IV	4
Future Interests	V	6
Trusts	VI	9
Powers of Attorney	VII	10
Government Entities Other Than State Agencies	VIII	11
Streets and Highways	IX	14
Cemeteries	X	16

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## II. Minors' Interests

### Problem:

“Grandma Gogan’s will left her property to her son John Gogan and her granddaughter Sally Sue Gogan. I called up John, and he agreed to lease. I asked where I could find Sally Sue. He said ‘she lives here with me.’ I asked to talk to her. He said ‘you can’t.’ ‘Why not?’ I asked. ‘She’s 18 months old.’”

### Solution:

At law, persons under the age of 18 are legally incapacitated.<sup>2</sup> Thus, it is not possible to obtain a binding oil and gas lease directly from a minor. To obtain a binding lease, there are more ideal situations than others in terms of time and expense. Ideally, the minor will have only a beneficial interest rather than being the record property owner. The best example of this is a trust held for the minor’s benefit. In that case, the trustee may execute the lease provided that the trustee possessed the authority under the trust agreement.<sup>3</sup> Another favorable possibility is that the title to the property complies with the Arkansas Uniform Transfers to Minors Act. If the conveyance is substantially in the form of “as custodian for [minor’s name] under the Arkansas Uniform Transfers to Minors Act,”<sup>4</sup> the adult custodian named in the title may execute the lease and bind the minor.<sup>5</sup> Finally, if the property was a gift from the parents of the minor, the parents are recognized as the child’s natural guardian, and they may lease the property without court intervention.<sup>6</sup> In the absence of these preferred circumstances, obtaining a binding lease from a minor requires court intervention. For minors aged 16 or older, it is possible to petition a court to remove the minor’s disability.<sup>7</sup> This is simple process where the minor petitions the circuit court with notice to any parent or legal guardian.<sup>8</sup> After notice and hearing, the court may grant the petition and allow the minor to deal in his or her own property.<sup>9</sup> The petition to remove the disability of minority is available for non-resident minors with regard to Arkansas real

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<sup>2</sup> See Ark Code Ann. §§ 9-26-103; 28-65-104(1).

<sup>3</sup> See Section VI, *infra*.

<sup>4</sup> Ark. Code Ann. § 9-26-209(a)(5). There are no Arkansas cases addressing the concept of “substantial compliance” under the statute.

<sup>5</sup> *Id.* at § 9-26-213.

<sup>6</sup> *Id.* at § 28-65-501.

<sup>7</sup> See *Id.* at § 9-26-104(a).

<sup>8</sup> See *Id.*

<sup>9</sup> See *Id.*

property.<sup>10</sup> If the minor is less than 16 years of age, the only option to obtain a binding lease from the minor is by court appointed guardian.

### III. Incompetents' Interests

#### Problem:

“I contacted John Gogan’s brother Jim. I asked if he knew where Jim was. He started choking up over the phone. After he collected himself, he told me that John was kidnapped by a drug cartel while on vacation in Mexico. He is being held for ransom for \$250,000.”

#### Solution:

An incompetent person is any person under the age of 18 without the removal of the disability of minority,<sup>11</sup> a missing person,<sup>12</sup> a person detained or confined by a foreign power,<sup>13</sup> or a person adjudicated mentally incompetent by a court of law.<sup>14</sup> The guardianship petition and proceedings are found in Ark. Code Ann. § 28-65-101 et. seq. Generally, the petitioner must prove the incapacity of the ward, that a guardianship is desirable to protect the interests of the incapacitated person, and that the petitioner is qualified under the statutes.<sup>15</sup> Once approved, an appointed guardian takes title to the ward’s estate.<sup>16</sup> The guardian, however, cannot give a lease without court intervention.<sup>17</sup>

There is a specific procedure to validate oil and gas leases given by guardians with extreme consequences for non-compliance.<sup>18</sup> After executing the lease, the guardian must report the lease to Circuit Court within 60 days.<sup>19</sup> If the guardian fails to report the lease within 60 days, the lessee may compel the guardian to report the lease up until 75 days.<sup>20</sup> If after 75 days, neither the guardian nor the lessee reports the lease to the court, the lease is void.<sup>21</sup>

The authority of an out-of-state guardian is an even rarer problem that may catch a landman unaware. Because Arkansas considers mineral interests real property, Arkansas retains absolute

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<sup>10</sup> Ark. Code Ann. at § 9-26-104(d)(1).

<sup>11</sup> *Id.* at § 28-65-104(1).

<sup>12</sup> *Id.* at (2).

<sup>13</sup> *Id.*

<sup>14</sup> *See Id.* at §§ 28-65-101(5)(A-B) and 28-65-211(b), respectively.

<sup>15</sup> *See Id.*

<sup>16</sup> Ark. Code Ann. at § 28-65-304.

<sup>17</sup> *See Id.* at § 28-65-314.

<sup>18</sup> *See Id.* at § 28-65-315.

<sup>19</sup> *Id.* at (b).

<sup>20</sup> *Id.* at (g).

<sup>21</sup> *Id.* at (h).

*in rem* jurisdiction. Thus, a guardian of a non-resident person cannot act to sell the property of an incompetent in Arkansas without the approval of an Arkansas court.<sup>22</sup> The guardian must seek the approval of an Arkansas court with jurisdiction over the property, and also follow the statutory provisions governing leaseholds from guardians in general.

#### **IV. Unincorporated Associations**

##### **Problem:**

“I have a deed that was granted to The Partrick Swayze Fan Club. I don’t see them in the Secretary of State’s records as a corporation or anything like that. The president told me they’re just a group of Patrick Swayze enthusiasts who meet at the property monthly to re-enact Dirty Dancing.”

##### **Solution:**

By these facts, The Partrick Swayze Fan Club is probably a non-profit association under Arkansas Law. This simply means they are “two or more members joined by mutual consent for a common, nonprofit purpose” other than one an organization created by trust.<sup>23</sup> A non-profit association may hold real property.<sup>24</sup> Arkansas has a leasing statute<sup>25</sup> covering the interests of organizations who own property, but lack formal existence other than their own rules governing membership:

Except where otherwise provided for in the charter, constitution, or bylaws of any church, lodge, or other eleemosynary institution, the trustee, deacons, or other governing body shall have the right and authority to make, execute, and deliver oil, gas, and mining leases, and mineral deeds upon lands owned by the institutions upon such terms and conditions as the governing body shall deem to be in the best interest of the institutions, and the majority vote of the body shall control in all such actions taken by the body.

Because the statute is a bit unwieldy, it is useful to diagram it:

An unincorporated association may give a good lease by majority vote of its governing body if:

- 1) the terms and conditions of lease are judged to be in the organization's best interest by the governing body; and
- 2) the charter, constitution, or bylaws do not prescribe a different means of approving the lease.

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<sup>22</sup> See Ark. Code Ann. §§ 28-65-601 and 28-65-602.

<sup>23</sup> *Id.* at § 4-28-501(2).

<sup>24</sup> *Id.* at § 4-28-503.

<sup>25</sup> *Id.* at § 15-73-202.

In addition, the Arkansas Uniform Nonprofit Association Act provides mechanisms to protect purchasers of real property interests from claims of ultra vires actions by members of the nonprofit association. The association may give a statement of authority to authorize transfer of the organization's property.<sup>26</sup> The statement must be in the form of an affidavit from a person who is not the person authorized to transfer the property, and the statement must set forth:

- 1) the name of the nonprofit association;
- 2) the federal tax identification number, if any, of the nonprofit association;
- 3) the address in this State, including the street address, if any, of the nonprofit association, or, if the nonprofit association does not have an address in this State, its address out of State;
- 4) that it is an unincorporated nonprofit association; and
- 5) the name or title of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.<sup>27</sup>

Once executed and filed of record, the statement will protect a purchaser against any claim the person executing the lease on behalf of the lessor was without authority to do so.<sup>28</sup> The landman's task is to identify the governing body, make certain there is nothing in the organization's bylaws that prescribe a means other than majority vote to adopt the lease, get the governing body to declare the conditions and terms to be in the organization's best interest, and then obtain a majority vote (or other approval method as prescribed by the organization's bylaws) from the governing body to approve the lease. The landman should obtain some type of documentation from the organization demonstrating its compliance. The ideal documentation would be copy of the organization's minutes, signed by the party charged with keeping those minutes. For example:

A special meeting of the Patrick Swayze Fan Club was held for the purpose of approving the oil and gas lease offered by Big Time Oil. Brother Gogan motioned that the lease terms be approved as in the Club's best interest. The motion was seconded. The motion passed with Brother Jones abstaining. Brother Gogan moved that the President, Brother Johnson, be approved to execute the lease on behalf of the Club. The motion was seconded. The motion passed by majority vote.

Attested to by: John Gogan, Secretary.

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<sup>26</sup> *Id.* at § 4-28-505.

<sup>27</sup> *Id.*

<sup>28</sup> Ark. Code Ann. § 4-28-505(g).

After obtaining the association's authorization, the landman should obtain a statement of authority in accordance with the Arkansas Uniform Nonprofit Association Act, and record the statement with the lease. In this case, John Gogan is probably the best person from who to obtain the statement of authority.

## **V. Future Interests**

### **A. Problem (Fee Tail):**

“This deed is to John Gogan and the heirs of his body. What does that mean? Who do I lease?”

#### **Solution:**

At common law, the fee tail was a mechanism to keep land in a family in perpetuity. This estate was common in feudal times to keep land in the lord's bloodline. The fee tail grant is “O to A and the heirs of A's body.” The estate gives a life estate to the grantee with a remainder in A's heirs perpetually. In reviewing more than 150,000 title documents, the author has seen a fee tail conveyance only once. By statute, any conveyance that creates a fee tail automatically converts to a life estate for the grantee with a remainder in the grantee's heirs.<sup>29</sup> Unlike a garden variety life estate, this special life estate has a statutory provision to allow a binding lease without the approval of the remaindermen.<sup>30</sup> Under this provision, the life tenant may take up to 1/16 (6.25%) of the minerals produced.<sup>31</sup> That is, on a 1/8 royalty, the life tenant may take half the royalty.<sup>32</sup> The statute protects the reversion holder and contingent remaindermen via a court-appointed trustee to hold the funds for the benefit of those parties.<sup>33</sup>

### **B. Problem (Ascertainable Future Interest Owner):**

“I have a deed granted to ‘John Gogan for life, then to Jim Gogan if he's still farming but if Jim Gogan is not farming at the time of John's death, to Robert Gogan.’”

#### **Solution:**

This solution is simple. Lease everybody with an interest. While the leasing solution is easy, the consequence of leasing these parties is not. The difficulty with leased future interests lies in the division of bonus and royalties between the future interest holder and the present interest holder. The classic example is the life estate/remainderman problem. In Arkansas, there is no statute

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<sup>29</sup> *Id.* at § 18-21-301.

<sup>30</sup> *See Id.* at § 15-73-301 et. seq.

<sup>31</sup> *Id.* at § 15-73-304(1).

<sup>32</sup> *Id.* at (3).

<sup>33</sup> *Id.* at § 15-73-306.

dictating the division of bonus and royalty between the two estates, so the leasee must obtain a written agreement between all parties as to how to share the bonus and royalties.

### **C. Problem (Unascertainable Owners—The Open Class)**

“This deed goes to John Gogan, then to Jim Gogan’s Children. I took a lease from John, and I called up Jim. He has one child, Sally Mae by a prior marriage. He’s fifty and he recently re-married a twenty-five year old.”

#### **Solution:**

Jim Gogan’s future children with his new wife are an open class of contingent remaindermen. There is a possibility the class of contingent remaindermen will expand, and as the contingent remaindermen come into being, each has a right to prevent waste of the estate if their estate is reasonably certain to vest.<sup>34</sup> Unfortunately, Arkansas currently has no statute that solves this problem.

In the absence of a statutory solution, only the general equity power of the judiciary remains to rectify the problem of leasing open classes. Arkansas has no case on point for the leasing of these interests, but there is authority supporting the court’s general power in equity to deal with open classes of future interest holders. In *Ball v. Curtis*,<sup>35</sup> a testator devised a life estate to his 3 children, remainder to his grandchildren, and reversion to his children. The testator’s grandchildren were an open class, with none in being by one of testator’s daughters.<sup>36</sup> The court held that the daughter was a proper party to represent her unborn children and that the court had the power to order the sale of the land for reinvestment.<sup>37</sup> In another case, the Arkansas court allowed the sale of property burdened by an open class where the sale was for a full and fair price, on fair terms, and there was a proper representative of the open class of contingent interests.<sup>38</sup> The court directed the proceeds of the sale to go into trust for the remaindermen, to be administered under the supervision of the court.<sup>39</sup>

It appears that the use of the court’s general equity power is possible to obtain a binding lease for contingent interests in Arkansas. There is authority for execution of leases on behalf of contingent remaindermen in other jurisdictions using a court’s equity powers.<sup>40</sup> The

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<sup>34</sup> See Kuntz, LAW OF OIL AND GAS § 8.3.

<sup>35</sup> 279 Ark. 498, 637 S.W.2d 571 (1982).

<sup>36</sup> *Id.* at 499, 572.

<sup>37</sup> *Id.*

<sup>38</sup> See *Walker v. Blaney*, 225 Ark. 918, 286 S.W.2d 479 (1956).

<sup>39</sup> *Id.* at 922, 481.

<sup>40</sup> See *Gage v. Curtner*, 215 S.W.2d 411 (Texas Civ. App. 1948); See also *Robinson v. Barrett*, 45 P.2d 587 (1935) (allowing court to appoint a trustee to execute a lease on behalf of a class of unascertained contingent interest holders).



requirements to achieve a successful petition to lease an open class in Arkansas seems to be a showing of necessity, a qualified representative of the class, a fair price and terms, and a court-approved plan for payment and investment of lease proceeds.

### **Statutory Solutions to Future Interest Problems From Other Jurisdictions**

Because this is a legislative year in Arkansas, it is worthwhile to explore statutory solutions from some of Arkansas' oil and gas producing neighbors. In Oklahoma, the statutes allow the life tenant who is burdened with a contingent remainder interest to petition a district court to appoint a trustee to lease the property for oil and gas development:<sup>41</sup>

**In any case where, by will or deed or other instrument, title to real estate is in a tenant for life or other person having the right to the use thereof and income therefrom, with the remainder interest left to one or more contingent remaindermen, so that it is impossible to determine until the death of the life tenant or the future happening of some other determining event, what interest, if any, the various contingent remaindermen will take; the district court, upon the application of the life tenant, shall have jurisdiction and authority to appoint a trustee under proper bond, over said real estate, for the purpose of leasing the same for oil and gas developing purposes.**

Following the court proceeding, the trustee may make a lease under Oklahoma's general guardianship laws.<sup>42</sup> The bonus and rentals go to the life tenant, and the lease may not exceed a 10 year term or as long thereafter the lease produces oil and gas.<sup>43</sup> The royalties are held in trust by the trustee and invested pursuant to the Oklahoma Prudent Investor Act.<sup>44</sup> The income from the trust goes to the life tenant, and the corpus goes to "the ultimate taker," the fully ascertained contingent beneficiary.<sup>45</sup>

The Texas statutory approach is similar. The chief difference between the approaches is the necessity that the life tenant prove particular conditions precedent. A life tenant may petition for a receiver to lease the land under the Texas statute if the land is susceptible to drainage, and that leasing the land will be advantageous to the future interests.<sup>46</sup> The receiver may then lease the minerals and invest the proceeds. Units must not be more than 640 acres for gas and 160 acres for oil.<sup>47</sup>

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<sup>41</sup> 60 Okl. St. § 71.

<sup>42</sup> *Id.* at § 72.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* § 73.

<sup>45</sup> *Id.*

<sup>46</sup> *See* Tex. Civ. Prac. & Rem. Code § 64.092

<sup>47</sup> *See Id.*

## VI. Trusts

### Problem:

“I contacted Bob Jones, Trustee of the John Gogan Trust. I asked to see a copy of the trust agreement so that I could tell if he could lease the interest. He refused, saying that ‘it was none of my business.’”

### Solution:

A trustee holding title to real property can execute an oil and gas lease if the trust agreement gives the trustee the power to do so. Prior to taking a lease, the landman should verify and document the powers of the trustee. Because many trusts contain sensitive provisions, reviewing the actual trust document may be impossible. To remedy this, the General Assembly enacted Act 1031 of 2005 codified as Ark. Code Ann. § 27-73-1013:

28-73-1013. Certification of trust.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) a statement that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
- (7) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) (1) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification.

(2) Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if a court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

To summarize, the trustee can give a binding lease by furnishing this certification and stating therein they have the power to convey. More saliently, there is no duty on the part of the lessee to review any portion of the trust instrument, yet there is significant liability for requesting to view the trust document when not done “in good faith.” The certification of trust should be recorded with the lease to document the trustee’s authority.

## VII. Powers of Attorney

### **Problem:**

“Take a look at this power of attorney. John Gogan Sr., the grantor, was diagnosed with Alzheimer’s 5 years after he signed it. He is currently in a nursing home. His son John Jr. is the grantee. Can I take a lease?”

### **Solution:**

Powers of attorney are written legal designations made by a principle empowering an agent to perform certain acts on the behalf of the principle under certain conditions.<sup>48</sup> A power of attorney can be durable or non-durable.<sup>49</sup> A non-durable power does not empower the agent to act if the principle becomes incapacitated or incompetent.<sup>50</sup> In that case, one must obtain court intervention to appoint a guardian to act. A durable power, however, continues in force despite the incapacity or incompetence of the principle.<sup>51</sup>

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<sup>48</sup> BLACK’S LAW DICTIONARY, 542 (2d Pocket Edition).

<sup>49</sup> See Ark. Code Ann. § 28-68-402.

<sup>50</sup> *Id.* at § 28-68-202.

<sup>51</sup> See *Id.* at § 28-68-401.

Further, powers of attorney may be limited in scope.<sup>52</sup> For Example, a power of attorney may give management powers to property, but not the power to convey the property under management. The power of attorney must name an agent, be signed by the principle, and be acknowledged according to the law.<sup>53</sup>

A power of attorney expires upon the principle's death, but if the agent is not aware of the principle's death, he may bind the principle's estate if he acts in good faith.<sup>54</sup> It is also noteworthy that a durable power of attorney is revocable under certain circumstances. Namely, if there is a court-appointed guardian of the incapacitated's estate, that guardian may revoke the power as though the guardian were the principle.<sup>55</sup>

Because powers of attorney can be very specific, always request a copy of and read the power of attorney before taking the lease. The real estate records and court records should be examined for revocations of the power.<sup>56</sup> Further, the power of attorney must be of record or filed with the lease to avoid problems with subsequent purchasers. A conveyance recorded without a supporting power of attorney is not notice to a subsequent purchaser for value.<sup>57</sup>

## **VIII. Government Entities Other Than State Agencies**

### **Problem:**

“I need to take a lease from the County/City/School District/College. Who has to sign it? What has to be done?”

### **Solution:**

#### **A. Counties**

With the sale or conveyance of real property, a County must ordinarily follow a sophisticated procedure to ensure the public receives maximum benefit from the sale.<sup>58</sup> This statutory

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<sup>52</sup> *See Id.*

<sup>53</sup> *See Id.*

<sup>54</sup> *See Id.* at § 28-68-101.

<sup>55</sup> *See Ark. Code Ann.* at § 28-68-203.

<sup>56</sup> To revoke a power of attorney, the principle must file a document doing so that is duly acknowledged. *See Id.* at § 18-1-502.

<sup>57</sup> *See Jones v. Green*, 41 Ark. 363, 1883 Ark. LEXIS 185 (1883).

<sup>58</sup> *See Ark. Code Ann.* at § 14-16-105.

procedure, however, exempts “leasing county property.”<sup>59</sup> The County Judge has a general power to lease county property.<sup>60</sup>

## **B. Municipalities**

As government corporations, municipalities have more latitude to lease their real property interests. A municipal corporation has plenary power by Ark. Code Ann. § 14-54-302 to lease its lands, provided that the lease is:

- 1) Executed by the mayor; and
- 2) Executed by the City Clerk or Recorder; and
- 3) Authorized by a resolution of the City Counsel; and
- 4) Approved by a majority vote of the City Counsel, present and participating.

To support this lease, the landman should include a copy of the ordinance showing the adoption of the lease.

## **C. School Districts**

The General Assembly gives full power to the directors of school districts to execute oil, gas, and mineral leases without the need for an election.<sup>61</sup> The statute authorizing the execution of leases prescribes no particular method to validate the lease.

## **D. Vo-Techs, Community Colleges, Technical Colleges, Public Four-Year Colleges and Universities**

The General Assembly enacted a specific statute authorizing Arkansas Tech to lease its lands for oil, gas, and mineral exploration. Any lands held by Arkansas Tech or held by the State for the benefit of Arkansas Tech may be leased by the Board of Arkansas Tech with all proceeds to go to the University.<sup>62</sup> This stands as an anomaly among university systems in Arkansas.

The Boards of the remainder of the university systems have “general management authority statues.” In some instances, these statutes expressly give the governing boards of the institution the power to manage their real property. This includes the University of Central Arkansas and Henderson State University. The statues give the rest of the university systems general authority to manage the “affairs” of the University. These include Arkansas State, University of Arkansas,

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<sup>59</sup> *Id.* at (f)(2)(D).

<sup>60</sup> *Id.* at § 14-14-1102 (3)(A).

<sup>61</sup> *Id.* at § 6-13-624.

<sup>62</sup> *Id.* at § 6-65-304.

and Southern Arkansas University. In any case, the statutes are vague as to whether these institutions can execute a binding oil and gas lease on their own. Briefly, here are the enabling statutes:

University System	Code Section
University of Central Arkansas	6-67-103
Henderson State University	6-66-102
Arkansas State University System	6-65-202
University of Arkansas System	6-64-202
Southern Arkansas University	6-65-402
All other Vo-Techs, Community Colleges, or Technical Colleges	6-51-206 <sup>63</sup>

Under Ark. Code Ann. § 22-5-801, the General Assembly declares that it wishes the Commissioner of State Lands (COSL) to possess the “authority and responsibility” to grant leases and permits for the taking of oil, gas, and minerals from “lands held in the name of the State of Arkansas or any state agency or institution.”<sup>64</sup> There is no guidance from the legislature or courts as to the scope of “any state agency or institution.” The statutes specifically exempt the Arkansas Game and Fish Commission (AGFC).<sup>65</sup> By negative implication, “state agency” likely includes any governmental unit that similar to AGFC. The Highway Commission and Natural Heritage Commission come to mind as similar bodies for who the COSL will manage the minerals.<sup>66</sup> The author does not believe that “lands held in the name of the State of Arkansas” or “state agency or institution” includes municipalities or local school districts, but vo-techs, colleges, and universities (save for Arkansas Tech), may be “institutions” under the statute.

According to the COSL’s office, the COSL handles leasing for these institutions as a matter of practice.<sup>67</sup> Whether this authority comes from interpreting the statutes to give direct authority for

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<sup>63</sup> The exact authority to lease is for “unneeded lands.” Presumably, the mineral estates of these institutes are “unneeded.”

<sup>64</sup> Ark. Code Ann. § 22-5-801.

<sup>65</sup> *Id.* at 22-5-802(c)

<sup>66</sup> The list of state agencies found at <http://portal.arkansas.gov/government/Pages/governmentAgencies.aspx> is probably the scope of the statute as it pertains to state agencies.

<sup>67</sup> Personal communication, COSL’s office.

leasing, by delegation of the leasing and management powers from the universities themselves, or as an implied repeal of conflicting statutes is unclear.

## **IX. Roadways<sup>68</sup>**

### **A. Problem (Title to Municipal Streets):**

“The mayor of Centerville called me about our leasing activity. He says they own the minerals under the city streets, and that they’ll lease for \$1500 and 1/5. The town plat was signed by the original owner of the town proprietor, showing the streets laid out as they are now with nothing more. From there, the owner sold out the town lots to various private parties.”

### **Solution:**

The general rule in Arkansas is that a dedication of a street on a plat provides only “an easement or right of passage over the soil” with “the original owner still retaining the fee, together with all rights not inconsistent with public use.”<sup>69</sup> While there is no Arkansas case examining whether the minerals rights are one of those rights “not inconsistent with public use,” it is almost certain that they are. The limit on this would likely be operations that affect the public’s right to use the surface for roadway purposes. For example, staking an oil well or strip mining for lignite in the center of Main Street would be unacceptable, but running a horizontal well lateral 3,000 feet below the surface would be acceptable.

With the mineral rights not being in the municipality, the inquiry turns to who owns the mineral rights under the street—the original dedicator or the current lot owner? The so-called “strips and gores” doctrine applies to this situation. The doctrine embodies a public policy against the retention of small, useless tracts of land by remote grantors.<sup>70</sup> That is, where a grantor owns an interest in a small, useless piece of property that adjoins the larger, useful piece of property

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<sup>68</sup> For a good general roadmap (no pun intended) on the issues of leasing roadbed minerals, see William G. Bredthauer and Shawna Snellgrove Rinehart, *OWNERSHIP AND LEASING OF MINERALS UNDER HIGHWAYS AND RIGHT-OF-WAYS*, 16 *Tex. Wesleyan L. Rev.* 3 (2009). The article is based on Texas law, but provides a fine overview of roadbed mineral leasing issues that are generally applicable to Arkansas.

<sup>69</sup> *Taylor v. Armstrong*, 24 Ark. 102, 104-105 (1863); *See also Kansas C. S. R. Co. v. Ft. Smith*, 228 Ark. 625, 309 S.W.2d 315 (1958) (city obtained only an easement from public streets platted and dedicated by Federal Government, and when railroad bought lots and city agreed to close street, railroad owned streets in fee simple); *Padgett v. Arkansas Power and Light Co.*, 226 Ark. 409, 411, 290 S.W.2d 426, 428-429 (1956) (examining the public’s rights of use in street and road easements). The author does not suggest that fee title can never be passed to a municipality or county by a plat, but the author could not find an Arkansas case examining the issue. Most likely, a very clear intent to pass fee title to the public would pass title to the county or municipality charged with the road’s maintenance. In Oklahoma, there is a statute that clarifies when a plat conveys fee title. *See Langston City v. Gustin*, 191 P.2d 197 (1942) (holding that by statute, use of the words “grant or donate” on a plat conveys fee title to the government). This may serve as some guidance on what may pass fee title on a plat in Arkansas.

<sup>70</sup> *See Abbott v. Pearson*, 257 Ark. 694, 700-701, 520 S.W.2d 204, 208 (1975).

conveyed to the grantee, the grantor's interest the small, useless piece of property passes to the grantee unless the grantor demonstrates a precise and conspicuous intent to retain his interest in the small, useless piece of property.<sup>71</sup> In Arkansas, there are examples of courts applying the rule to railroad right of ways<sup>72</sup> and roadways.<sup>73</sup> The mineral rights in the roadbed pass or are reserved depending upon the status of the mineral rights in the deed to the adjoining lot.

### **B. Problem (Deeds to the Highway Commission):**

“In 1965, Bob Gogan conveyed a 0.96 acre strip along Highway 63 to the Arkansas Highway Commission reserving the minerals. He conveyed the residual tract to Jones free of reservation ‘less and except a 0.96 acre tract conveyed to the Highway Department.’ Do I need to lease Gogan’s heirs?”

#### **rSolution:**

Arkansas would very likely apply the “strips and gores” doctrine to this situation. Arkansas has no case construing whether the doctrine applies to minerals in the manner described in this problem.

Looking to Texas for guidance, there is little doubt the doctrine should apply to minerals severed in highway right of way conveyances. In *Reagan v. Marathon Oil Co.*,<sup>74</sup> a grantor conveyed 14.116 acres to the State of Texas for a highway, reserving the minerals.<sup>75</sup> The grantor then conveyed the residual tract bounding the North right of way along the 14.116 acres to a third party, using the concrete highway right way markers as calls (“North Tract”).<sup>76</sup> Following this, the grantor conveyed an additional 3.018 acre tract on the South side of the highway to The State of Texas, reserving the minerals.<sup>77</sup> The grantor next conveyed the residual tract South of the highway (South of both the 14.116 acre and 3.018 acre tract) to a third party using the concrete highway right of markers as calls, but he reserved half the minerals for life (“South Tract”).<sup>78</sup> The Court ruled that the grantor passed all of his interest in the mineral estate underlying the North half of the original 14.116 acres to the grantee of the North Tract.<sup>79</sup> As for

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<sup>71</sup> *See Id.*

<sup>72</sup> *See Id.*

<sup>73</sup> *See McGee v. Swearingen*, 194 Ark. 735, 109 S.W.2d 444 (1937).

<sup>74</sup> 50 S.W.3d 70, 2001 Tex App. LEXIS 4457 (2001).

<sup>75</sup> *Id.* at 73-74, 1-6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 83, 30.



the South half of the original right of way and the additional 3.018 acres, the court held that the grantees took title to it as well, but subject to the grantor's lifetime reservation.<sup>80</sup>

## X. Cemeteries

### A. Problem (Establishment of a cemetery by Fee Conveyance to Trustee(s)):

"I have an 1895 deed into John Gogan, Bob Jones, and John Johnson as trustees for the Eternal Rest Cemetery. There is nothing else in the record. A group of local volunteers is taking care of the cemetery. Some of them are descendants of the original trustees, and some are just nice folks who want to help."

#### Solution:

This is the preferred situation when leasing a cemetery. The general form of the conveyance is "O to A and B as trustees of the A Cemetery." The trustee has the power to lease the lands so long as the lease does not conflict with the use of the land as a cemetery or the terms of any express trust agreement.<sup>81</sup> Over time, the trusteeship often passes informally, and it is essential to document the appointment and acceptance of the trusteeship.

In many cases, though, the cemetery trustee may be long deceased without appointing a successor trustee. In that case, the doctrine of cy pres is available to formally appoint new trustees to give the lease. The doctrine of cy pres is shorthand for "cy pres convmc possible," French for "as near as possible." The doctrine applies to charitable trusts that lost some element of their existence, i.e. a trustee or a purpose. Cemeteries are generally within the definition of a charitable trust. Arkansas recognizes the doctrine of cy pres, and court action is generally not required if the action is defensible in court as consistent with the intent of the trust. For example, in *Slade v. Gammill*,<sup>82</sup> the court approved the actions of a group of successor trustees for a cemetery who traced their trusteeship to an ad hoc appointment by a group of the grantor's descendants.<sup>83</sup> The trustees sold an 86 foot strip of the cemetery to a church in exchange for some improvements to the cemetery and perpetual care of the cemetery.<sup>84</sup> The court upheld the conveyance under the doctrine of cy pres.<sup>85</sup>

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<sup>80</sup> *Reagan*, 50 S.W.3d at 83, 2001 Tex App. LEXIS 4457 at 30 (2001).

<sup>81</sup> *See generally*, 11 SUMMERS OIL AND GAS 23, 3d edition (Thomson/West 2006)

<sup>82</sup> 289 S.W.2d 176, 226 Ark. 244 (1956)

<sup>83</sup> *See Id.*

<sup>84</sup> *Id.* at 178, 247.

<sup>85</sup> *Id.* at 181, 251. Procedurally, *Slade* was a unique case. The church that purchased the property intended to build a \$400,000 improvement on the strip, so the church initiated a quiet title suit in which the cemetery trustees and the heirs of the cemetery grantor were named as defendants. *Id.* at 178-179, 247. The heirs, being diaspora located in all 50 states, were named as a class. *Id.* The court ratified the actions of the trustees as "a good sensible

When faced with a vacant trusteeship or a gap in the transfer of the trusteeship, the best practice is to seek out the person or persons caring for the cemetery. In most cases, this will be a small community group or volunteers. Care should be taken to determine if there are competing persons or groups.<sup>86</sup> To obtain total assurance of title and authority, the lessee may choose to petition a court to recognize the title and authority of the trustee under the doctrine of cy pres.

**B. Problem (Lands dedicated for cemetery use without a deed and no other factors):**

“There’s a cemetery shown on the topo map. We can’t find a deed for it, and we can’t see where anybody mentions it in the record. We visited the site. There’s about a quarter acre of graves, no fence, and Jay Gogan, who owns the property around the cemetery, is maintaining it.”

**Solution:**

Courts recognize that in the absence of any grant or reservation, a cemetery is merely in the nature of an encumbrance. In the Oklahoma case of *Heiligman v. Chambers*,<sup>87</sup> the court examined a situation where there was an existing graveyard on a larger tract, but no reservation or conveyance of the graveyard in the chain of title.<sup>88</sup> The owner of the larger tract sought to remove the bodies, but a relative of one interred at the site sued for an injunction to stop the disinterment.<sup>89</sup> The court determined that owner of the larger tract held naked legal title subject to an easement by the heirs of those interred at the graveyard to visit and maintain the graves of their ancestors until such time as the heirs chose to disinter their ancestors.<sup>90</sup>

Arkansas recognizes the concept of a graveyard as an encumbrance. In *Bowen v. Hooker*,<sup>91</sup> the Arkansas Supreme Court reviewed a case in which Bowen conveyed a one acre tract to a church on which there was located “Bowen Graveyard.”<sup>92</sup> The church later conveyed the property to Hooker.<sup>93</sup> At the time of the conveyance to Hooker, half of the acre tract was fenced with half of the enclosed area containing actual interments.<sup>94</sup> Later, members of the community moved the fence to enclose only the North half of the original enclosed area.<sup>95</sup> The trial court ruled that all of the original area enclosed by the fence was dedicated to public use, but the area not enclosed

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solution...which carries out the intent” of the grantor which “equity should approve...though no case like this appears in the books.” *Id.* at 181, 251.

<sup>86</sup> See e.g. *Powhatan Cemetery Inc. v. Colbert*, 292 S.W.3d 302 (Ark. App. 2009).

<sup>87</sup> 338 P.2d 144 (1959).

<sup>88</sup> *Id.* at 146-147.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 148.

<sup>91</sup> 237 Ark. 250, 372 S.W.2d 257 (1963).

<sup>92</sup> *Id.* at 251, 258,

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

by the original fence was not.<sup>96</sup> The defendant appealed, questioning the trial court's determination that the entire area within the original fence not used for actual interments was a part of the cemetery.<sup>97</sup> The Arkansas Supreme Court disagreed with the defendant, ruling that while the legal title in the area in the fence belonged to the defendant, it was subject to the public's use.<sup>98</sup> It is clear from this case that the existence of a graveyard with no outstanding legal title in a cemetery trustee or dedicator is simply an encumbrance.

**C. Problem (Lands dedicated for cemetery use without a deed; evidence of conflicting claims):**

“In 1910, the title stops with the Old Reliable Stave Company. Next, there's a 1941 warranty deed from John Gogan to A.J. Johnson for the NW/4 NW/4, ‘less and except a half acre tract known as Jones Cemetery.’ We checked the tax rolls, and Bob Jones was on the rolls from 1910 to 1921. There are a number of people buried there, including Bob Jones who died in 1936. The earliest burial is ‘Bart Jones’”b July 1, 1912, d. July 5, 1912, but there are several other local families buried there. Some of the Jones descendants and community members are keeping up the cemetery. There's a primitive native stone wall around the part with the graves. It's been there since everybody can remember. The part without graves is being cultivated by A.J. Johnson's heirs.”

**Solution:**

A case can be made that the encumbrance rule of *Heiligman* and *Bowen* applies to the Jones Cemetery. There is no deed creating the cemetery, but there is a deed that purports to except or reserve it. The gap in the chain of title in the Jones problem and the continued use and care by the Jones family is a factor to consider. The ancient case of *Mooney v. Cooledge*<sup>99</sup> is instructive on this problem.

The heirs of Henry Mooney who claimed ownership of a small family cemetery sued an adjoining cemetery that extended its fence onto an acre of land used by Henry Mooney and his family and friends for a burial ground.<sup>100</sup> Mooney conveyed his 147 acre farm to the adjoining cemetery's predecessors in title with “one acre of the same...to be kept by him [grantor] forever as a burial ground. The aforesaid number of about 146 acres remaining.”<sup>101</sup> The court held this

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<sup>96</sup> *Id.* at 251-252, 258.

<sup>97</sup> *Bowen*, 237 Ark. at 252, 372 S.W.2d at 258 .

<sup>98</sup> *Id.*

<sup>99</sup> 30 Ark. 640, 1875 Ark. Lexis 84 (1875).

<sup>100</sup> *Id.* at 641-642, 2-3.

<sup>101</sup> *Id.* at 644, 5.

exception as void to reserve title in Mooney, passing all title to the adjoining cemetery's predecessors.<sup>102</sup>

Mooney's descendants, however, argued for adverse possession.<sup>103</sup> The facts supporting adverse possession were that following the sale to the adjoining cemetery's predecessor, Mooney exercised control over the property, buried his family members there, gave permission to others to inter remains, and that nobody made an adverse claim against him for nearly 30 years.<sup>104</sup> Among the testimony was that Mooney often refused to allow burials on the plot, and there was a disclaimer of interest from one of the adjoining cemetery's immediate predecessors in title.<sup>105</sup>

The court held that Mooney's heirs kept title to the area actually used for interments on the theory of adverse possession.<sup>106</sup> Thus, the use of a tract of ground as a graveyard can amount to adverse possession if there is a party asserting control over the tract to the exclusion of the legal title holder.

In the Jones problem, there is evidence that the Jones family still asserts some claim of ownership because of their continued care of the cemetery. Further, there are a limited number of burials. This indicates that the use is exclusive or done with permission only. The prudent course of action in this problem would be to consider the unclosed portion of the cemetery as adversely possessed by Johnson's heirs, but the enclosed portion, however, is likely the property of Jones's heirs by adverse possession depending upon what further facts can be gleaned from the heirs. In the absence of facts giving rise to adverse possession or a missing deed, the cemetery would likely be a mere encumbrance.

#### **D. Problem (Abandoned, but cared for cemetery with no deed):**

Same facts as C, but suppose that 20 more years elapse, and Jones's family disperses all around the country. Local community members assume care of the cemetery and begin to allow interments from the general public.

#### **Solution:**

Refer back to the portion of this paper dealing with non-profit associations. Such an entity can not only hold real property, but also has standing to sue.<sup>107</sup> As such, if their acts of dominion over the property give them title by adverse possession, they may sue to quiet their title in the

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<sup>102</sup> *Id.* at 646, 9.

<sup>103</sup> *Id.* at 648, 12.

<sup>104</sup> *Id.* at 648-649, 13-14.

<sup>105</sup> *See Mooney*, 30 Ark. at 650-654, 1875 Ark. Lexis at 15-28.

<sup>106</sup> *Id.* at 654-656, 22-26.

<sup>107</sup> Ark. Code Ann. §§ 4-28-503 and 507, respectively.

property. The community group, whether they call themselves trustees or a cemetery association, would be the best bet to gain a binding lease over the cemetery.

**E. Problem (Completely abandoned cemetery):**

Same facts as C, but assume that Jones's family disperses and exercised no control over the property since the 1950's. Burials of members of the general public take place occasionally. Nobody does anything to care for the cemetery save for the very infrequent care of a Good Samaritan or burial preparations by funeral companies. The efforts of the Good Samaritan aren't enough and the property is becoming overtaken by bush and trees.

**Solution:**

There is an obscure statute dealing with ancient cemeteries.<sup>108</sup> Under the statute, a cemetery that has been open to public use for more than 50 years is public property,<sup>109</sup> but the statute is vitiated only by the filing of a petition with the Quorum Court for the County to assume management and care of the cemetery.<sup>110</sup> The County will then issue notice to any interested landowner, and once 6 months passes without objection, all suits to recover title from the County are barred.<sup>111</sup> The proper party to lease would be the County Judge.<sup>112</sup>

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<sup>108</sup> *Id.* at § 18-15-1408.

<sup>109</sup> *Id.* at (a).

<sup>110</sup> *See Id.* at (b).

<sup>111</sup> *Id.* at (c).

<sup>112</sup> Section VII(A), *supra*.