MINERAL AND ROYALTY CONVEYANCES

A SET OF FORMS WITH COMMENTARY

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Author	"Negotiating and Drafting a Modern Oil & Gas Lease on Behalf of Lessor," 13 Tex. Tech L. Rev. 1401 (1982)(Texas Bar Foundation Law Review Award 1982).
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I. CRITICAL WORDS AND PHRASES

This article is about creating deeds that convey and reserve minerals and royalty in Texas.[2] More than ten years ago, Bruce M. Kramer concluded an encyclopedia of canons of construction addressing mistakes in deeds with the hope that the courts and the practicing bar would join together in better drafting and more consistent use of canons to avoid conveyancing mistakes and handle mistakes more uniformly.[3] To date, there has been no organized effort to promulgate a set of annotated forms to further that goal. Conveyances of land in Texas continue to involve minerals and royalty and the need for a set of comprehensive forms has not been met. This article begins with a discussion of critical words and phrases---words of art---and then offers a flow chart to a follow-up collection of suggested forms that are, in turn, followed by commentary. Each form paragraph is supported by a same-numbered commentary paragraph that explains the suggested phrase or clause. The starting point in drafting and interpreting mineral and royalty deeds is understanding words of art.

A. The Mineral - Royalty Distinction

The defining reference to minerals in place is the phrase "oil, gas and other minerals in and under."[4] This phrase is usually coupled with "and that may be produced from." Royalty is defined by the word "royalty" used with the phrase "in oil, gas and other minerals produced, saved and sold."[5] These phrases come from common sense, the minerals being "in and under" the land and the royalty becoming due when they are "produced, saved and sold."[6] The word "produced" does not automatically make the conveyance one of minerals or royalty.[7] "Produced" is a word traditionally associated with either concept---minerals or royalty---and does not in and of itself present an ambiguity or require a finding of one over the other. In some cases it will be related to minerals[8] while in another context it may be read as referring to royalty.[9] Given the potential value of minerals and the exponential value of royalty, a deed which strays from common defining terminology may give rise to litigation. For instance, a claim was made that the use of the phrase "oil and gas and other minerals developed from said land" referred to a royalty interest rather than a mineral interest. The argument was advanced that "developed" and "produced" were synonymous and since "produced" was a royalty rather than a mineral word, "developed" also meant royalty.[10] The court rejected the argument.

It is when the word "royalty" is used in a document that the courts will be most likely to hold the contested

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[2] Because oil and gas laws of Texas differ sometimes from its surrounding states, this article does not attempt to provide forms and commentary for other jurisdictions than Texas.

[3] Bruce M. Kramer, THE SISYPHEAN TASK OF INTERPRETING MINERAL DEEDS AND LEASES: AN ENCYCLOPEDIA OF CANONS OF CONSTRUCTION, 24 Tex. Tech L.R. 1 (1993). This is a masterful and oft-cited encyclopedia of canons of deed construction, which are the end-use tools to construe the imperfectly finished products of scriveners who didn't quite get it right.

[4] *Miller v. Speed*, 248 S.W.2d 250, 252 (Tex.Civ.App.-Eastland 1952, no writ); *Bank One, Texas, National Association v. Alexander*, 910 S.W.2d 530 (Tex.App.-Austin 1995, writ den'd), *Citing* 1 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 304.4, at 475 (1994 ed.) ("An instrument that grants or reserves 'the oil, gas and other minerals in, on and under' or 'in and under' described land, without further provisions relating to the minerals, creates a mineral interest.").

[5] *Masterson v. Gulf Oil Corporation*, 301 S.W.2d 486 (Tex.Civ.App.-Galveston 1957, writ ref'd n. r. e.).

[6] *Luckel v. White*, 819 S.W.2d 459, 491 (Tex. 1991): "We also hold as a matter of law the interest conveyed by the Mayes-Luckel deed is singularly a royalty interest, evidenced by, (1) the repeated use of the words 'royalty interest'; (2) the lack of any reference whatsoever in the deed to 'minerals'; and, more importantly, (3) the lack of any words to indicate the interest is of anything 'in and under' the land."

[7] *Bank One, Texas, National Association v. Alexander*, 910 S.W.2d 530 (Tex.App.-Austin 1995, writ den'd).

[8] See *Buffalo Ranch Company, Ltd. v. Thomason*, 727 S.W.2d 331 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.), which presented an example of an instrument which was clearly a mineral deed. Appellant attacked the deed claiming it was a royalty deed based upon words "in and to" rather than "in and under" coupled with the words "which are produced" and the additional fact that the executive right was stripped from the contested interest. The court rejected the contention.

[9] *Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361, 363 (Tex.App.-Amarillo 1990, no writ). "The words 'from actual production' stated in *Watkins* are not exclusive words of art which must be used when expressing a party's intent to reserve a royalty rather than mineral interest. In this instance, the reservation before us provides: '[i]n the event oil and gas and/or other minerals are produced from said land, the said Bank shall receive a full one-sixteenth (1/16) portion thereof as its own property, to be paid or delivered to said Bank free of cost to it.'" *Citing Pan American Petroleum Corp. v. Southland Royalty Co.*, 396 S.W.2d 519, 524 (Tex.Civ.App.-El Paso 1965, writ dism'd).

[10] *Bank One, Texas, National Association v. Alexander, supra* at 531.

interest to be royalty. If this statement seems simplistic, read the majority opinion by the court of appeals, the dissent, and the opinion of the supreme court in *Temple-Inland Forest Products Corporation v. Henderson Family Partnership, Ltd.*[11] The words "bonus," and "rentals," also have a separate, distinct and well-established meaning in the oil and gas business, but their current usage may not be the same as they were 50 years ago.[12] Use of terms which are not current or not commonly understood in the oil and gas industry, even though they are commonly understood in everyday affairs, can generate confusion and litigation.

B. Appurtenant Rights

When oil and gas migrates from reservoirs into deeds it comes "together with all and singular the rights and appurtenances thereto in any wise belonging…."[13] Those rights and appurtenances are listed in one of the most commonly quoted statements about minerals, from *Altman v. Blake*:[14] "A mineral estate consists of the following five rights: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments." It is now a settled rule that pursuant to the "greatest estate rule," a conveyance of minerals carries with it all of these rights unless one or more of them has been previously severed or is being reserved in the deed.[15] Thus, use of the term "minerals," "mineral estate," or "oil, gas and other minerals" incorporates the five appurtenant rights without need of express enumeration. These rights are apportioned in accordance with the quantum of interest conveyed or reserved.[16]

Royalty, on the other hand, comes with no appurtenant rights and for that reason it is generally referred to as "nonparticipating." A nonparticipating royalty owner has no right to develop or lease the land or its minerals or share in bonus or rentals.[17] While the mineral estate is akin to an exclusive possessory estate in land with all of the powers that go with it,[18] a nonparticipating royalty carries no rights or powers in the land except the right to a stated share of production from the land free and clear of expenses of finding and developing production.[19] The very act of severing

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[11] 911 S.W.2d 531, 534 (Tex.App.-Beaumont 1995), rev'd 958 S.W.2d 183 (Tex. 1997).

[12] For example, bonus is no longer considered a share of production as once stated in *Griffith v. Taylor*, 284 S.W.2d 768, 773 (Tex.Civ.App.-Amarillo 1955), aff'd 156 Tex. 1, 291 S.W.2d 673 (1956). Judge Calvert speaking for the court stated at 676 as follows: "…it may be that the words 'bonus' and 'royalty' in their broadest concepts and meanings are conflicting and overlapping. On the other hand, when it is necessary that they be distinguished there is a narrower concept of the two terms as they are ordinarily and commonly used and understood in the oil and gas industry in which they do not conflict but are harmonious. In this narrower sense a reservation or a payment of a part or percentage of production under a lease which is to continue throughout the life of the lease is regarded as 'royalty', and a sum certain to be paid in cash or out of production is regarded as 'bonus'."

[13] The language of the habendum. In deeds, the word "premises" refers only to the lands actually conveyed. In that regard, these forms depart from the older common law concept of "premises" which included the naming of the grantor and grantee, the expression of consideration, as well as a description of the land conveyed. *Harris v. Strawbridge*, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).

[14] 712 S.W.2d 117, 118 (Tex. 1986); first articulated as such in *Schlittler v. Smith*, 128 Tex. 628, 630-31, 101 S.W.2d 543, 544 (1937).

[15] *Cockrell v. Texas Gulf Sulphur Co.*, 157 Tex. 10, 15, 299 S.W.2d 672, 675 (1956) ("A warranty deed will pass all of the estate owned by the Grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed.").

[16] *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 306 (1943). See also *French v. Chevron U.S.A., Inc*., 896 S.W.2d 795, at 798 (Tex. 1995) in which the Texas Supreme Court quoted the rule in *Altman* that a mineral estate consists of five interests, naming them, and then the court said "A conveyance of a mineral estate need not dispose of all interests; individual interests can be held back, or reserved, in the grantor."

[17] *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex.Civ.App.-Houston 1957, writ ref'd n.r.e.); *Bank One, Texas, National Association v. Alexander*, 910 S.W.2d 530, 534 (Tex.App.-Austin 1995, writ den'd)("A 'royalty interest' consists of the right to a fractional share of the mineral production, the owner of which typically has no share in the development and executive rights relative to the mineral estate; he may not explore for the minerals himself and is not a necessary party to a lease of the mineral estate. In the ordinary case, he simply possesses the right to his specified proportionate share of production once the minerals are produced. His interest is in 'land,' but since he may not enter the premises for the purposes of exploration and development, his interest is viewed as an incorporeal interest in the land.").

[18] *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Campbell v. Dreier*, 382 S.W.2d 179, 183 (Tex.Civ.App.-San Antonio 1964, writ ref'd n.r.e.).

[19] *Martin v. Schneider*, 622 S.W.2d 620, 622 (Tex.App.-Corpus Christi 1981, writ ref'd n.r.e.); *Luckel v. White*, 792 S.W.2d 485, 489 (Tex.App.-Houston [14th Dist.] 1990)("A royalty interest is a subset of a mineral interest and a royalty deed conveys the royalty interest as a fee. (Albeit a fee which is far less than a fee simple absolute.) Under a royalty deed the grantee obtains possessory rights only when and if the minerals are produced and readied for market. Unlike the holder of the mineral fee who owns the minerals in place, the royalty owner may not enter the property to explore, develop or produce the minerals, nor may he allow anyone else to do so. As a further logical practice, the royalty interest owner normally takes no part in leasing to others and does not share in rentals or bonus payments. Consistent with his lack of

royalty from the other four rights creates a nonparticipating royalty. Nevertheless, scriveners have always followed up the royalty grant or reservation with a statement that the royalty is "nonparticipating."[20]

Land titles have become increasing fractionated due to succession and severances. When undivided interests in land are the subject matter of a deed, the choice of the phrase "lands described" or "lands conveyed" will result in drastically different quantums of interest conveyed.

C. Lands Herein "Described" v. "Conveyed" - The Lessons of *Hooks* and *King*

When a grantor who owns less than 100% of the minerals in lands ties a grant or reservation of an undivided part of the minerals or royalty to the words "the lands described herein" or "the lands conveyed" a different fraction of interest may result from the phrase selected. Where a fraction granted or reserved in a deed is stated to be an interest in land *described* in the deed, the fraction is to be calculated upon the entire mineral interest in the lands described; conversely, where a fraction granted or reserved in a deed is stated to be an interest in land *conveyed* by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest.[21] These two statements may seem confusing upon a first reading. Once understood, they may be difficult for some to accept, but they are absolute, fixed rules. It is important for anyone drafting a deed to understand the rationale underlying the rules, and that means understanding the trilogy of cases that created the rules.

In *Hooks v. Neill*[22] the grantors owned an undivided 1/2 interest in land that they conveyed, reserving 1/32 "of all oil on and under the said land and premises herein described and conveyed." In their lawsuit they argued that they had reserved a full 1/32 of oil produced from the entire tract. Focusing on the term "conveyed," the court of appeals, however, felt that by using the word "conveyed" the grantors reserved only a 1/64 interest because the mathematical equation was a 1/32 reserved interest in the 1/2 of the land "conveyed."

In *King v. First National Bank*[23] the grantor owned an undivided 1/2 interest in land which he conveyed, reserving "an undivided one eighth of the usual and customary one eighth royalty ... in oil and gas and other minerals that may be produced from the hereinabove described land." The court distinguished "described" from "conveyed" in holding that the grantor retained a 1/64 royalty under the entire tract "described" in the deed.[24]

D. Middleton Joins The Axis of Confusion

Middleton v. Broussard[25] expanded the rules pertaining to "lands described" and "lands conveyed" from reservations to grants. This is the main import of the case; however, the case serves as a warning against incorporating certain types of legal descriptions in deeds that may inadvertently cause confusion. The deed conveyed land to R. M. Middleton, subject to a reservation of all the oil, gas and other minerals in certain tracts or parcels of land described by both fractional interest and net acres (i.e. "…An undivided three-fourths (3/4) interest (480 acres) in and to Survey No. 76, containing 640 acres…"). The deed also conveyed a royalty interest by the following clause: "NINTH: An undivided one-sixty-fourth (1/64) Royalty interest in and to all of the oil, gas and other minerals in and under and that may be produced and saved 'from all of the above described land and premises.'" This is an automatic ambiguity because the "above described land" was a series of tracts described in terms of both fractional interests, net acres, and gross acres. The trial court entered judgment that the deed conveyed a 1/64 royalty interest in all of the lands described in the deed, not in the undivided interests conveyed; that is, the 1/64 interest applied to gross acres rather than net acres. The court of civil appeals reversed the judgment and construed the deed as follows: "Our deed uses the words 'above described', 'described', and 'description'. The trial court construed those words as referring to the larger tracts out of which an undivided interest was conveyed . We construe those words as referring to the undivided interest that is being conveyed and hold that the larger number of acres was referred to for descriptive purposes only. We find nothing in the language in our deed to indicate the grantor intended to convey a larger percentage interest in the royalty interest than in the surface conveyed. For example, the first tract is an undivided 22/32 interest in 1157 acres, or 795.5 undivided acres of surface. There is nothing in

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mineral ownership (until brought to the surface and made marketable), the royalty interest owner enjoys "nonparticipation" in the costs of exploration, development, production, saving, and making ready for sale."). This law is correct notwithstanding overall reversal of the case by the Supreme Court at 819 S.W.2d 459 (Tex. 1991).

[20] Some examples of the language used can be found in *Bank One, Texas, National Association v. Alexander*, *supra* at 361; *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986); *Neel v. Alpar Resources, Inc.*, *supra* at 362; *Averyt v. Grande, Inc.*, *supra* at 898; *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 211 (Tex. 1968) in Case Footnote 1; *Martin v. Snuggs*, 302 S.W.2d 676 (Tex.Civ.App.-Fort Worth 1957, writ ref'd n.r.e.).

[21] This a rule now "well entrenched" in Texas oil and gas case law. *Middleton v. Broussard*, 504 S.W.2d 839, 842 (Tex. 1974).

[22] *Hooks v. Neill* , 21 S.W.2d 532 (Tex.Civ.App.-Galveston 1929, writ ref'd).

[23] *King v. First National Bank*, 144 Tex. 583, 192 S.W.2d 260 (Tex. 1946).

[24] *Id* at 262.

[25] 504 S.W.2d 839 (Tex. 1974).

the deed to indicate the grantor intended to convey more than a 1/64 royalty interest under the undivided 795.5 acres. The use of the word 'all' in the ninth paragraph refers to the eight tracts of land described above it and does not enlarge the number of acres of royalty interest conveyed."[26] The Supreme Court reversed the judgment of the court of civil appeals and affirmed the judgment of the trial court, stating that it made no difference whether the royalty fraction was designated in a granting clause or a reservation clause (as was the case in *Hooks)*, because in logic, the rule operates whether the deed grants or reserves a fractional part of an interest identified as "the land conveyed."[27] Then the court held that "it appears that the grantors intended to convey the one-sixty-fourth royalty in all of the lands described."[28] The court did not comment upon the apparent ambiguity created by the description of the 1/64 royalty in oil, gas and other minerals from all of the above described land **and premises**. "Premises" is a "lands conveyed," not a "lands described" term and any one of the courts that construed the deed could have held that the coupling of "**described land** and **premises"** meant the 1/64 interest applied to the grantor's interest in the tract rather than the whole tract.

The forms promulgated in this article, and specifically the legal descriptions contained in Forms Paragraph 8, avoid the use of the type of legal descriptions used in the Middleton deed. That is simply because the linkage from one forms paragraph to the next are not constructed for use with this type of legal description. However, the legal descriptions in the Middleton case could have been used without generating confusion, and a resulting lawsuit, by simply paying homage to *Hooks* and *King* by referring back not to the "described land and premises," but by referring back to the specific legal description, i.e. Survey 76. For example, this language in the deed would have been unambiguous:

> "[The Broussards]…HAVE GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY to R.M. Middleton an undivided three-fourths (3/4) interest (480 acres) in and to Survey No. 76, containing 640 acres, reserving unto Grantors all oil, gas and other minerals in and under and produced from Survey 76, but Grantors HAVE ALSO GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY unto Grantee…"
>
> **and**
>
> an undivided 1/64 royalty in oil, gas and other minerals produced, saved and sold from Survey 76.
>
> **or**
>
> an undivided 3/4 of 1/64 royalty in oil, gas and other minerals produced, saved and sold from Survey 76.

In either case, the extent of the grant is clear as to what is conveyed. Note that the two examples use a royalty fraction and a fraction of royalty.

E. Fractions Of Royalty And Royalty Fractions

In addition to the rules of *Hooks* and *King*, the distinction between a "royalty fraction" and a "fraction of royalty" must be made.[29] In other words, the attorney's quandary in choosing words is not just limited to lands "described" or "conveyed," the attorney must be careful when using the word "of." When dealing with the quantum of royalty to be conveyed or reserved, the word "of" has the same mathematical effect that fractions multiplied against each other have. The interest is reduced. A fraction of royalty is expressed as "1/2 of 1/8 royalty" which equals a 1/16 royalty. A royalty fraction, on the other hand, is expressed in terms such as "an undivided 1/32 royalty." Thus, an undivided 1/64 royalty is just that---a one-sixty forth of production---but a 1/64 **of** royalty is a fraction reduced by the base royalty; i.e., 1/64 of 1/8. The same rule applies to minerals, of course, so that an undivided 1/8 of the minerals is 12.5% of the minerals; whereas, an undivided 1/8 of Grantor's 1/2 interest in the minerals is 6.25%. A royalty fraction is also referred to sometimes as a fractional royalty.

F. Examples Of How The Hooks+King+Middleton Rules Operate

The effects of the Hooks+King+Middleton rules and the use of royalty fractions and fractions of royalty can be exemplified by hypothetical cases.

Hypothetical Case 1: Grantor owns the surface and an undivided 1/2 of the minerals in Section 100, Block 1, AB&C Survey. He agrees to sell the land to Grantee, negotiating a reservation of 1/2 of his minerals, with the intention that he will be left with 1/4 of the minerals in Section 100 after the sale. How should the deed be drawn?

Choice 1: Grantee retains the lawyer, who draws a deed with a granting clause that uses the description "Section 100, Block 1, AB&C Survey" and which contains a

[26] *Broussard v. Middleton*, 496 S.W.2d 766, 769 (Tex.Civ.App.-Beaumont 1973).
[27] 504 S.W.2d at 841.
[28] *Id* at 842.

[29] *See Brown v. Havard*, 593 S.W.2d 939, 942, 946 (Tex. 1980)(distinguishing between conveyance of fraction of production as royalty and fraction of royalty). *See also White v. White*, 830 S.W.2d 767 (Tex.App.-Houston [1st Dist.] 1992, writ den'd)(deed granting "A non-participating mineral royalty equal to three-eighths (3/8) of all the oil and gas and other minerals that may be on or under and produced and saved…." conveyed a royalty fraction rather than a fraction of royalty).

proper subject-to clause, [30] and the lawyer adds a clause which reads "save and except, and there is reserved unto Grantor an undivided 1/4 of the oil, gas and other minerals in and under and that may be produced **from the lands hereby conveyed.**"

Result: Grantor reserves only an undivided 1/8 of the minerals in Section 100, Block 1, AB&C Survey. The "lands hereby conveyed" are the surface and 1/2 of the minerals. The grantor has by this language reserved 1/4 of 1/2 of the minerals.[31] This is a pure Hooks outcome that accords with the Supreme Court's reminder that "where a fraction granted or reserved in a deed is stated to be an interest in land *conveyed* by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest." The words "lands conveyed" acts as a multiplier; i.e., 1/2 of 1/4 = 1/8.

Choice 2: Grantor retains the lawyer, who draws a deed with a granting clause that uses the description "Section 100, Block 1, AB&C Survey" and which contains a proper subject-to clause, and the lawyer inserts a clause which reads "save and except, and there is reserved unto Grantor an undivided 1/4 of the oil, gas and other minerals in and under and that may be produced **from the lands herein described.**"

Result. Grantor correctly reserves an undivided 1/4 of the minerals in Section 100, Block 1, AB&C Survey. The "lands herein described " are Section 100, Block 1, AB&C Survey, which would be all of the surface and minerals. The grantor has by this language reserved 1/4 of all of the minerals in the lands so described.

Hypothetical Case 2. Assume that Grantor owns 1/2 of the surface and minerals in Section 100, Block 1, AB&C Survey. Grantor agrees to sell the surface to Grantee, but wishes to reserve all minerals. Grantor will, however, convey an undivided 1/64 royalty to the grantee.[32]

Choice 1. The granting clause conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey, followed by a reservation of all minerals, followed by a grant of "**an undivided 1/64 royalty interest** in the oil, gas and other minerals produced and saved or sold from the **lands hereby conveyed**."

Result: Grantee receives surface and 1/2 x 1/64 royalty in Section 100. This outcome is mandated by *Hooks*. Be aware that even when the term "of" is not used, the multiplier effect is present when the term lands hereby "conveyed" is used.

Choice 2. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," reserves all minerals in and under and that may be produced from Section 100, Block 1, AB&C Survey, and contains a clause which conveys "**an undivided 1/64 royalty** in the oil, gas and other minerals produced and saved or sold from the lands **herein described.**"

Result: Grantee receives 1/2 of the surface and a 1/64 royalty in Section 100. The "lands herein described " are Section 100, Block 1, AB&C Survey.

Choice 3. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," and reserves all minerals, and contains a clause which conveys "**an undivided 1/64 royalty** in the oil, gas and other minerals produced and saved or sold from **Section 100**."

Result: Grantee receives 1/2 of the surface and a 1/64 royalty in Section 100. This clear language conveys a full 1/64 royalty in all of the minerals in the lands described as Section 100. It is not necessary to confine the deed to the words "lands herein (described)(conveyed). There is no reason why a repeat of the entire legal description is not appropriate, especially where disparate parts of the deed operate to accomplish different results.

Hypothetical Case 3. Assume that Grantor owns 1/2 of the surface and minerals in Section 100, Block 1, AB&C Survey, which is subject to a producing oil and gas lease having a 3/16 royalty clause. Grantor agrees to sell the 1/2 surface to Grantee, but wishes to reserve all minerals. Grantor will, however, convey a full 1/64 royalty interest to the grantee.

[30] The deed is correctly made "subject to" prior severances of mineral interests. This prevents operation of the *Duhig* rule. See Forms and Commentary Paragraph 12 relating to subject-to clauses and the *Duhig* rule.

[31] This outcome is explained in *Ayert v. Grande, Inc.*, 717 S.W.2d 891, 893 (Tex. 1986): "Specific rules of construction apply to cases in which a grantor owns an undivided mineral interest and reserves a fraction of the minerals under the land in the deed. If the deed reserves a fraction of the minerals under the land conveyed, then the deed reserves a fraction of the part of the mineral estate actually owned by the grantor and conveyed in the deed. *Hooks v. Neill*, 21 S.W.2d 532 (Tex.Civ.App.-Galveston 1929, writ ref'd). In *Hooks*, the grantor conveyed all of his undivided one-half interest in a tract of land. He then reserved "a one-thirty second part of all oil on and under the said land and premises herein described and conveyed." The *Hooks* court focused on the word "conveyed" to hold that the reservation clause applied "only to the interest which [grantors] have in the land and ore which they conveyed." Hooks, 21 S.W.2d at 538."

[32] This is the type of fact situation dealt with in *Middleton v. Broussard*, 504 S.W.2d 839 (Tex. 1974).

Choice 1. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," and reserves all minerals, and contains a clause which conveys "**an undivided 1/64 of the royalty** in the oil, gas and other minerals produced and saved or sold from the lands hereby **conveyed**."

Result: Grantee receives surface and 1/2 x 1/64 x 3/16 royalty in Section 100. The use of the term "lands **conveyed**" triggers one multiplier effect (1/2 x 1/64) and the term "of" is a second multiplier effect (a fraction of royalty) further reducing the royalty percentage. This is clearly not what the parties intended when they agreed that grantor would convey an undivided 1/64 royalty interest to the grantee.

Choice 2. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," and reserves all minerals, and contains a clause which conveys "**an undivided 1/64 of the royalty** in the oil, gas and other minerals produced and saved or sold from the lands **herein described**."

Result: Grantee receives surface and 1/64 x 3/16 royalty in Section 100. Although Grantee's royalty is not reduced by 1/2 by reference to lands "conveyed," the use of the word "of" incorporates a reduction effect of its own. Again, this is not what the parties intended when they agreed that grantor would convey an undivided 1/64 royalty interest to the grantee.

Choice 3. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," and reserves all minerals, and contains a clause which conveys "**an undivided 1/64 royalty** in the oil, gas and other minerals produced and saved or sold from the lands **herein described**."[33]

Result: Grantee correctly receives the full 1/64 royalty in Section 100. Grantee's royalty is not reduced by 1/2 by reference to lands "conveyed," and use of the word "of" (which incorporates a reduction effect of its own) is avoided. Of course, the 1/64 royalty is carved out of whatever part of the 3/16 royalty the grantor owns under the oil and gas lease. That carving "out of" the royalty of the grantor sometimes leads a scrivener into the following ambiguity:

Choice 4. The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," and reserves all minerals, and contains a clause which conveys "**an undivided 1/64 royalty out of Grantor's royalty** in the oil, gas and other minerals produced and saved or sold from Section 100.

Query: Does grantee receive surface and 1/64 x 3/16 royalty in Section 100, or a full 1/64 royalty in Section 100 which is carved out of grantors royalty?

Result: Grantee's royalty may be reduced by the language "out of." Even when the 1/64 royalty is carved out of whatever part of the 3/16 royalty is conferred upon the grantor under the oil and gas lease, use of the term "of" may further reduce the fraction. On the other hand, the royalty is clearly a 1/64 and the term "out of" just describes where it comes from. This is the kind of atypical deed language that generates construction litigation.

Hypothetical Case 4: Assume that John Doe wishes to give his undivided 1/2 community interest in the surface of Section 100 to his niece, Sally Doe, reserving the minerals, but he also wishes to give his three nieces and nephews 1/4 of his royalty, or a 1/12 fraction of royalty interest to each.

Choice 1. The deed is drawn to read:

> That I, John Doe, joined herein by my wife, Janey Doe, *pro forma*, for the reason that I am dealing with my undivided one half interest in our community property, for and in consideration of the love and affection held by Grantor for Grantees, HAVE GRANTED, GIVEN and CONVEYED and by these presents do GRANT, GIVE and CONVEY unto Sally Doe, Grantee, whose address is ____, my undivided one half interest in Section 100, Block 1, AB&C Survey, Bravo County, Texas.
>
> There is reserved unto Grantor, and Grantor's heirs or assigns, the oil, gas and other minerals in and under the land herein conveyed.
>
> I, John Doe, for the same consideration, HAVE GRANTED, GIVEN and CONVEYED and by these presents do GRANT, GIVE and CONVEY unto my two nieces and my nephew, Sally Doe, Molly Doe, James Doe, and Rolly Doe, to each an undivided 1/3 of 1/4 of royalty in the oil, gas and other minerals produced and saved or sold from the lands herein conveyed.

Result: Since this is gift transaction, Grantor has properly used a two-grant deed rather than a reservation followed by an express agreement that the nieces and nephews will have a royalty interest (there is no consideration involved). Grantor wanted to give the nieces and nephew 1/4 of his royalty, a fraction of royalty interest to each, and the language "of royalty" is a fraction of royalty language. However, Grantor has made the mistake of referring to the grant of royalty in terms of lands "herein conveyed." Grantor owns an undivided 1/2 community interest in the land. The Hooks rule mandates that when "lands conveyed" is

[33] The dollar difference in royalty generated by Solutions 1 and 3 is calculated at Paragraph I.H *infra*.

used and the grantor conveys but 1/2 of the lands, the royalty equation from this deed must be 1/3 x 1/4 x 1/2 = l/24.

G. Future Lease Clauses And Other Anomalies - A Modern Perspective

Many problems in oil and gas conveyancing were initially caused by an early case in which the court of appeals refused to acknowledge the apportionment doctrine as to minerals subject to an oil and gas lease existing at the time of the conveyance.[34] The decision caused scriveners drafting commercial lease forms and attorneys writing custom leases to create clauses (most often the subject-to clause) which expressly apportioned royalty and other lease benefits under an existing lease and then went further by attempting to set out in writing the royalty outcome of future leases. Most common were mistakes in referring to the lands described in the subject-to clause rather than lands conveyed in the granting clause and mistakes based on the assumption that 1/8 would remain the standard royalty fraction for all time. The problems caused by these deeds gave rise to construction rules such as the "future lease clause" and "express agreements" and the "two-grant" theory which became the basis of some very erudite law review articles.[35] Anyone who wishes to truly understand the historical basis of the forms suggested in this article should read a sampling of the cases and commentary from that era.[36] Hopefully, we are past that stage in the development of oil and gas law. The decision refusing to acknowledge implied apportionment of appurtenant rights in minerals subject to existing leases was reversed.[37] One-eighth royalties are no longer thought to be standard or usual (they are now the exception). Scriveners came to appreciate the difference between fractions of royalty and royalty fractions. Nevertheless, some scriveners retained an uncomfortable sense that they should continue to use explanations and double grants and future lease clauses. Today, most attorneys who draft mineral conveyances are comfortable with the greatest estate doctrine and the concept of automatic apportionment. There is no need to create a follow up clause attempting to describe or explain what future bonus, rental or royalty will flow from the grant. There are no forms suggested in this article to explain a grant or fix a royalty under a future lease.[38] However, the two-grant theory has its uses. Express agreements are also useful. The forms in this article do recommend a two-grant approach or the use of an express agreement in a conveyance or reservation involving more than one subject matter.[39]

H. Avoiding Negligence Claims

It is common in many oil and gas transactions for an attorney to represent both parties, or for an attorney to represent one party with the other party simply relying upon the presumed neutrality of the scrivener. The first situation is not a violation of the disciplinary rules.[40] If an attorney must represent both clients, careful attention should be given to Rule 107[41] which defines a lawyer as an intermediary if he or she represents two or more parties with potentially conflicting interests, and it requires written consent, consultation and full disclosure, and a reasonable belief "that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients." Even where the lawyer represents only one of the parties, a failure to correctly understand or state the quantum of royalty being conveyed or reserved may result in litigation.

The choices of "lands described" or "lands conveyed" and "royalty fraction" or "fraction of royalty" produce profound differences in both the fractional interest and the revenue generated by royalty.

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[34] See *Caruthers v. Leonard*, 254 S.W. 779 (Tex.Com.App. 1923).

[35] A sampling of commentary includes fine articles such as Richard W. Hemingway, THE LAW OF OIL AND GAS §§ 9.1-.2 (3d ed. 1991); Laura H. Burney, The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction, 34 S. TEX. L.J. 73 (1993); Tevis Herd, Deed Construction and the "Repugnant to the Grant" Doctrine, 21 TEX. TECH L.REV. 635 (1990); Stuart C. Hollimon & Robert E. Vinson, Jr., Oil, Gas, and Mineral Law, Annual Survey of Texas Law, 45 SW. L.J. 1965 (1992); Bruce M. Kramer, THE SISYPHEAN TASK OF INTERPRETING MINERAL DEEDS AND LEASES: AN ENCYCLOPEDIA OF CANONS OF CONSTRUCTION, 24 Tex.Tech L.R. 1 (1993); Phillip E. Norvell, Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest, 48 ARK. L.REV. 933 (1995); Joseph Shade, Petroleum Land Titles: Title Examination & Title Opinions, 46 BAYLOR L.REV. 1007 (1994).

[36] *Hawkins v. Texas Oil and Gas Corp.*, 724 S.W.2d 878, 883 (Tex.App.-Waco, 1987) offers a succinct and clear explanation of the origins of the two-grant doctrine.

[37] *Hager v. Stakes*, 116 Tex. 453, 294 S.W. 835, 838 (1927); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305-06 (1943).

[38] A very bad outcome from explaining a fraction of royalty reservation can be found in *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192 (Tex.Civ.App.-Galveston 1954, writ ref'd n.r.e.).

[39] Express agreements are treated in the forms at Forms Paragraph 11.

[40] The general rule seems to confer a blessing on representation of multiple parties. TEX. DISCIPLINARY R. PROF'L CONDUCT 106(d), reprinted in TEXAS. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon 1998) provides that "A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute."

[41] TEX. DISCIPLINARY R. PROF'L CONDUCT 107, reprinted *supra*.

For example, in Hypothetical Case 3 recited in Paragraph I.F above, the Grantor owns 1/2 of the surface and minerals in Section 100, Block 1, AB&C Survey, which is subject to a producing oil and gas lease having a 3/16 royalty clause, and Grantor agrees to sell his undivided 1/2 of surface, reserving all minerals, but conveying an undivided 1/64 royalty to the grantee. Under Choice 1 in which the deed conveys "**an undivided 1/64 of the royalty** in the oil, gas and other minerals produced and saved or sold from the lands hereby **conveyed,**" Grantee receives 1/2 of 1/64 of 3/16 royalty in Section 100. Under Choice 3 (the correct wording) the Grantee receives a full 1/64 royalty in Section 100. Now, compare the two different outcomes in real world terms---dollars. Assume that Section 100 has a gas well which produces 500 mcf of 1200 btu gas per day sold for a wellhead price averaged over one year at $5.49 per mmbtu,[42] subject to the Texas 7.5% severance tax. Here are the differences in revenue to the 1/64 royalty interest under Choices 1 and 3 of Hypothetical Case 3:

Choice 1: 1/2 x 1/64 x 3/16 x 500 x 1.2 x $5.49 x .925 x 365 = **$1,629.10** annual royalty net of severance tax.

Choice 3: 1/64 x 500 x 1.2 x $5.49 x .925 x 365 = **$17,377.14** annual royalty net of severance tax.

The choice of wording results in radically different financial outcomes; therefore, knowing and disclosing in advance the results which flow from these choices may insulate the transaction from litigation and the lawyer from a malpractice claim by a client or a negligent misrepresentation claim by a third party.[43]

The other potential malpractice trap is the real estate sales contract. The typical real estate contract is generally a form. The form covering rural property usually has a place to insert mineral and royalty reservations, exceptions, and agreements. If it doesn't, the attorney must be alert enough to spot the omission and discuss mineral and royalty issues with the client prior to presenting the final draft for signature. A mineral or royalty reservation must be correctly stated in the contract if it is to be placed in the deed. The contract is the attorney's first opportunity to draft language that will ultimately be found in the deed. The attorney should closely interrogate the client as to the mineral outcome of the transaction and assure that both the contract starting the transaction and the deed closing it will reflect that outcome.

[42] One free source of current gas prices can be found at http://tonto.eia.doe.gov/oog/info/ngw/ngupdate.asp. Another source is the commercial publication Inside FERC. See http://www.platts.com/Natural%20Gas/Newsletters%20&%20Reports/Inside%20FERC/.

[43] *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999)("an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim").

II. FLOW CHARTS & PRACTICE TIPS

A. Flow Charts

The following flow charts apply to the Suggested Forms for the various types of conveyances set out in Section III. Each clause is numbered and the clauses are annotated by the same number in the commentary at Section IV.

Mineral Deed

¶¶ 1 – 8 (preamble through legal description)
¶ 10 (ingress and egress)
¶ 11 (optional reservations or express agreements)
¶ 12.b (reservation of royalty)
¶ 13 (subject-to clause)
¶¶ 15 through 18 (habendum through acknowledgment)

Deed to Surface Reserving Minerals

¶¶ 1 – 6 (preamble through grantee)
¶ 8 (legal description)
¶ 9 (reservation of minerals)
¶ 10 (ingress and egress)
¶ 11 (optional reservations or express agreements)
¶ 13 (subject-to clause)
¶¶ 15 through 18 (habendum through acknowledgment)

Deed to Surface & Minerals Reserving Royalty

¶¶ 1 – 6 (preamble through grantee)
¶ 8 (legal description)
¶ 12.b (reservation of royalty)
¶ 13 (subject-to clause)
¶¶ 15 through 18 (habendum through acknowledgment)

Royalty Deed

¶¶ 1 – 6 (preamble through grantee)
¶ 12.a (grant of royalty)
¶ 8 (legal description)
¶ 13 (subject-to clause)
¶¶ 15 through 18 (habendum through acknowledgment)

Term Interests: See generally ¶ 14

B. Practice tips

Before using the suggested forms it may be helpful to keep in mind some guidelines that emerge from the case law and from a cautious practice of law. These are reminders of some basic rules, canons and presumptions.

- Interrogate the client, understand the transaction from the mineral/royalty perspective, and assure that the real estate contract correctly sets out the client's agreement.
- The words "in, under and produced from" refers to minerals. The words "produced and saved or sold" refers to royalty. When dealing with royalty, always use the word "royalty."
- Where a fraction granted or reserved in a deed is stated to be an interest in land *described* in the deed, the fraction is to be calculated upon the entire mineral interest in the lands described; conversely, where a fraction granted or reserved in a deed is stated to be an interest in land *conveyed* by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest.
- Do not confuse a royalty fraction with a fraction of royalty.
- Appurtenant rights (executive right, right of ingress and egress, bonus, rent, royalty) are implied with the grant or reservation of minerals in the same proportion to the quantum of interest granted or reserved.
- An appurtenant right may be severed or reapportioned by conveyance, express agreement or reservation in the deed.
- References to prior instruments may be made "solely to incorporate the legal description and not for any other purpose" or "for all legal purposes." The choice may have profound implications.
- There is no need to describe a royalty as "nonparticipating" but we all do it anyway.
- A multi-tract grant of minerals should always be accompanied by a broad form ingress and egress clause.
- Commence a reservation with the word "There is reserved" and identify prior severances and burdens with the words "This deed is subject to." The phrase "save and except" is unnecessary.
- Use a disclaimer phrase at the end of the subject-to clause to avoid a revivor of an expired interest.
- A grantor may not reserve a present, executory, or remainder interest in a stranger to the transaction.
- A subject-to clause will prevent operation of the *Duhig* rule as to the matter excepted.
- Better practice is to include a warranty in the deed.
- Deeds lacking an express warranty carry an implied warranty from the grant unless expressly disclaimed and lack of an express warranty will not defeat operation of the *Duhig* rule.
- When disclaiming a warranty of title, include a disclaimer of the implied covenant against encumbrances. They are not the same.
- Conveying only right, title and interest with no warranty creates a quit claim deed.
- Do not create a class of unknown or contingent remaindermen in a grant of a life estate, or if this result is unavoidable under the facts, fix the executive right with certainty to avoid the results.
- When granting a life estate or limiting the conveyance to a term, omit "heirs or assigns" from the habendum clause.
- Proof read the deed, compare it to the real estate contract, assure that the deed correctly sets out the client's agreement.

III. SUGGESTED FORMS

The following suggested form paragraphs may be implemented using the flow chart in Section II on the preceding page. Each suggested form is discussed in the commentary in Section IV using the same paragraph number.

1. Name of Instrument, Notice and Preamble

DEED
MINERAL DEED
ROYALTY DEED

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your social security number or your driver's license number.

STATE OF TEXAS
COUNTY OF BRAVO
KNOW ALL PERSONS BY THESE PRESENTS,

2. Grantor

a. Examples of grantors[44]
- That I, John Doe,
- That We, John Doe and Janey Doe, husband and wife,
- That I, John Doe, not joined herein by my wife for the reason that I am dealing with my separate property,

b. Recitation of county
of the County of Bravo, State of Texas, Grantor(s),

c. Grantor's mailing address (optional)
whose mailing address is _____,

Proceed to ¶ 3 or ¶ 4

3. Recital of Consideration

a. Common recitals of consideration
- for valuable consideration,
- for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration,
- for and in consideration of the sum of $_____,

b. Recital of consideration from separate funds
paid from the separate funds and estate of the Grantee,

c. Acknowledgement of sufficiency (optional)
the receipt and sufficiency of which is hereby acknowledged,

d. Grants & assumption of liens pursuant to lending arrangements[45])

Proceed to ¶ 5

4. Recital of Gift
- for and in consideration of the love and affection held by Grantor for Grantee,
- for no consideration, this conveyance being one of gift,

Proceed to ¶ 5

5. Granting Clause

a. Granting clause used with consideration
HAVE GRANTED, SOLD and CONVEYED, and by these presents do GRANT, SELL and CONVEY

b. Granting clause used with gift
HAVE GRANTED, GIVEN and CONVEYED and by these presents do GRANT, GIVE and CONVEY

c. Granting clause used with quitclaim
HAVE QUITCLAIMED, and by these presents do QUITCLAIM

Proceed to ¶ 6

6. The Grantee

a. Examples of grantees
- unto John Doe, Jr., whose address is ___, Grantee,
- unto John Doe, Jr., whose address is ___, Grantee, as his separate property,
- unto Doe Corporation, a Texas Corporation, whose address is ___, Grantee,
- unto John Doe, Jr., Trustee of the John Doe, Jr. Family Trust, whose address is ___, Grantee,
- unto John Doe, Jr., as custodian for (my/our) (his/her) (son/daughter, grandson/ granddaughter, etc.) under the TEXAS UNIFORM TRANSFERS TO MINORS ACT, whose address is ___, Grantee,

b. Deeds to spouses
- unto John Doe, Jr. and Jenny Doe, husband and wife, whose address is ___, Grantees,
- unto John Doe, Jr., my beloved husband, whose address is ___, Grantee,

c. Multiple grantees [see Commentary ¶ 6.c]

- **If the interest being conveyed is minerals, proceed to ¶ 7**
- **If the interest being conveyed is surface, reserving minerals or royalty, proceed to ¶ 8**
- **If the interest being conveyed is royalty, proceed to¶ 12.a**
- **For conveyances and reservations of life estates**

[44] See Commentary Paragraph 2.a, *infra*, for other examples of grantors.]

[45] See Texas Real Estate Forms Manual and Supplements, State Bar of Texas Legal Forms Committee, for lien granting and assumption clauses and related clauses.

and other terms interests see ¶ 14

7. Conveyance of minerals

a. Samples of acceptable mineral conveyancing phrases

- all of the oil, gas and other minerals
- an undivided _/_ of the oil, gas and other minerals
- an undivided _/_ of Grantor's _/_ undivided interest in oil, gas and other minerals

and

in and under and that may be produced from

or

- an undivided ___ mineral acres in and under

b. Conveyance of percentage of minerals when grantor's interest is unknown – Avoiding the effect of the Duhig Rule

an undivided _/_ of Grantor's undivided interest in oil, gas and other minerals in and under and that may be produced from

c. Quit claim language

all of the right, title and interest of Grantor in and to all oil, gas and other minerals in and under and that may be produced from

d. Grant of "oil" or "gas"

Use same fractions but replace words oil, gas and other minerals **with** oil and casinghead gas,

or

natural gas, including condensate and natural gas liquids associated with natural gas,

and

in and under and that may be produced from

e. Restricting grant to hydrocarbon minerals - use same fractions but replace words oil, gas and other minerals **with** oil, gas and other hydrocarbon minerals

optional

(and it is expressly agreed that the term "other hydrocarbon minerals" shall include helium, nitrogen and carbon dioxide)

and

in and under and that may be produced from

Proceed to ¶ 8

8. Legal Description

a. Sample descriptions that may be used with these forms

- Section 100, Block 1, AB&C Survey, Bravo County, Texas, containing 641.54 acres more or less,
- the North Half of the Southeast quarter of the Southwest quarter of Section 100, Block 1, AB&C Survey, Bravo County, Texas, containing 40 acres more or less,
- the East 100 acres of the North Half of the Southeast quarter of Section 100, Block 1, AB&C Survey, Bravo County, Texas,
- all of the land contained within the following boundary, to wit commencing at the southwest corner of Section 100; thence, in a northerly direction along the west boundary line of Section 100 a distance of 500 feet to a point, thence, in an easterly direction along a line north of and parallel to the south boundary line of Section 100 to a point which is the southern most interior corner of Section 100, thence in a southerly direction along the most westerly east boundary line of Section 100 to the southeast corner of Section 100, thence in a westerly direction along the south boundary line of Section 100 to the southwest corner of Section 100, the point of beginning, containing ___ acres more or less.

b. Examples of descriptions that may not be used with these forms are demonstrated at Commentary Paragraph 8.b.

c. Horizontal limitations

Section 100, Block 1, AB&C Survey, Bravo County, Texas, containing 640 acres more or less, limited to a depth from the surface of the ground to 5,000 feet below the surface of the ground, and reserving to the Grantor and Grantor's heirs or assigns all minerals below such depth,

[See Commentary Paragraph 8.c for other examples of legal descriptions with horizontal limitations]

d. Legal description incorporated by reference

the lands described in Warranty Deed dated ___ from John Doe, Sr. to John Doe, Jr., recorded at Volume ___, Page ___ of the Official Public Records of Bravo County,

and

reference to which is made solely to incorporate the legal description of said lands herein, and not for any other purpose,

or

reference to which is made for all legal purposes,

e. Grants and reservations of near surface minerals [see Commentary Paragraph 8.e]

f. Mother Hubbard clause

together with a like interest in land owned or claimed by Grantor which is adjacent to or contiguous with the land described above, whether the same be in said survey or surveys or in adjacent surveys,

- **If the interest being conveyed is minerals, proceed to ¶ 10**
- **If the interest being conveyed is surface, reserving minerals proceed to ¶ 9**
- **If the interest being conveyed is surface or minerals, reserving royalty proceed to ¶ 12.b**
- **If the interest being conveyed is royalty, proceed to ¶ 12.c**

9. Reservation of Minerals

a. Reservation in grantor

There is reserved unto Grantor, and Grantor's heirs or assigns,

or

There is reserved unto each Grantor, and each Grantor's heirs or assigns,

but not

b. Example of void reservation in favor of stranger to title

There is reserved unto Grantor's sister, ___, whose address is ___, and her heirs or assigns,

c. Reservation in grantor using "save and except"

Save and except, and there is reserved unto Grantor, and Grantor's heirs and assigns,

d. Reservation in grantor using "except"

Except, and there is reserved unto Grantor, and Grantor's heirs and assigns,

e. Quantum of minerals reserved

- all of the oil, gas and other minerals
- an undivided _/_ of the oil, gas and other minerals
- an undivided _/_ of Grantor's _/_ undivided interest in oil, gas and other minerals
- an undivided _/_ of Grantor's undivided interest in oil, gas and other minerals
- an undivided ___ net mineral acres of oil, gas and other minerals

and

in and under and that may be produced from the lands herein (conveyed)(described).

f. Reservation of "oil" or "gas"

Use same fractions but replace words oil, gas and other minerals **with** oil and casinghead gas

or

natural gas, including condensate and natural gas liquids associated with natural gas

and

in and under and that may be produced from the lands herein (conveyed)(described).

g. Restricting reservation to hydrocarbon minerals

Use same fractions but replace words oil, gas and other minerals **with** oil, gas and other hydrocarbon minerals

optional

(it being expressly agreed that the term "other hydrocarbon minerals" shall include helium, nitrogen and carbon dioxide)

and

in and under and that may be produced from the lands herein (conveyed)(described).

- **Proceed to ¶ 10**

10. Ingress and Egress

It is expressly agreed that the mineral (grant)(reservation) herein made includes the right of ingress and egress across any or all of the (Grantor's)(Grantee's) lands herein described, and lands contiguous or adjacent therewith, for the purposes of exploring and prospecting for such minerals, whether by geological, geophysical, seismograph or other method, and for the purposes of developing, producing, treating and transporting such minerals (whether by truck or by pipeline) as may be necessary to develop the minerals in and under and that may be produced from the lands herein described.

- **Proceed to ¶ 11 (Reservations and Express Agreements) if applicable, otherwise proceed to ¶ 13 (Subject-to clause) if applicable, otherwise proceed to ¶¶ 15 – 18 (Habendum & Warranty)**

11. Reservations and Express Agreements

a. Reservations and express agreements – fixing the executive right

(1) Grantee to own executive right in minerals reserved by grantor in transaction supported by consideration

For the same consideration, Grantor has granted, sold and conveyed and by these presents does hereby grant, sell and convey to Grantee the executive right in the minerals herein reserved to Grantor,

and (optional)

to exercise on behalf of Grantor, and Grantor's heirs or assigns, as a fiduciary.

or (with term limitation)

For the same consideration, Grantor has granted, sold and conveyed and by these presents does hereby grant, sell and convey unto Grantee the executive right in the minerals herein reserved to Grantor, to exercise on behalf of Grantor, and Grantor's heirs or assigns, as a fiduciary, for a term of ___ years, and upon expiration of this term, the executive right shall revert to Grantor and Grantor's heirs or assigns.

or (express agreement as to term limitation)

It is expressly agreed that Grantee shall have the sole and exclusive executive right in the minerals herein reserved to Grantor, to exercise on behalf of Grantor, and Grantor's heirs or assigns, as a fiduciary, for a term of ___ years, and upon expiration of this term, the executive right shall revert to Grantor and Grantor's heirs or assigns.

(2) Grantee to own executive right in minerals reserved by grantor in gift transaction

For the same consideration, Grantor HAS GRANTED, GIVEN and CONVEYED, and by these presents does hereby GRANT, GIVE and CONVEY unto Grantee the executive right in the minerals herein reserved to Grantor,

(3) Grantor to reserve executive right in minerals conveyed to Grantee

There is reserved unto Grantor, and Grantor's heirs or assigns, the executive right in the minerals herein conveyed to Grantee.

or

There is reserved unto Grantor the executive right in the minerals herein conveyed to Grantee (for a term of ____ years)(until the (18^{th})(25^{th}) birthday of the Grantee), whereupon the executive right shall vest in Grantee and Grantee's heirs or assigns, and it is expressly agreed that

and

provided, should the Grantor die prior to the end of this term, the executive right shall vest in the Grantee, and Grantee's heirs or assigns, to be exercised during the Grantee's minority as provided by law.

(4) Grant of executive right in minerals to third party

There is reserved unto Grantor, John Doe, Sr., the executive right in the minerals herein conveyed to Grantee, (for a term of ____ years)(until the (18^{th})(25^{th}) birthday of the Grantee) and upon expiration of this term, the executive right shall vest in Grantee and Grantee's heirs or assigns.

and

[by separate deed covering executive right]

For and in consideration of the sum of TEN dollars, and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, I, John Doe, Sr., Grantor, HAVE GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY unto Bravo National Bank, whose address is ___, and its successors, the executive right in the minerals in the following lands (describe premises granted to John Doe, Jr.), for and during the term of the reservation of such executive right in deed of even date herewith to John Doe, Jr. covering such lands, said executive right to be exercised pursuant to that one certain Agency Agreement of even date herewith executed by and between Grantor and Bravo National Bank attached to and filed with this deed as an addendum, and upon expiration of such term the executive right shall vest in John Doe, Jr. and his heirs or assigns.

or

[by power of attorney covering executive right contained in same deed or by separate instrument]

I have appointed, and by these presents I hereby appoint Sam Doe and James Doe, the uncles of John Doe, Jr., as my agents and attorneys in fact, to jointly exercise the executive right reserved by me as to

and [if power of attorney is contained in the deed]

the mineral estate in the lands described herein

or [if power of attorney is contained in separate instrument]

the oil, gas and other minerals in and under Section 100, Block 101, ABC Survey, Bravo County, Texas, conveyed by me in deed of even date herewith to John Doe, Jr., Grantee.

and [for use with both types of powers of attorney]

My said agents and attorneys in fact shall have full power and authority to make oil, gas and other mineral leases and pooling agreements, and to ratify oil and gas leases, amendments and extensions, and pooling agreements, for any bonus, royalty and rental consideration which my agents and attorneys in fact shall deem fair and reasonable in their absolute discretion, all without joinder or ratification of the said John Doe, Jr., for and during the term of the reservation of such executive right, and upon expiration of such term this power of attorney shall terminate and the executive right shall vest in John Doe, Jr. and his heirs or assigns.

(5) Executive right defined

The term "executive right," as used in this deed,

and

means the right to make oil and gas leases,

or

means the right to makes oil and gas leases in order to develop the mineral estate (which shall include the right of ingress and egress),

and (optional)

without the joinder or ratification of the non-executive.

(6) Ratification of leases by owner of executive right – see Commentary Paragraph 11.a (6)

b. Reservations and express agreements – reapportioning bonus or rentals

(1) Agreement pertaining to disproportionate division of bonus/rentals in transaction based on consideration

For the same consideration recited above, it is expressly agreed that in lieu of apportionment of (bonus)(rentals) in accordance with the (grant)(reservation) herein made, (Grantor and Grantor's heirs or assigns)(Grantee) shall own and be entitled to have and receive (all)(an undivided _/_ of all) future (bonuses)(delay rentals) payable under any future lease covering the lands herein (conveyed)(described),

or

For the same consideration recited above, it is expressly agreed that in lieu of apportionment of (bonus)(rentals) in accordance with the (grant)(reservation) herein made, Grantor and Grantee, and their heirs or assigns, shall own, share and be entitled to receive future (bonuses)(delay rentals) payable under any future lease covering the lands herein (conveyed)(described) upon the basis of _/_ to Grantor and _/_ to Grantee.

(2) Gift of bonus/rentals in minerals reserved to grantor in gift transaction

and for the same consideration, Grantor HAS GRANTED, GIVEN and CONVEYED, and by these presents does hereby GRANT, GIVE and CONVEY unto Grantee (all)(an undivided _/_ of all) (bonuses)(delay rentals) payable under any future lease covering the minerals herein reserved,

(3) Reservation of bonus/rentals

There is reserved unto Grantor, and Grantor's successors or assigns, (all)(an undivided _/_ of all) (bonuses)(delay rentals) payable under any future lease covering the lands herein (described)(conveyed).

(4) Reservation of executive right, bonus and rentals

There is reserved unto Grantor, and Grantor's successors or assigns, the executive right and (all)(an undivided _/_ of all) (bonuses)(delay rentals) payable under any future lease covering the lands herein (described)(conveyed).

c. Reservations and express agreements – fixing development rights and surface protections

(1) Restriction on water use

It is expressly agreed that water on, in and under and that may be produced from the premises, including fresh water running or lying in streams or rivers and water in lakes, sloughs, ponds or playa lakes, shall never be used for oil and gas secondary or tertiary recovery or pressure maintenance operations connected with development of the mineral estate in the land herein (conveyed)(described).

(2) Reservation of commercial water and water rights

There is reserved unto Grantor, and Grantor's heirs or assigns, (all)(an undivided _/_ of all) of the commercial water and water rights appurtenant to the surface estate, including water running or lying in streams or rivers, water contained in near surface aquifers, and water in lakes, sloughs, ponds or playa lakes, together with the executive right in commercial water and commercial water rights.

and [optional]

It is expressly agreed, however, that that Grantee shall have unrestricted use of water for Grantee's personal residential, domestic and livestock pasturage uses free and clear of any claim of Grantor and Grantor's heirs or assigns under this reservation.

and

It is expressly agreed that water appurtenant to the surface estate shall never be used for oil and gas secondary or tertiary recovery or pressure maintenance operations, irrigation farming, and other water-intensive uses connected with development of the mineral estate in the land herein (conveyed)(described).

and

It is expressly agreed that the (grant)(reservation) of water herein made includes the right of ingress and egress across any or all of the (Grantor's)(Grantee's) lands herein described, and lands contiguous or adjacent therewith, for the purposes of exploring and prospecting for such water, whether by drilling test holes or other method, and for the purposes of developing, producing, treating and transporting such water (whether by truck or by pipeline) as may be necessary to produce and sell the water.

and

The term "executive right" includes the right to make contracts and option agreements for the pumping, transportation and sale of water for off-site agricultural and commercial purposes, together with the right of ingress and egress in order to enter upon and use so much of the surface of the lands herein described to develop the water estate by drilling water wells and laying water pipe lines, and the right to apply for and obtain permits for pumping, transportation and sale of water upon such terms and conditions as Grantor, in Grantor's sole and absolute discretion, shall deem necessary or prudent.

(3) Non-development surface

It is expressly agreed that (add specific legal description) shall be considered as a non-surface use site and may not be used in connection with development of the mineral estate, including use of the surface for drilling or completion operations, storage of equipment or product, pipeline transmission of product, compression or treating facilities, or other usage of any kind or character. This provision shall not prohibit subsurface operations necessary to develop the mineral estate below the surface, including directional or horizontal drilling.

(4) Restrictions on ingress and egress

It is expressly agreed that ingress and egress to

the lands conveyed herein shall be from County Road 10 only.

or

It is expressly agreed that there shall be no ingress and egress nor any right of way over, across, or through Bravo Creek to the lands conveyed herein.

d. Reservations and express agreements - seismic rights [See Commentary Paragraph 11.d.]

12. Conveyances and Reservations of Royalty

a. Grant of royalty [Continue from ¶ 6]

royalty fraction

an undivided _/_ nonparticipating royalty

or, fraction of royalty

an undivided nonparticipating _/_ of royalty

or, fraction of grantor's royalty

an undivided nonparticipating _/_ of Grantor's royalty

or, grant of royalty acres

an undivided nonparticipating __ royalty acres

and (for use with any selection from above)

in oil, gas and other minerals produced and saved or sold from

- **Proceed to ¶ 8 (legal description)**

b. Reservation of royalty

There is reserved unto the Grantor, and Grantor's heirs and assigns,

royalty fraction

an undivided _/_ nonparticipating royalty

or, fraction of royalty

an undivided nonparticipating _/_ of royalty

or, fraction of grantor's royalty

an undivided nonparticipating _/_ of Grantor's royalty

or, royalty acres

__ royalty acres

and (for use with any selection from above)

in oil, gas and other minerals produced and saved or sold from the lands herein (conveyed)(described).

- **Proceed to ¶ 12.c**

c. Fixing Pooling Rights

Agreement as to pooling in transaction for consideration

For the same consideration recited above, it is expressly agreed that Grantee, and Grantee's heirs or assigns, shall own and exercise all pooling rights and powers in the royalty herein reserved to Grantor, and Grantor's heirs and assigns.

or

There is reserved unto Grantor, and Grantor's heirs or assigns, all pooling rights and powers in the royalty herein granted to Grantee.

or

Grant of pooling authority in royalty in gift transaction

Grantor further HAS GRANTED, GIVEN and CONVEYED, and by these presents does hereby GRANT, GIVE and CONVEY unto Grantee the pooling rights and powers in the royalty herein reserved to Grantor and Grantor's heirs or assigns.

- **Proceed to ¶ 13 (Subject-to clause) if applicable, otherwise proceed to ¶¶ 15 – 18 (Habendum & Warranty)**

13. Subject-to clause

a. Specific subject-to clause

This deed is subject to the following

and

Oil and gas lease from ___ to ___ dated ___, recorded at Volume ___, Page ___ of the Lease Records of Bravo County, Texas.

or

1/64 nonparticipating royalty pursuant to a royalty deed from ___ to ___ dated ___, recorded at Volume ___, Page ___ of the Deed Records of Bravo County, Texas.

b. Broad Form subject-to clause

This deed is subject to (a) all interests in minerals or royalties previously severed or vested in third parties and not currently owned by Grantor, (b) all valid oil and gas leases, (c) all valid royalty agreements, pooling agreements and designations of pooled units, (d) easements and other encumbrances and burdens of every kind and character, (e) discrepancies in acreage; (f) the rights of any person lawfully in possession of the premises, whether by recorded or unrecorded instrument or otherwise, (g) and claims of any person to any of the foregoing, whether such claims may be valid or not, and whether such claims arise by recorded or unrecorded instrument or otherwise.

c. Disclaimer Clause

These exceptions do not constitute an acknowledgment of the existence or viability of any of the foregoing, nor a ratification, adoption or revivor of any expired or terminated interest.

- **Proceed to ¶¶ 15 – 18 (Habendum & Warranty)**

14. Life Estates and Other Term Limitations

a. Grant of life estate in minerals (Continue from ¶ 5)

unto John Doe, Jr. , whose address is ___, Grantee, for life, with remainder to

or

unto John Doe, Jr., whose address is ___, Grantee, for life, and thereafter unto John Doe, III, whose address is ___, Grantee, for life, with remainder to

and (per stirpes remainders)
Grantor and Grantor's heirs per stirpes,
or
Grantee's heirs per stirpes,
or
Grantee's children, John Doe, III and Sally Doe, or their heirs per stirpes,
or (per capita remainder)
Grantee's children, John Doe, III and Sally Doe, or their heirs, share and share alike per capita and not per stirpes,
and
- all of the oil, gas and other minerals
- an undivided _/_ of the oil, gas and other minerals
- an undivided _/_ of Grantor's _/_ undivided interest in oil, gas and other minerals
- an undivided _/_ of Grantor's undivided interest in oil, gas and other minerals

and
in and under and that may be produced from
or
an undivided ___ net mineral acres in and under

- **Proceed to following selections:**
  ¶ 8 (select legal description)
  ¶ 11.a (select express agreement fixing executive right)
  ¶ 14.c (select agreement as to bonus and royalty rights)
  ¶ 13 (Subject-to clause) if applicable, otherwise
  ¶¶ 15 – 18 (Habendum & Warranty)

b. Reservation of life estate in minerals
There is reserved unto Grantor, for life,
and
- all of the oil, gas and other minerals
- an undivided _/_ of the oil, gas and other minerals
- an undivided _/_ of Grantor's _/_ undivided interest in oil, gas and other minerals
- an undivided _/_ of Grantor's undivided interest in oil, gas and other minerals
- an undivided ___ mineral acres

and
in and under and that may be produced from the lands herein (conveyed)(described).

- **Proceed to following selections:**
  ¶ 8 (select legal description)
  ¶ 11.a (select express agreement fixing executive right)
  ¶ 14.c (select agreement as to bonus and royalty rights)
  ¶ 13 (Subject-to clause) if applicable, otherwise
  ¶¶ 15 – 18 (Habendum & Warranty)

c. Express agreement pertaining to bonus and royalty
It is expressly agreed that the life tenant shall have the right to receive and consume the bonuses and royalties appurtenant to the grant herein made as income without preserving all or any part of the same as corpus for the remaindermen.
or
It is expressly agreed that the life tenant shall have the right to receive and consume an undivided _/_ of all bonuses and royalties as income without preserving all or any part of same as corpus for the remaindermen, and as to the remaining _/_ of all bonuses, rentals and royalties from the lands herein conveyed, same shall be delivered to and held in trust by (the Grantee)(the Bravo National Bank) pursuant to the provisions of the TEXAS TRUST CODE during the term of the life estate herein granted.
or (Use reservation instead of agreement as to bonus and royalty in a grantor making gift in minerals or reserving life estate in minerals)
There is reserved to Grantor for the term stated, the right to receive and consume the bonuses and royalties appurtenant to the grant herein made as income without preserving all or any part of the same as corpus for the remaindermen.
or (Use grant to life tenant instead of agreement as to bonus and royalty in a gift deed in minerals)
For the same consideration, Grantor has granted, sold and conveyed and by these presents does hereby grant, sell and convey to the life tenant the right to receive and consume the bonuses and royalties appurtenant to the grant herein made as income without preserving all or any part of the same as corpus for the remaindermen.

d. Grant of life estate in royalty (Continue from ¶ 6)
for life, with remainder to
and (per stirpes remainders)
Grantor and Grantor's heirs per stirpes,
or
Grantee's heirs per stirpes,
or
Grantee's children, John Doe, III and Sally Doe, or their heirs per stirpes,
or
Grantee's children, John Doe, III and Sally Doe, or their heirs per stirpes,
or (per capita remainder)
Grantee's children, John Doe, III and Sally Doe, or their heirs, share and share alike per capita and not per stirpes,
and
- an undivided _/_ nonparticipating royalty in oil,

gas and other minerals produced and saved or sold from

- an undivided nonparticipating _/_ of royalty in oil, gas and other minerals produced and saved or sold from
- an undivided nonparticipating _/_ of Grantor's royalty in oil, gas and other minerals produced and saved or sold from
- an undivided nonparticipating __ royalty acres in oil, gas and other minerals produced and saved or sold from

or

- an undivided ___ royalty acres in oil, gas and other minerals produced and saved or sold from

- **Proceed to following selections:**
  - **¶ 8 (select legal description)**
  - **¶ 11.a (select express agreement fixing executive right)**
  - **¶ 14.c (select agreement as to bonus and royalty rights)**
  - **¶ 13 (Subject-to clause) if applicable, otherwise**
  - **¶¶ 15 – 18 (Habendum & Warranty)**

e. Reservation of life estate in royalty

There is reserved unto Grantor, for life, with remainder to vest in Grantee,

- an undivided _/_ nonparticipating royalty in oil, gas and other minerals produced and saved or sold from
- an undivided nonparticipating _/_ of royalty in oil, gas and other minerals produced and saved or sold from
- an undivided nonparticipating _/_ of Grantor's royalty in oil, gas and other minerals produced and saved or sold from
- an undivided nonparticipating __ royalty acres in oil, gas and other minerals produced and saved or sold from

or

- an undivided ___ royalty acres in oil, gas and other minerals produced and saved or sold from

and

the lands herein (conveyed)(described).

- **Proceed to ¶ 14.g (express agreement pertaining to pooling); next proceed to ¶ 13 (subject-to clause) if applicable, otherwise proceed to ¶¶ 15 – 18 (Habendum & Warranty)**

f. Other term limitations

It is expressly agreed that the term of the (grant)(reservation) herein made shall be concurrent with the term of the oil and gas lease dated ___ from John Doe to Deep Reef Drilling Company, recorded at Volume ___, Page ___ of the Official Public Records of Bravo County, Texas,

or

It is expressly agreed that the term of the (grant)(reservation) herein made shall be for ten years from this date and for so long thereafter as any lease in force and effect at the expiration of the ten year period covering the lands herein (conveyed)(described)(or lands pooled therewith) is held in whole or in part in accordance with its terms,

and

g. Fixing Pooling Rights

Agreement as to pooling in transaction for consideration

For the same consideration recited above, it is expressly agreed that Grantee, and Grantee's heirs or assigns, shall own and exercise all pooling rights and powers in the royalty herein reserved to Grantor for and during the term of such reservation.

or

There is reserved unto Grantor, and Grantor's heirs or assigns, all pooling rights and powers in the royalty herein granted to Grantee, for and during the term of such grant.

or

Grant of pooling authority in royalty in gift transaction

Grantor further HAS GRANTED, GIVEN and CONVEYED, and by these presents does hereby GRANT, GIVE and CONVEY unto Grantee the pooling rights and powers in the royalty herein reserved to Grantor for and during the term of such reservation.

- **Proceed to ¶ 13 (Subject-to clause) if applicable, otherwise proceed to ¶¶ 15 – 18 (Habendum & Warranty)**

15. <u>Habendum</u>

a. For use with fee simple

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Grantee,

optional

as his/her separate property,

and

and his/her heirs or assigns, forever,

or

and its successors and assigns,

b. For use with term interest

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Grantee, for and during the (life tenancy)(life of grantor/grantee)(other term stated),

with remainder to vest in the remaindermen herein named.

Proceed to ¶ 16.

16. Warranty Clause

And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Grantee, (his/her heirs or assigns,)(its successors and assigns) against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

optional

by, through or under Grantor, but not otherwise.

or

But I do hereby disclaim all warranties and covenants of any kind or character, express or implied.

or

But I do hereby disclaim all warranties of title.

Proceed to ¶ 17.

17. Signature

See Commentary Paragraph 17 for samples.

18. Acknowledgment

See Commentary Paragraph 18 for samples.

19. Special Conveyance - Partition of Surface Reserving Minerals

THAT the undersigned, John Doe, Jr., whose address is ___ and Susie Doe, whose address is ___, being the owners of all of the lands described below in undivided ownership, herein referred to as Grantors, in order to partition the surface estate of said lands between themselves, for and in consideration of the mutual covenants and promises herein contained, including the covenant and agreement that each of the partitioned tracts is of like kind and value, and in consideration of the conveyances herein made, have PARTITIONED, GRANTED, AND CONVEYED, and by these presents do hereby PARTITION, GRANT, AND CONVEY unto John Doe, Jr., Grantee, the surface only of the South One Half of Section 100, Block 1, AB&C Survey, Bravo County, Texas, and unto Susie Doe, Grantee, the surface only of the North One Half of Section 100, Block 1, AB&C Survey, Bravo County, Texas, to each as their separate property.

But there is reserved unto the Grantors as their ownership shall appear of record, and unto their heirs or assigns, in undivided ownership, the oil, gas and other minerals in and under and that may be produced from all of the lands described herein.

(Insert Broad Form Ingress and Egress Clause from ¶ 10).

To have and to hold each of the above described premises unto each Grantee, together with all and singular the rights and appurtenances thereto in any wise belonging, unto each Grantee, and his or her heirs or assigns, and each of us, as Grantor, do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto each Grantee, his or her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

optional

by, through or under Grantor, but not otherwise.

- **Proceed to 17 – 18 (Signature & Acknowledgment)**

20. Special Conveyance - Estate or Trust Distribution

DEED OF DISTRIBUTION

STATE OF TEXAS {
COUNTY OF BRAVO {

KNOW ALL PERSONS BY THESE PRESENTS:

THAT the undersigned, John Doe, Jr. Trustee of the John Doe Testamentary Trust, for no consideration, this conveyance being made upon the termination of the John Doe Testamentary Trust in order to carry out the final distribution scheme of said Trust, has GRANTED, DISTRIBUTED, and CONVEYED, and by these presents does hereby GRANT, DISTRIBUTE, and CONVEY

or

THAT the undersigned, John Doe, Jr., Independent Executor of the Estate of John Doe, Sr., Deceased, for no consideration, this conveyance being made to distribute the assets of the Estate of John Doe, Sr. to the proper Devisees or their lawful successors and assigns pursuant to the Last Will and Testament of the said John Doe, Sr., probated in Cause No. 1212 in the County Court in and for Bravo County, Texas, which said last will and testament fully empowers the said Grantor to make this conveyance, has GRANTED, DISTRIBUTED, and CONVEYED, and by these presents does hereby GRANT, DISTRIBUTE, and CONVEY

and

unto John Doe, III, Grantee, whose address is ___, and unto Susie Doe, Grantee, whose address is ___, to each an undivided one half interest in and to Section 100, Block 1, AB&C Survey, Bravo County, Texas,

and

(Insert Broad Form Ingress and Egress Clause from ¶ 10).

and

To have and to hold unto each Grantee, as his or her separate property, together with all and singular the rights and appurtenances thereto in any wise belonging, unto each Grantee, and his or her heirs or assigns, and Grantor does hereby bind himself, and his successors, to warrant and forever defend all and singular the said premises unto each Grantee, and his or her heirs and

assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof,
optional
by, through or under Grantor, but not otherwise.

- **Proceed to 17 – 18 (Signature & Acknowledgment)**

Note. If a ratification of a trust distribution is desired, the following ratification can be placed at the foot of the instrument:

RATIFICATION AND RELEASE

Each of the undersigned Grantees hereby acknowledge the termination of the John Doe, Sr. Testamentary Trust and ratifies the distribution by the Trustee unto the Grantees named above in the respective portions allocated to each such Grantee, both as to proper capacity as a Distributee and as to the quantum of interest distributed to each such Distributee, and the undersigned hereby release John Doe, Jr., Trustee of the John Doe, Sr. Testamentary Trust, by reason of such distributions.

IV. THE COMMENTARY

The following commentary applies to the form paragraphs suggested in Section III. Each of the following paragraphs is numbered to correspond to the suggested form it comments upon.

1. Name of Instrument, Notice and Preamble

Any instrument, to be recorded, must have a heading clearly identifying the instrument at the top of the first page.[46] Until enactment of the TEXAS PROPERTY CODE and its predecessor statutes, no particular form was suggested to convey title or an estate in land.[47] The minimum elements for a conveyance to be effective were, and are, the name of grantor, the name of grantee, a description of property sufficient to satisfy the statute of frauds, and words of grant.[48] The form of a general warranty deed is suggested by statute.[49] In addition to this suggested form, a recent amendment to the TEXAS PROPERTY CODE requires that a confidentiality notice be placed on any instrument transferring an interest in real property from or to an individual.[50] The title of the instrument should state what type of deed it is but courts look to the body of the instrument to determine what it is and what it does.[51] In completing the COUNTY OF ___, use the county in which the land is situated. The archaic preamble "KNOW ALL MEN BY THESE PRESENTS" is suggested at TEXAS PROPERTY CODE Section 5.022. Unless the deed deals with land on the Augusta National Golf Club, it might be better to commence an important document of any kind with gender-safe language. The preamble "KNOW ALL PERSONS BY THESE PRESENTS" seems safe enough.

2. The Grantor

The mailing address of the grantor, though not mandatory, is recommended practice as it may assist landmen seeking curative material in connection with stand up title examinations.[52] Although the statutory form is silent as to capacity, this is a critical point in the document and the capacity of the grantor must be stated if it is other than an individual. If a portion of minerals or royalty is owned, conveyed or reserved under a tract by more than one owner, the ownership is said to be "undivided." The term connotes a mineral cotenancy with all of its legal ramifications.[53] It should be kept in mind that trustees rather than trusts, executors or administrators rather than estates, and guardians or receivers rather than guardianships and receiverships, are the named grantors in deeds.

2.a. The Grantor - Examples of Grantors

Forms Paragraph 2.a lists several common capacities. Others that might be used include the following:

- That I, John Doe, joined herein by my wife Janey Doe *pro forma* for the reason that I am dealing with my separate property,
- That I, John Doe, joined herein by my wife Janey Doe *pro forma* for the reason that I am dealing with my undivided one-half of our community property,
- That I, John Doe, Jr., Trustee of the John Doe, Sr. Testamentary Trust,
- That I, John Doe, Jr., Independent Executor of the Estate of John Doe, Sr., Deceased,
- That Doe Corporation, a Texas Corporation,
- That I, John Doe, Sr., Guardian of the Person and Estate of John Doe, Jr., an incapacitated person, duly appointed by the County Court in and for Bravo County, Texas and acting pursuant to court order entered after notice and hearing which was in accordance with law in all respects,
- That I, John Doe, Jr., Guardian of the Person of John Doe, Sr., acting pursuant to an order of the County Court in and for Bravo County, Texas entered pursuant to PROBATE CODE Section 890, after notice and hearing, which was in accordance with law in all respects,

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[46] TEX. LOC. GOV'T CODE ANN. § 191.007(c) (Vernon 2003).

[47] *Leal v. Leal*, 4 S.W.2d 985 (Tex.Civ.App.-1928), aff'd 14 S.W.2d 797 (No particular form is required to accomplish a conveyance).

[48] *Harris v. Strawbridge*, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).

[49] TEX.PROP.CODE Section 5.022. The form provided by statute is:

> The State of Texas,
> County of___.
>
> Know all men by these presents, That I, ____, of the ____(give name of city, town, or county), in the state aforesaid, for and in consideration of ____dollars, to me in hand paid by____, have granted, sold, and conveyed, and by these presents do grant, sell, and convey unto the said ____, of the ____ (give name of city, town, or county), in the state of ____, all that certain ____ (describe the premises). To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said ____, his heirs or assigns forever. And I do hereby bind myself, my heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said ____, his heirs, and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.
>
> Witness my hand, this ___ day of ___, A.D. ___.
>
> Signed and delivered in the presence of ___

[50] TEX.PROP.CODE Sec. 11.008.

[51] *Harris v. Strawbridge*, 330 S.W.2d 911, 915 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).

[52] The mailing address of the grantee is required by TEX.PROP.CODE Section 11.003.

[53] *Cox v. Davison*, 397 S.W.2d 200 (Tex. 1965).

- That I, John Doe, Sr., natural parent of John Doe, Jr. a minor, acting pursuant to an order of the County Court in and for Bravo County, Texas entered pursuant to PROBATE CODE Section 889 after notice and hearing, which was in accordance with law in all respects,
- That I, John Doe, Jr., doing business as the John Doe Company,
- That We, John Doe and Frank Doe, Partners of the Doe Company, a Texas Partnership,
- That I, John Doe, Jr., General Partner of the Doe Family Partnership, a Texas Limited Partnership,
- That Doe Corporation, General Partner of the John Doe Family Partnership, a Texas Limited Partnership,
- That I, John Doe, Jr., Manager of Doe, LLC, a Texas Limited Liability Company,
- That We, John Doe, Jr. and Susie Doe, the Members of Doe, L.L.C., a Texas Limited Liability Company,

2.a (1) The Grantor - Ascertaining authority to convey

The attorney should exercise due diligence when dealing with entities other than an individual to assure full authority of the grantor to make the grant or to include all grantors necessary to the grant. Articles of organization of a limited liability company will generally state whether a manager or its members may make a conveyance.[54] The articles of organization may prohibit or limit some types of conveyances by a manager, such as a majority of the company's assets or an interest in real estate. A general partnership agreement may limit the rights of a partner to convey property and the safer practice is to require that all partners join in the conveyance as grantors. A limited partnership acts through a general partner, not the limited partners. The general partner may be an individual, a corporation, or a limited liability company, and there may be more than one general partner, only one or some of whom may have the right to deal with real property of the partnership.[55] While it may be common for title examiners to review partnership agreements and trust declarations to determine the authority of grantors, at some point the attorney drafting an instrument of conveyance may find it necessary to rely upon the intelligent representation of the client as to such authority. In May 1993 the Texas Legislature amended the TEXAS PROBATE CODE to include a separate section on guardianships.[56] Deeds by guardians will entail both the validity of the guardianship and the procedure by which the guardian applied for and obtained authority of the court to make the sale and the attorney involved in drafting a deed should be aware of the litigation that may result from failing to follow the statutory requirements.[57] It is also important for the attorney to insert into the deed a recital of the guardian's authority to make the conveyance and that the conveyance is made in accordance with court order. This may make the recital binding as a matter of estoppel by deed.[58]

2.a (2) The Grantor - Minors

Under Texas law, a parent is a natural guardian of a minor,[59] but the parent has no absolute right to control the minor's estate in the absence of formal appointment as guardian of the child's estate.[60] Section 12.04 of the TEXAS FAMILY CODE sets out the rights, privileges, duties and powers of a parent. There is no power specifically set out to contract or convey property on behalf of the child. Section 14.02 concerns the rights, privileges, duties and powers of a managing conservator. These include those of a parent, as well as

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[54] TEXAS LIMITED LIABILITY ACT Art. 2.111 states that "Real or personal property owned or purchased by a limited liability company may be held and owned, and conveyance may be made, in the name of the limited liability company. Instruments and documents providing for the acquisition, mortgage, or disposition of the property of the limited liability company shall be valid and binding upon the company, if they are executed by one or more persons as provided in Article 2.21 of this Act." Art. 2.21 addresses the authority of officers, agents, members and managers to act for the company.

[55] TEXAS REVISED LIMITED PARTNERSHIP ACT § 3.03 establishes liability of a limited partner who participates in the control of the business. § 4.03 provides that a written partnership agreement "may establish classes or groups of one or more general partners having certain expressed relative rights, powers, and duties, including voting rights, and may provide for the future creation of additional classes or groups of general partners having certain relative rights, powers, and duties, including voting rights, expressed in the partnership agreement or at the time of creation of the class or group. The rights, powers, or duties may be senior to those of one or more existing classes or groups of general partners."

[56] TEX. PROB. CODE Section 601 et seq.

[57] See for example *Hardeman v. Judge*, 931 S.W.2d 716 (Tex.App.-Fort Worth 1996 no writ)(contested sale of homestead); *Carroll v. Carroll*, 893 S.W.2d 62 (Tex.App.-Corpus Christi 1994, no writ)(guardian's sale contested on procedural grounds); *Thomas v. Whaley*, 561 S.W.2d 526 (Tex.Civ.App.-6 Dist. 1977 writ ref'd n.r.e.)(Quoting *Crawford v. McDonald*, 88 Tex. 626, 33 S.W. 325, 328 (1895) that "The public policy of this state requires, where possible, that a judgment of a state court be upheld against a collateral attack in order that property rights can be protected when property is acquired upon faith in the validity of such judgment."

[58] *Williams v. Hardie*, 85 Tex. 499, 22 S.W. 399, 401 (Tex.1893); *Adams v. Duncan*, 147 Tex. 332, 215 S.W.2d 599, 603 (Tex. 1948); *Greene v. White*, 137 Tex. 361, 153 S.W.2d 575, 583-86 (Tex. 1941).

[59] *Thomas v. Thomas*, 228 S.W.2d 548, (Tex.Civ.App.-Fort Worth 1950).

[60] *In re Kaufman's Guardianship Estates*, 429 S.W.2d 612 (Tex.Civ.App.-Dallas 1968).

additional powers, none of which include the power to act as an agent in a contractual or conveyance situation. When a minor reaches majority, he or she may seek to declare an unauthorized conveyance void.[61] The statute of limitations as to the claim of a minor does not begin to run until majority.[62] An oil and gas lease is a sale of minerals in fee simple determinable[63] and a parent has no right at common law nor by statute to sell a child's estate.[64]. Minors will require the appointment of a guardian to make a lease or the authorization under PROBATE CODE Section 889.[65] To avoid such problems, most conveyances to a minor use either a trust or a gift under the UNIFORM TRANSFERS TO MINORS ACT[66] so that a person other than the minor may deal with the property as a grantor during minority. An alternative is to sever the executive right from minerals granted to a minor and either grant it to third parties or reserve it to the grantor to exercise during the grantee's minority or for some longer period of time.[67] The PROBATE CODE does provide that a parent or conservator may obtain a court order to sell property of the minor having a value of less than $100,000.00 without the necessity of a guardianship.[68]

2.a (3) The Grantor - Executors & Administrators

The "estate" of a decedent is not an entity.[69] Deeds must be executed by the representative of the estate. Preparing a conveyance by the representative of an estate requires care, and prior grants by executors or administrators in the chain of title may also present thorny problems. This is so because dependent administrators and executors require specific court authorization to sell real property. An independent executor may sell real property only if authorized by the will;[70] otherwise, he or she must also look to court ordered procedures set out by the TEXAS PROBATE CODE for an order of sale.[71] Even under a will which provides that "no other action shall be had in the probate court in relation to the settlement of my estate than the probating and recording of my will, and the return of the statutory inventory and appraisement," the will must also specifically authorize the sale.[72] It is true that the phrase empowers the independent executor to do any act that could be done under an order of the probate court.[73] But pursuant to Section 331, the executor cannot sell real estate---including interests in oil and gas---unless authorized by the will.[74]

Recitals of authority or recitals of proper court order in prior deeds in the chain will generally be upheld, especially if the sale took place long ago or if the heirs have not stepped forward to challenge the sale.[75] Recitals give rise to estoppel by deed.[76] This rule has been extended to a realty lease in a case of first impression.[77] Of course, deeds executed by executors or administrators in their representative capacities will estop them to later assert in themselves individually any title to the property conveyed.[78] It should also be noted that a foreign executor or trustee may not deal with property in Texas unless the will has been admitted to probate in this state.[79]

2.b The Grantor - Multiple grantors

The lawyer dealing with multiple grantors must be aware of a trap set for the unwary. A deed from each grantor may describe the entire tract rather than his or her interest but if rights are reserved, that may create a problem: Consider the following example:

Hypothetical Case 4. Assume that brother and sister each own an undivided 1/2 interest in Section 100, which they agree to sell to grantee by means of separate deeds. The grantee is to receive 50% of the total

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[61] *Kaplan v. Kaplan*, 373 S.W.2d 271 (Tex.Civ.App.-Houston 1963, no writ); *Sims v. University Interscholastic League*, 111 S.W.2d 814 (Tex.Civ.App.-Beaumont 1937, no writ)(contract made in person or by agent, is void at election of the minor).

[62] *Francis v. Stanley*, 574 S.W.2d 629 (Tex.Civ.App.-Ft. Worth 1978, no writ).

[63] *Anadarko Petroleum Corp. v. Thompson* , 94 S.W.3d 550, 554 (Tex. 2002).

[64] See Commentary Paragraph 2.C *supra*.

[65] This statutory provision allows a minor's interest in real or personal property having a net value of less than $100,000 to be sold by a natural or adoptive parent, or the managing conservator, pursuant to application and court order. The statute provides that the minor may not disaffirm a sale of property pursuant to a court order under this section.

[66] TEX. PROP. CODE Sec. 141.001-.025.

[67] See Forms Paragraphs 11.a.

[68] PROBATE CODE Section 889.

[69] *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975).

[70] *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, (Tex.App.-Hous. [1 Dist.] 1985).

[71] TEX. PROB. CODE Sec. 331.

[72] *San Antonio Sav. Ass'n v. Palmer*, 780 S.W.2d 803 (Tex.App.-San Antonio 1989 writ denied).

[73] *Hutcherson v. Hutcherson*, 135 S.W.2d 757 (Tex.Civ.App.-Galveston 1939, writ ref'd.); *Rowland v. Moore*, 141 Tex. 469, 174 S.W.2d 248, 250 (1943); *Lang v. Shell Petroleum Corporation*, 138 Tex. 399, 159 S.W.2d 478, 482 (1942).

[74] *Id*.

[75] *Fields v. Burnett*, 49 Tex.Civ.App. 446, 108 S.W. 1048 (1908 writ ref'd); *White v. Jones*, 67 Tex. 638, 4 S.W. 161 (1887).

[76] *Williams v. Hardie*, 85 Tex. 499, 22 S.W. 399, 401 (Tex. 1893); *Adams v. Duncan*, 147 Tex. 332, 215 S.W.2d 599, 603 (Tex. 1948); *Greene v. White*, 137 Tex. 361, 153 S.W.2d 575, 583-86 (Tex. 1941).

[77] *Gateville Redi-Mix, Inc. v. Jones*, 787 S.W.2d 443 (Tex.App.-Waco 1990, writ den'd).

[78] *Millican v. McNeill*, 102 Tex. 189, 114 S.W. 106 (1908); *Surtees v. Hobson*, 4 S.W.2d 245, 246 (Tex.Civ.App.-El Paso 1928), affirmed 13 S.W.2d 345 (Tex.Com.App.1929).

[79] *Swirce v. McBride*, 254 S.W.2nd 143 (Tex.Civ.App.-San Antonio 1952, no writ).

minerals and one half of the total bonus rights. The grantee retains a lawyer to prepare two deeds, one for each sibling, which state that "Grantor grants, sells and conveys unto Grantee ... all of Section 100, Block 1, AB&C Survey, Bravo County, Texas, reserving unto Grantor an undivided 1/4 of the minerals in the "land herein described" and the deed provides "It is expressly agreed that Grantee shall receive an undivided 1/2 of any bonus paid for any future lease" covering "the lands described herein." Neither deed contains a subject-to clause.[80]

Result:
Grantee receives 100% of the minerals, and all rights appurtenant to the minerals except 1/2 of the bonus rights. Each sibling retains no minerals, but each retains 1/4 of the bonus rights. Under the rules in *Hooks*[81] and *Duhig*[82] each Grantor purports to deed 100% of the tract which would carry with it 100% of the minerals in the "lands herein described," except that each Grantor reserves 25% of the minerals. Each deed must, therefore, convey 75% of the minerals in the lands described. Since each Grantor has only 50% of the minerals, *Duhig* operates to convey that quantum to the grantee. However, each Grantor would still retain 25% of the bonus rights because, although *Duhig* applies to both a grant and a reservation of minerals, royalties or appurtenant rights, the doctrine does not apply to any of these if they are the subject matter of an express agreement rather than a grant or reservation.[83]

The solutions to the problem of a separate deed by an undivided interest owner is a subject-to clause,[84] and language which describes the undivided interest instead of describing the entire tract, i.e. "an undivided one-half of Section 100, Block 1, AB&C Survey, Bravo County, Texas, reserving unto Grantor an undivided 1/4 of the minerals in the lands described." Better yet, the problem can be avoided by joining both grantors in one deed, i.e.:

> "Grantors grant, sell and convey unto Grantee ... all of Section 100, Block 1, AB&C Survey, Bravo County, Texas, reserving unto each Grantor an undivided 1/4 of the minerals in the lands herein described…."

3. Recital of Consideration

It is delivery and acceptance rather than consideration which effectuates a transfer of title to property.[85] No particular form of words or action is required to constitute delivery of a deed.[86] When a deed is signed, acknowledged and recorded, a presumption arises that the deed has been delivered[87] and that the grantor intended to convey the land according to terms of the deed.[88] Delivery by the grantor must be accompanied by acceptance by the grantee.[89] A deed that is not accepted by the grantee does not convey any interest in the property.[90] Recording a deed by grantor creates a presumption that the deed was delivered and recording a deed by grantee creates a presumption that the deed is accepted.[91] Presumptions of both delivery and acceptance may be rebutted by contrary evidence.[92] The prima facie case of delivery and the accompanying presumption that the grantor intended to convey the land according to the terms of the deed established when it is shown that the deed has been filed for record, may be overcome by showing (1) that the deed was delivered or recorded for a different purpose, (2) that fraud, accident, or mistake accompanied the delivery or recording, or (3) that the grantor had no intention of divesting himself of title.[93] The question of delivery of the deed, being controlled by the intent of the grantor, is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument.[94] Acceptance of a deed cannot be partial.[95] If a deed is accepted, the grantee accepts all of its terms and provisions.[96] While the question of whether there has been a delivery of the

[80] See Forms Paragraph and Commentary Paragraph 13 for the form and commentary on subject-to clauses.
[81] *Hooks v. Neill*, 21 S.W.2d 532 (Tex.Civ.App.-Galveston 1929, writ ref'd).
[82] See Commentary Paragraph 7.B for a discussion of the *Duhig* case and its implications.
[83] *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (Tex. 1953).
[84] See Forms Paragraph and Commentary Paragraph 12 for the form and commentary on subject-to clauses.
[85] *Taylor v. Sanford*, 108 Tex. 340, 193 S.W. 661, 662 (1917).
[86] *Id.*
[87] *Vannerberg v. Anderson*, 146 Tex. 302, 206 S.W.2d 217, 219 (1947); Savell v. Savell, 837 S.W.2d 836, 840 (Tex.App.-Houston [14th Dist.] 1992, writ denied).
[88] *Thornton v. Rains*, 157 Tex. 65, 299 S.W.2d 287, 288 (1957).
[89] *Tanner v. Doty*, 311 S.W.2d 508, 509-10 (Tex.Civ.App.-Fort Worth 1958, writ ref'd n.r.e.).
[90] *Martin v. Uvalde Sav. and Loan Ass'n.*, 773 S.W.2d 808, 812 (Tex.App.-San Antonio 1989, no writ); *Robert Burns Concrete Contractors, Inc. v. Norman*, 561 S.W.2d 614, 618 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.).
[91] *Texas Land & Mortgage Co. v. Cohen*, 138 Tex. 464, 159 S.W.2d 859, 863 (1942); *Sorsby v. State*, 624 S.W.2d 227, 234 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ).
[92] *Thornton*, 299 S.W.2d at 288; *Hennessey v. Bell*, 775 S.W.2d 650, 651 (Tex.App.-Corpus Christi 1988, writ denied); *Tanner*, 311 S.W.2d at 509.
[93] *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974).
[94] *Id*.
[95] *Chandler v. Hartt*, 467 S.W.2d 629, 632 (Tex.Civ.App.-Tyler 1971, writ ref'd n.r.e.).
[96] *Rutten v. Cazey*, 734 S.W.2d 752, 755 (Tex.App.-Waco 1987, writ denied); *Chandler*, 467 S.W.2d at 632.

deed is one for the trier of facts, the question of what constitutes a delivery is one of law.[97]

Nevertheless, consideration is generally stated in the instrument as a nominal amount or as the amount upon which the transaction is based. It distinguishes the grant from a gift.[98] The exact amount of the consideration need not be disclosed and the form of deed set out by statute suggests no dollar amount.[99] In practice, few recorded deeds display the actual purchase price of the property; instead, one of two statements of consideration usually appear:

> "…for a valuable consideration, paid by the Grantee to the Grantor, the receipt and sufficiency of which is hereby acknowledged,
>
> **or**
>
> "…for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to the undersigned paid by the Grantee,

This is not to say that the actual consideration may not be expressed in the deed. Usually, the reason for disclosing the actual consideration paid is very subjective to the grantor or grantee.

3.a Recital of Consideration – Common recitals of consideration

These clauses are the common recitations of consideration.

3.b Recital of Consideration – Community and Separate Property

A recital may be used to establish the separate nature of the property conveyed or received.[100] Thus, the recital "…for valuable consideration, paid from the separate funds and estate of the Grantee…" will rebut the presumption that the property is being acquired as community property.[101] While generally speaking, presumptions of separate property are rebuttable, in the absence of allegations entitling the party to equitable relief, such as fraud, accident, or mistake, parol evidence is inadmissible to rebut the presumption created by a significant recital.[102]

3.c Recital of Consideration – Liens

This article does not cover consideration clauses dealing with assumption of liens and purchase money liens in favor of lenders and other third parties.[103]

4. Recital of Gift

A gift is a voluntary transfer of property by one party to another without consideration, that must go into immediate and absolute effect.[104] It must be made gratuitously and without consideration.[105] Three elements are required to establish the existence of a gift: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property.[106] When land is conveyed by deed reciting no consideration the presumption arises that the grant is made by gift.[107] This presumption is, however, rebuttable and when a deed of gift is attacked the court will look to the facts and circumstances surrounding its execution in addition to the recitation in the deed itself.[108] Likewise, acceptance of a gift deed by the grantee is presumed, unless such presumption is rebutted by showing a rejection.[109]

A recital of consideration in the nature of love and affection is appropriate to denote gift, but no recital of consideration is required of a gift, and a recital of "ten dollars and other good and valuable consideration" does not necessarily negate a gift.[110].

Property acquired by gift is separate property of the

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[97] *Ragland v. Kelner*, 148 Tex. 132, 221 S.W.2d 357, 359 (1949).

[98] *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (1961).

[99] TEX. PROP. CODE Section 5.022.

[100] *Little v. Linder*, 651 S.W.2d 895, 900-901 (Tex.App.-Tyler 1983, writ ref'd n.r.e.). "The elemental presumption in favor of the community as to land acquired in the name of either spouse during the marriage is, indeed, sometimes displaced by a presumption in favor of the separate estate of the wife where the deed of acquisition recites either that the land is conveyed to her as her separate property, or that the consideration is from her separate estate, or includes both types of recital." *Citing Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900, 904 (Tex. 1955); See also *Goldberg v. Zellner*, 235 S.W. 870 (Tex.Comm'n App. 1921, judgment adopted and holding approved); *Smith v. Buss*, 135 Tex. 566, 144 S.W.2d 529 (1940); Paudler v. Paudler, 210 F.2d 765 (5th Cir.1954).

[101] *Henry S. Miller Company v. Evans*, 452 S.W.2d 426, 430-31 (Tex. 1970). A recital in an instrument of conveyance is considered to be a "separate property recital" if it states that the consideration is paid from the separate funds of a spouse or that the property is conveyed to a spouse as his or her separate property.

[102] *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968).

[103] See generally the Texas Real Estate Forms Manual and Supplements, published by the State Bar of Texas Legal Forms Committee.

[104] *Woodworth v. Cortez*, 660 S.W.2d 561 (Tex.Civ.App.-San Antonio 1983, writ ref'd n.r.e.).

[105] *Hilley v. Hilley, supra*.

[106] *Roberts v. Roberts*, 999 S.W.2d 424, 432 (Tex.App.-El Paso 1999, no pet.).

[107] *Kunkel v. Kunkel*, 515 S.W.2d 941, 946 (Tex.Civ.App.-Amarillo 1974, writ ref'd n.r.e.).

[108] *Haile v. Holtzclaw*, 414 S.W.2d 916, 927 (Tex. 1967).

[109] *Taylor, supra* at 662; *Dikes v. Miller; Sorsby v. State, supra* at 234.

[110] Language reciting "the payment of $10 and other good and valuable consideration" has been said by one court to constitute the usual and customary formal recitation contained within deeds of gift. *Roberts v Roberts*, 999 S.W.2d 424, 431 (Tex.App.-El Paso 1999), *Citing Hall v. Barrett*, 126 S.W.2d 1045 (Tex.Civ.App.-Fort Worth 1939, no writ).

spouse.[111] Some attorneys use the recital of gift and a "separate property recital" in both the granting and habendum clause.[112] Some conveyances between husband and wife are construed as gifts. See Commentary Paragraph 6.b in this regard. The gift of realty may be made by delivery of the deed to the grantee or by recordation.

Express agreement clauses should not be used in gift deeds because gifts involve no consideration for the grant. Express agreements within the deed can be argued to require consideration. It may be argued that an express agreement in a deed of gift is void or voidable for failure of consideration.[113] Therefore, when dealing with a gift deed, the subject matter of the express agreement should be expressed as a separate grant or reservation rather than as an express agreement. This concept is embedded in the forms.

5. Granting Clause

At early common law the granting clause required strict words of art to accomplish conveyances we now deem customary under a variety of phraseology. Texas case law is a series of steps around the technicalities of the early words of art to arrive at what the courts believed to be the intent of the parties.[114] The granting clauses suggested in this article come from accepted usage and the statute suggesting the form of a deed.[115]

5.a Granting Clause - Granting clause in transactions supported by consideration

The standard granting clause set out in Section 5.022 of the TEXAS PROPERTY CODE uses the words "GRANTED, SOLD and CONVEYED." There is no reason to deviate from this language unless the conveyance is a gift [has "GRANTED, GIVEN and CONVEYED"] or a quitclaim deed [has "QUITCLAIMED, and by these presents does hereby QUITCLAIM"].

5.b Granting Clause - Granting clause for gift

In early common law the term "give" was an operative word for a fee tail.[116] Fee tail is a subject that is no longer relevant in modern drafting[117] and the term "give" now has a broader meaning as a nontechnical word connoting gift. The word "grant" still retains its technical meaning as an operative word of conveyance[118] and should be retained in the granting clause even when a gift is made by the clause and the preceding recitals.[119] In some cases, discussed below, the granting clause may recite partition or distribution of an estate.[120] The word "convey" is also retained in the granting clause of a gift deed. The words "bargain" or "sell" should not be used in a gift deed.

5.c Granting Clause - Granting clause for quitclaim

This clause is designed for use with Forms Paragraph 7.c. The quitclaim deed passes what the grantor may have without warranty. The same effect is reached by a deed that conveys "all of my right, title and interest" and disclaims warranty.[121] A quitclaim deed is a deed of conveyance intending to pass any title, interest or claim of the grantor, but not professing that such title is valid, nor containing any warranty or covenants for title.[122]

Said another way, the quitclaim deed passes the mere chance of title while a warranty deed will convey land.[123] The quitclaim deed is not a conveyance or a muniment of title and, by itself, it does not establish any title in those holding the deed, but merely passes whatever interest the grantor in the property may have, and validity of title goes back to the common source.[124]

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[111] TEX. FAM. CODE ANN. § 3.001(2) (Vernon 1998).

[112] See the habendum and comments on the habendum in Forms Paragraph 14 and Commentary Paragraph 14.

[113] There appears to be no case in point in support of this proposition, so it is only a suggestion.

[114] See *Young v. Rudd*, 226 S.W.2d 469 (Tex.Civ.App.-Texarkana 1950) for an interesting discussion of this early law in both Texas and other jurisdictions.

[115] TEX.PROP.CODE Section 5.022.

[116] *Richardson v. Levi*, 67 Tex. 359, 3 S.W. 444 (1887).

[117] *Reilly v. Huff*, 335 S.W.2d 275 (Tex.Civ.App.-San Antonio 1960).

[118] *Harlowe v. Hudgins*, 84 Tex. 107, 19 SW 364 (1892), cited in *Harlan v. Vetter*, 732 S.W.2d 390, (Tex.App.-Eastland 1987). The words "assign" or "transfer" may also operate as a "grant." *Herndon v. Vick*, 89 Tex. 469, 35 SW 141 (1896).

[119] "For a deed or instrument to effect conveyance of real property it is not necessary to have all the formal parts of a deed formerly recognized at common law or contain technical words. If from the whole instrument a grantor and grantee can be ascertained and there are operative words or words of grant showing an intention by the grantor to convey title to a real property interest, which is sufficiently described, to the grantee, and is signed and acknowledged by the grantor it is deed which accomplishes a legally effective conveyance." *Atlantic Richfield Co. v. Exxon Corp.*, 663 S.W.2d 858, 867 (Tex.App.-Hous. [14 Dist.] 1983), *Citing Brown v. Byrd*, 512 S.W.2d 753 (Tex.Civ.App.-Tyler 1974, no writ); *Harris v. Strawbridge*, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1957, writ ref'd n.r.e.); *Harlowe v. Hudgins*, 84 Tex. 107, 19 S.W. 364 (1892).

[120] See Forms Paragraphs 19 & 20 for sample partition deed and deed of distribution.

[121] *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763 (Tex. 1994)(the Court considered a deed in which grantor "…granted, conveyed, sold, assigned, and transferred to Dakota all of the right title and interest…of grantor…all without warranty of any kind, either expressed or implied." The Court said that this is the essence of a quitclaim deed, *Citing* BLACK'S LAW DICTIONARY 1126 (5th ed. 1979)).

[122] *Porter v. Wilson*, 389 S.W.2d 650, 655-56 (Tex. 1965).

[123] *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62, 65 (Tex. 1959).

[124] *Id*.

The quitclaim instrument is sometimes concluded without an habendum clause and never contains a warranty clause. There is no reason to give a warranty, and some careful attorneys even add a disclaimer of warranty.

6. The Grantee

The grantee must be identified or the instrument is generally a nullity.[125] However, a grantee may be identified anywhere in the conveyance[126] or the deed may have a blank space which may be filled in with a name by the person to whom the deed is delivered.[127] The mailing address of the grantee is required by statute and an instrument executed after December 31, 1981, conveying an interest in real property may not be recorded unless the mailing address of each grantee appears in the instrument or in a separate writing signed by the grantor or grantee and attached to the instrument. Failure to add the grantee's address will result in a penalty filing fee equal to the greater of $25 or twice the statutory recording fee for the instrument; however, the validity of a conveyance as between the parties is not affected by a failure to include an address of each grantee in the instrument or an attached writing.[128] A grantee need only accept the deed, in person or by its conveyance, and need not sign it.[129]

6.a The Grantee – Examples of grantees

These are common examples of grantees. Note that the recitation of separate property may be appended to the name of the grantee and may also appear in the habendum.[130]

6.b The Grantee - Deeds to and between spouses

A grant naming husband and wife and reciting consideration will result in a presumption that the property is community property. A grant to one spouse from the other spouse or from a third party, reciting gift, will be presumed separate property.[131] As pointed out in Commentary Paragraph 3.b, a grant naming one of the spouses and reciting separate property or use of separate funds will result in a presumption of separate property in that spouse. A grant to both spouses reciting use of one spouse's separate property or use of one spouse's separate funds raises the presumption that the purchasing spouse intended to make a gift of one-half of the separate funds to the other spouse.[132] Where both spouses are named as grantees with a separate property recital, each is vested with an undivided one-half interest as his or her separate property.[133] In order to overcome the presumption that property possessed by either spouse during or on dissolution of marriage is community property,[134] a party claiming separate property must show by clear and convincing evidence that the property is separate.[135] The presumption of separate property can be rebutted by evidence of the absence of an intent to make a gift.[136] But these rebuttals may be precluded if the deed is unambiguous in its recitals.[137] These cases demonstrate the wisdom of the separate property recitals in the consideration recital, the granting clause and the habendum.

6.c The Grantee - Multiple grantees

The better practice is to use multiple instruments when there are two or more grantees, but one

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[125] *Nolte v. Meyer*, 79 T. 351, 15 S.W. 276 (1891).

[126] *Bailey v. Mullins*, 313 S.W.2d 99 (Tex.Civ.App.-San Antonio 1958, writ ref'd n.r.e.).

[127] *Womack v. Stegner*, *supra.*

[128] TEX.PROP.CODE 11.003.

[129] *Webb v. American Oil Prod. Co.*, 281 S.W.2d 726 (Tex.Civ.App.-Eastland 1955, writ ref'd n.r.e.). The same is true of oil and gas leases.

[130] See Habendum at Forms Paragraph 15.

[131] TEX. FAM. CODE ANN. § 3.001(2) (Vernon 1998).

[132] *Bahr v. Kohr*, 980 S.W.2d 723, 726 (Tex. App.- San Antonio 1998, no writ), *Citing Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *In re Thurmond*, 888 S.W.2d 269, 273 (Tex.App.-Amarillo 1994, writ denied).

[133] *Rogan v. Williams*, 63 Tex. 123 (1885); *Belkin v. Ray*, 142 Tex. 71, 176 S.W.2d 162 (1943); *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637 (Tex. 1949).

[134] *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965); TEX. FAM. CODE ANN. § 3.003(a).

[135] TEX. FAM.CODE ANN. § 3.003(b). Separate property includes any property owned by a spouse before marriage or acquired by a spouse by gift, devise, or descent during the marriage. Tex. Const. art. XVI, § 15; TEX. FAM. CODE ANN.§ 3.001 (Vernon 1998).

[136] *Cockerham*, *supra* 168.

[137] *Massey v. Massey*, 807 S.W.2d 391, 405 (Tex.App.-Houston [1st Dist.] 1991, writ denied); 867 S.W.2d 766 (Tex. 1993)("a spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake." *Citing Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 431-32 (Tex. 1970)). See also *Muhm v. Davis*, 580 S.W.2d 98, 101 (Tex.Civ.App.-Houston [1st Dist.] 1979 writ ref'd n.r.e.)(when a writing is intended as a completed memorial of a legal transaction, the parol evidence rule excludes other evidence of any prior or contemporaneous expressions of the parties relating to that transaction.). In the *Miller* case, a deed recited that the conveyed property was the separate property of the wife. *Miller*, 452 S.W.2d at 429. The court would not admit testimony that the property was the community property of the marriage. The court found that parol evidence, which contradicted the express recital that the property was the separate property of the wife, would not be admitted unless a showing of fraud, accident, or mistake was made. *Id*. at 431. Other cases which hold that parol evidence is not admissible to contradict the express recitals in a deed, and which involve deeds that expressly state that property is conveyed to grantees as their separate property or for their separate use are *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968) and *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900).

instrument may be used if necessary.

> unto John Doe, Jr., whose address is ___, and Janey Doe, whose address is ___, Grantees, in equal shares per stirpes, to each an undivided 1/32 of 8/8 of the oil, gas and other hydrocarbon minerals in and under and that may be produced from [select legal description from Forms Paragraph 8].
>
> **or**
>
> unto John Doe, Jr., Grantee, whose address is ___, an undivided 1/32 of 8/8, and unto Susie Doe Jones, whose address is ___, Grantee, an undivided 1/16 of 8/8, of the oil, gas and other minerals in and under and that may be produced from [select legal description from Forms Paragraph 8].

7. <u>Conveyance of minerals - General Comments</u>

To this point in the forms the clauses for title and preamble, identification of grantor and grantee, and recital of consideration or gift have been laid out. To convey minerals, use the suggested forms to describe the quantum and the minerals being conveyed (Forms Paragraph 7.a-e), and proceed to a correct legal description (Forms Paragraph 8). In a mineral deed, like all other deeds, the grantor by law conveys the greatest estate possible, i.e. all title that he or she may own.[138] Unless one or more of the five *Altman* property rights are reserved, the grant will automatically include them all without any additional granting words to that effect.[139] Nevertheless, it is common practice to articulate all or some of these rights in the granting clause or in a clause immediately following, which generally commences "together with the right to make, execute an deliver oil and gas leases…." Except as to the ingress and egress clause, these forms do not incorporate that unnecessary practice.[140] The executive right (the right to lease), and the other mineral rights are commonly referred to as a bundle of rights.[141] The rights stay bundled without the need to say so.[142] If the natural apportionment of these rights is to be altered by agreement, on the other hand, that can be accomplished by use of one of the reservations or express agreements set out in Forms Paragraph 11.

In the forms recommended by this article there is no deviation from the language "in and under and that may be produced from." That phrase connotes minerals. There are some cases in which the words "and that may be produced from" are dropped and the phrase may not be absolutely necessary to the mineral definition, but its use is commonly accepted and does not convert the interest to a royalty, and it is favored in the case law as a hallmark of minerals.[143]

7.a Conveyance of Minerals – Samples of acceptable mineral conveyancing phrases

The first option--- "all of the oil, gas and other minerals"--- is the traditional language for a conveyance of the entire mineral estate.[144] The second option is a fraction of minerals, expressed as "an undivided _/_ of all oil, gas and other minerals in and under and that may be produced from…." Some practitioners prefer to use a fraction stated as "an undivided _/_ of 8/8 of the oil, gas and other minerals in and under and that may be produced from…." This is also a conveyance of a fraction of minerals. The term 8/8 means the entire mineral estate[145] and does not change the quantum of an interest.[146] The third option under Forms Paragraph 7.a is expressed as "an undivided _/_ of Grantor's _/_ undivided interest in all oil, gas and other minerals in and under and that may be produced from…." This is also an exact fraction of the mineral estate. These three options are to be used when the exact mineral interest of the grantor is known. If it is not known, the description in Paragraph 7.b is recommended.

7.b Conveyance of Minerals – Conveyance of percentage of minerals when grantor's interest is

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[138] All doubts concerning the quantum of the estate granted must be resolved against the grantor, who is held to convey the greatest estate permissible under the language of the deed. *Garrett v. Dils Company*, 157 Tex. 92, 299 S.W.2d 904 (1957); *Curdy v. Stafford*, 88 Tex. 120, 30 S.W. 551 (1895); *Allen v. Creighton*, 131 S.W.2d 47 (Tex.Civ.App.-Beaumont 1939, writ ref'd).

[139] *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409, 412 (Tex.App.-Texarkana 1990, writ denied)(when an owner conveys a mineral estate, all attributes are impliedly transferred as well unless specifically reserved to the grantor).

[140] The exception in these forms is the inclusion of an ingress and egress clause at Forms Paragraph 10. The recommendation to include this clause in a deed, even though it is an appurtenant right that comes with the grant, is more fully explained in Commentary Paragraph 10.

[141] *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935).

[142] *Schlittler v. Smith*, 128 Tex. 628, 630-31, 101 S.W.2d 543, 544 (1937); *Martin v. Snuggs*, 302 S.W.2d 676, 678 (Tex.Civ.App.-Fort Worth 1957, writ. ref'd n.r.e.).

[143] *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699, 700 (1945); *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409 (Tex. App.- Texarkana 1990, writ den'd).

[144] Some practitioners prefer the shorter term "mineral estate" to "oil, gas and other minerals." This is not a traditional usage for deeds and not included in the forms, but the term clearly has the same meaning as "oil, gas, and other minerals."*In re Bass* , 113 S.W.3d 735 (Tex. 2002); *Seagull Energy E & P, Inc. v. Railroad Com'n of Texas* , 99 S.W.3d 232, 244, fn 3 (Tex.App.—Austin 2003).

[145] *Concord Oil Company v. Pennzoil Exploration and Production Company*, 966 S.W.2d 451, 463, at 460 (Tex. 1998).

[146] See this usage in *First Nat. Bank in Dallas v. Kinabrew*, 589 S.W.2d 137 (Tex.Civ.App.-Tyler 1979). The court accepted without comment the use of 8/8.

unknown – Avoiding the effect of the Duhig Rule

It is common practice for farm and ranch sales contracts to state that the purchaser will receive a part of whatever minerals the seller may have. Often the grantor will not know exactly how much of the minerals he or she owns and will be unwilling or unable to pay for the title work necessary to find out.[147] If the extent of the grantor's minerals is unknown the language of Forms Paragraph 7.b should be used to avoid the effect of *Duhig v. Peavy-Moore Lumber Co., Inc.*[148] The case is important for attorneys drafting deeds to understand. In that case, grantor conveyed land to W. J. Duhig reserving one-half of the minerals. Duhig later conveyed the land, and title to the land ultimately became vested in the Peavy-Moore Lumber Company. Duhig's deed reserved to Duhig an undivided one-half of the minerals in the land and had no subject-to clause. In that case, it was held that the warranty in the Duhig deed was breached at the very time of the execution and delivery of the deed and that Duhig held the very interest required to remedy the breach---one-half of the minerals---and therefore Duhig would be estopped to claim title to the reserved minerals as against his grantee and their successors in title to the land. The estoppel principle in *Duhig* was adopted from after-acquired title cases.[149] If a party attempts to claim an interest which he purported to convey, he is in effect denying a fact represented by his warranty.[150] Forms Paragraph 7.b grants an undivided interest in whatever interest Grantor may have and may be used to avoid the effect of the *Duhig* rule.[151] A practical problem facing attorneys is how to ascertain what minerals their clients have and explain to them the consequences of the *Duhig* rule if they make a mistake.[152] If those problems cannot be addressed, Paragraph 7.b is the solution.[153]

7.c Conveyance of Minerals – Quit claim language

This option---all of the right, title and interest of grantor---is sometimes used with a disclaimer of warranty, which results in a quit claim of the minerals, discussed more fully in connection with the warranty clause discussed at Commentary Paragraph 16. It is to be used when the grantor does not know the extent of the minerals and may not even claim an interest in the land.

7.d. Conveyance of Minerals – Grant of "oil" or "gas"

It was pointed out above that an unrestricted grant carries with it the greatest possible estate. Thus, a grant of "oil, gas and other minerals" comprises the entire range of hydrocarbons. But mineral constituents can be "stripped out" and conveyed separately. For example, a grant of "oil and casinghead gas" would not include natural gas and its liquid constituents. In some instances, natural gas and oil and casinghead gas have been severed from each other and "gas rights" have remained held by production under a lease while "oil rights" have reverted to the mineral owners to lease again. Such a situation occurred in the Texas Panhandle and while sorting out the rights of the owners of natural gas and oil and casinghead gas the Texas Supreme Court in *Amarillo Oil Company v. Energy-Agri Products, Inc.*[154] collected and used definitions from the cases, the statutes, and the commentary, applicable to the terms "oil well," "gas well," "oil," "gas," "sour gas," "sweet gas," "casinghead gas," "oil stratum," "horizon," "pay horizon," "producing horizon," "reservoir," and the court noted the new oil field term, "white oil." Any of these, except "white oil," may be

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[147] In today's active leasing environment, a landowner frequently has the good fortune to learn that a landman doing standup title work for a company desiring an oil and gas lease has quantified the mineral ownership in a tract in which he or she may have an interest. It is a good idea to require that title report as a part of leasing negotiations.

[148] 135 Tex. 503, 144 S.W.2d 878 (1940).

[149] *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270, 272 (1942)(estoppel in after-acquired title cases arises from a representation of title made by grantor in the covenant of warranty and having represented the fact of ownership, the grantor is estopped to deny that fact).

[150] *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62, 65 (Tex. 1959). See also *Scarmardo v. Potter*, 613 S.W.2d 756 (Tex.Civ.App.-Houston [14 Dist.]1981, writ ref'd n.r.e.). The court held that since Potter, in his deed to Scarmardo, failed to mention a previously reserved one-half interest, and only reserved a one-eighth mineral interest in himself, Potter breached his warranty to Scarmardo at the very time of the execution and delivery of the deed "for the deed warrants the title to the surface estate and to an undivided seven-eighths interest in the minerals." Potter thereby purported to convey to Scarmardo an undivided seven-eighths interest at a time when he only owned one-half. Under *Duhig*, Scarmardo is entitled to all of Potter's reserved interest. Since the reserved interest of Potter is insufficient to make Scarmardo whole, Scarmardo would have a cause of action in money damages for breach of warranty for an additional undivided three-eighths of the mineral interest.

[151] A simple solution to the *Duhig* problem is the broad form subject-to clause referring to the prior reserved minerals demonstrated at Forms Paragraph 13.

[152] Author's Note: A sharp elderly woman once grew impatient with my tedious efforts to explain the *Duhig* rule to her befuddled husband and snapped, "If you sell more than you got, they get what you keep." I have never heard a more lucid or succinct explanation of the *Duhig* rule.

[153] See also *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968)("Under the rule of *Duhig*, and as to each separate tract…Respondents are to be made whole from the reserved interests before Petitioners may enjoy the mineral and royalty reservations; otherwise, Petitioners would be permitted to breach their warranty with respect to the title and interests which the deed purported to convey." *Citing* cf. *Forrest v. Hanson*, 424 S.W.2d 899 (Tex.Sup.1968).

[154] 794 S.W.2d 20 (Tex. 1990).

the subject of a grant or reservation.[155]

7.e. Conveyance of Minerals – Restricting grant to hydrocarbon minerals

Forms Paragraphs 7.e and 9.g offer the limiting phrase "oil, gas and other hydrocarbon minerals" as one alternative means of protecting the surface estate from development by surface destruction. The bitter truth of surface destruction is nowhere better told than in *Getty Oil Company v. Jones*, [156] where the Texas Supreme Court summarized the law regarding payment of damages for uses of the surface in developing minerals. The Court said that the oil and gas estate was the dominant estate and its owner was entitled to use so much of the surface as was "reasonably necessary" to produce and remove minerals. While these rights are to be exercised with due regard for the rights of the owner of the servient estate,[157] if there is only one manner of producing minerals, and it results in destruction of the surface, the lessee has the right to pursue this use regardless of surface damage.[158] In *Humble Oil and Refining Co. v. Williams*, [159] the Texas Supreme Court held that "A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary."

While it appears that the war over near surface minerals appears to be over,[160] an exercise of caution---using the term "hydrocarbon minerals"---is not altogether unwarranted. It is not crystal clear what "near" means when it modifies the word "surface" in the *Moser* case.[161] Moreover, even if some near surface minerals are clearly enumerated now and held by law to be a part of the surface estate, uranium is not on the Moser list of minerals now considered to be of the surface. Nor is gold or silver. Finally, even though the Texas Supreme Court has held that minerals extracted by destruction of the surface are to be considered a part of the surface estate, at least one court has held that a deed was to be construed to include uranium within the mineral estate even though its extraction would destroy the surface.[162] The supreme court is not reluctant to admit to what it believes is a mistake and chart a different course when it comes to oil and gas matters[163] and a conveyance of oil, gas and "other" minerals simply leaves the issue open for debate. All of these

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[155] Caveat: white oil is probably is better left alone. It is generally not legally produced and is not suitable to convey. *Id. See also Hufo Oils v. Railroad Commission of Texas*, 717 S.W.2d 405 (Tex.Civ.App.-Austin 1986).

[156] 470 S.W.2d 618, at 621-622 (Tex. 1971).

[157] *Id*, *Citing Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 344 S.W.2d 668 (1961); *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (1961); Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Tex.L.R.. 1 (1956); Comment, Land Uses Permitted an Oil and Gas Lessee, 37 Tex.L.R. 889 (1959); Lambert, Surface Rights of the Oil and Gas Lessee, 11 Ok.L.R. 373 (1958); Davis, Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner, 8 Rocky Mt.Min.L.Inst. 315 (1963).

[158] *Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex.Civ.App.-Waco 1961, writ ref'd).

[159] 420 S.W.2d at 134.

[160] See *Moser v. United States Steel Corporation*, 676 S.W.2d 99 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977); 579 S.W.2d 329 (Tex.Civ.App.-Waco 1979); 597 S.W.2d 743; *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971). Note that *Moser* is prospective in application and applies only to those severances of the surface and mineral estates occurring after June 8, 1983. *Moser v. United States Steel Corporation*, *supra* at 102.

[161] According to *Moser*, *supra* at 102, and the cases cited there, near surface minerals which are a part of the surface estate are building stone and limestone, caliche, surface shale; water, sand and gravel, and "near surface" lignite, iron and coal. But the very use of the word "near" to modify surface leaves the issue open for future debate, or litigation as to lignite, iron and coal.

[162] *Wojtasczyk v. Burns*, 744 S.W.2d 354 (Tex.App.-Corpus Christi 1988)(The court construed a 1923 deed which used the term "all minerals" and stated that these minerals included "gold, silver, coal, oil, gas, etc." The court said that the deed's reference to three minerals (gold, silver and coal) "…which are typically extracted by means causing destruction of the surface, and two (oil and gas) which are not,…" indicated that the means of extraction was not intended to be a controlling or limiting factor in the interpretation of the phrase "all minerals," especially in light of the fact that "…the deed specifically provides for compensation to the grantee/surface owner for 'the reasonable market value of all the land reasonably necessary to the taking of such minerals,' which reflects that the parties contemplated that minerals such as uranium would be extracted by methods destructive to the surface." The court then held that the intent to include uranium in the mineral reservation was fairly expressed in the deed.

[163] See published *mea culpas* in *Day & Co. v. Texland Petroleum*, 786 S.W.2d 667, 669 (Tex. 1990): "We erred in *Cain* when we compared the executive right to a power of appointment."); See also Justice Enoch's concurrence in *Concord Oil Company v. Pennzoil Exploration and Production Company*, 966 S.W.2d 451, 463, at 460 (Tex. 1998): "We undermined our opinion by applying our presupposition that a typical grantor intends to convey only one estate before we concluded that the deed was internally inconsistent. Further, we were wrong to conclude that the "subject to" clause of the Crosby deed includes future leases. It does not-at least not clearly. And that is Pennzoil's second point. Reading the "subject to" clause to include future leases is not implausible, but it is unreasonable. The obligation of the Court is to construe the deed to avoid the disharmony, not create it. *Cf. National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995). In short, we violated our own rules for construing writings. We read the "subject to" clause in a way that created a conflict within the document, rather than in a way that avoided the conflict."

considerations lead right back to the difficult process of setting a dollar value on land used by the surface owner for one purpose and lawfully destroyed by the mineral owner for another.[164] But this process (read that "litigation") can be avoided by limiting a grant to "hydrocarbon" minerals. Thus, while the traditional term "oil, gas and other minerals" is the primary phrase used in these forms, the phrase "oil, gas and other hydrocarbon minerals" is included to at least remind the attorney drafting a deed that the clause will avoid the issues raised in the surface destruction cases.[165]

Of course, non-hydrocarbon gases which may exist in commercial quantities such as helium, nitrogen and carbon dioxide will have to be addressed if the term "oil, gas and other hydrocarbon minerals" is used. If they are not mentioned, they will not accompany the grant. They are not hydrocarbon gases. If they are to go with the grant the deed may enumerate them under the granting clause or they may be included within an express definition of hydrocarbons if the parties so agree.

It should also be noted here that the attorney may include within the deed an express agreement that tracts the case law and states that minerals which require extraction by surface destruction methods, whether near surface or not, constitute a part of the surface estate. Finally, it should be noted that an attorney may actually wish to draft a conveyance or reservation of near surface minerals or royalty in them, and this language is provided at Forms Paragraph 8.e.

8. Legal Descriptions

A mineral or royalty interest is an interest in real estate[166] and as realty, minerals and royalty cannot be conveyed except in compliance with the statute of frauds.[167] Deeds, Mortgages, Oil and Gas Leases, and other instruments covering real estate must contain property descriptions sufficient to comply with the Statute of Frauds.[168] If a conveyance does not describe the land to be conveyed sufficiently, it is void.[169] Generally, a reference to an undivided mineral or royalty interest (including royalty acres or net mineral acres[170]) within a sufficiently described tract of land is an adequate description.

Some scriveners use "that one, certain parcel or tract of land located in Bravo County, Texas, more fully described as…" This phrase adds nothing to the legal description. It will not bring the instrument into compliance with the statute of frauds if the legal description that follows is not accurate. Some mineral and royalty deeds append abbreviations in brackets to legal descriptions, especially when dealing with subdivisions:

> "…the North Half of the Southeast quarter [N2 of SE4] of Section 100...:"

There is nothing particularly wrong with this usage but the bracketed description adds nothing to the original and makes the instrument harder to prepare because one

[164] In *Moser*, at 103, the court said: "When dealing with the rights of a mineral owner who has taken title by a grant or reservation of an unnamed substance such as this, liability of the mineral owner must include compensation to the surface owner for surface destruction. This holding does not affect the right of the mineral owner to enter the surface estate and use so much of the surface as is reasonably necessary to remove the minerals. *Citing Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980) and *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (Tex. 1943). As in the case of the mineral owner who takes under a specific grant, the mineral owner under a grant of 'other minerals' is restricted in his use of the surface estate by the dictates of the 'due regard' or 'accommodation doctrine.' This rule is applied when the surface owner and mineral owner are attempting to use the surface estate for two conflicting and incompatible uses."

[165] The alternative approach might be to reserve or convey the executive rights in near surface minerals and uranium with the surface estate. This raises issues of duty of good faith to the non-executive. See discussion at Commentary Paragraph 11.a Express Agreements - Express agreements pertaining to the executive right.

[166] *Renwar Oil Corp. v. Lancaster*, 154 Tex. 311, 276 S.W.2d 774 (Tex. 1955); *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021, 80 S.W.2d 741 (1934).

[167] TEX. BUS. & COMM. CODE ANN § 26.01; *U.S. Pipeline Corp. v. Kinder*, 609 S.W.2d 837 (Tex.Civ.App.-Fort Worth 1980, writ ref'd n.r.e.).

[168] To comply with the statute of frauds, the contract must be in writing and signed by the party to be charged with the agreement. TEX. BUS. & COM. CODE ANN. § 26.01(a) (Vernon 1987). A contract for the conveyance of real property must comply with the statute of frauds to be enforceable. *Lewis v. Adams*, 979 S.W.2d 831, 834 (Tex. App.-Houston [14th Dist.] 1998, no pet.). A contract for the transfer or assignment of an interest in an oil and gas lease is treated as a real property interest and, therefore, is subject to the statute of frauds. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 908 (Tex. 1982); *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 134 (Tex. App.-El Paso 1997, pet denied); *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 (Tex. App.-Corpus Christi 1994, writ denied); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex.App.-San Antonio 1986, writ ref'd n.r.e.).

[169] *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *McDaniel v. Carruth*, 637 S.W.2d 498, 505 (Tex. App.-Corpus Christi 1982, no writ).

[170] In *Pan American Petroleum Corporation v. Texas Pacific Coal and Oil Company*, 340 S.W.2d 548, 557 (Tex.Civ.App.-El Paso 1960) the court was called upon to decide whether a description of an "undivided mineral interests equal to 200 mineral acres" in a tract of land violated the statute of frauds. The court held the description was valid.

must assure that each abbreviation is in accord with its preceding full description. The abbreviations do catch the eye quicker than the longer phrases but they make an instrument harder to proof read because no cautious examiner will read only the abbreviations in brackets; he or she will read and compare the abbreviations to the descriptive language. The practice of repeating spelled descriptions with abbreviation in brackets may also lead to mistakes such as "…the North Half of the Southeast quarter [N2 of NE4] of Section 100…." Other descriptions capitalize words with no particular rhyme or reason: "…the NORTH HALF of the SOUTHEAST QUARTER [N2/SE4] of SECTION 100, BLOCK 1..." Some attorneys prefer to capitalize the first letter of some words: "…the North Half of the Southeast Quarter of Section 100, Block 1..." Capitalization is generally a matter of style but in some instances it may become a matter of construction. These forms adopt the capitalization of each word indicating a geographical area but not a mere direction:

> "The North 30 acres of the North Half of the Southwest Quarter of Section 100…"

Finally, note that the optional phrase "more or less" following the statement of acreage protects a grantor from liability arising from minor shortages in actual acreage.[171]

8.a. Legal Descriptions - Sample descriptions that may be used with these forms

Forms Paragraph 7 is a grant of minerals to be followed by a legal description selected from Forms Paragraph 8.a. Forms Paragraph 9 is a grant of surface, reserving minerals, in a legal description from Forms Paragraph 8.a. The legal descriptions in Forms Paragraph 8 are designed specifically for use with all of the other forms paragraphs suggested in this article. There are descriptions which, though preferred by the practitioner, may not be used with the types of forms suggested in this article. They are listed in Commentary Paragraph 8.b.

8.b. Legal Descriptions - Examples of descriptions that may not be used with these forms

Some scriveners mix a fraction of interest with net acres and a call to the land. Some examples are:

> "an undivided three-fourths (3/4) interest (692.5 acres) in and to that certain 923 acres of Survey No. 180, containing 1023 acres,"
>
> **or**
>
> "an undivided 1/8 of Grantor's 1/2 interest in oil, gas and other minerals in and under Section 100, Block 1, AB&C Survey, Bravo County, Texas."

This language is acceptable in deeds generally, but it will not work within the scheme of linked forms presented in this article. At Paragraph I.D of this article the holding in *Middleton v. Broussard*[172] was addressed. The case involved the grant of a royalty interest in tracts of land by reference to legal descriptions which mixed fractional interests and net acres in described tracts (i.e. "…An undivided three-fourths (3/4) interest (480 acres) in and to Survey No. 76, containing 640 acres …"). The courts deciding the case could, and did, reach different holdings and the lesson to be learned from *Middleton* is to either avoid the type of legal description that leads to such litigation, or use them in accordance with the Hooks+King+Middleton rules.[173]

The forms promulgated in this article choose to avoid the *Middleton* type descriptions. This is not to say these types of descriptions cannot be used at all. If the grantor desires use a legal description like those used in the *Middleton* deed, the correct way to do so is by referring to the entire tract of land (i.e., Section 76). Here is how the *Middleton* deed should have been drawn:

> HAVE GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY unto R.M. Middleton, of the County of Chambers, State of Texas, an undivided three-fourths (3/4) interest (480 acres) in and to Survey No. 76, containing 640 acres, reserving unto Grantors all of the oil, gas and other minerals in and under Survey 76, but Grantors HAVE GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY unto ___, Grantee, an undivided 1/64 royalty in oil, gas and other minerals produced, saved and sold from Survey 76.[174]

This approach avoids the choice of "lands described" or "lands conveyed" by the attorney drafting the deed.

8.c. Legal Descriptions - Horizontal limitations

Most transactions involving depth limitations pertain to assignments or farmouts of working interests or Pugh clauses in oil and gas leases. To the extent such a limitation is needed for a deed, the following language may be used:

> in and under and that may be produced from
>
> **and**
>
> Section 100, Block 1, AB&C Survey, Bravo County, Texas,
>
> **and**
>
> limited to a depth from the surface of the ground to 5,000 feet below the surface of the ground, and reserving to the Grantor and Grantor's heirs or assigns all minerals below such depth,
>
> **or**
>
> limited to a depth commencing at 1,000 feet above

[171] *Wooten v. State*, 177 S.W.2d 56, 58 (Tex. 1944).

[172] 504 S.W.2d 839 (Tex. 1974).

[173] See generally the examples of how the Hooks+King+Middleton trilogy operates at Paragraph I.F.

[174] This type of legal description was approved in *McElmurray v. McElmurray*, 270 S.W.2d 880, 882 (Tex.Civ.App.-Eastland 1954).

sea level and terminating 3,000 feet below sea level, and reserving to the Grantor and Grantor's heirs or assigns all minerals above and below such depth,

or

limited to the geologic horizon beneath the lands herein described which is the stratigraphic equivalent of the geologic horizon classified by the Texas Railroad Commission as the Dead Dinosaur Field as shown on the logs of the Deep Reef Drilling Company John Doe No. 1 Well located 467 feet from the north line and 467 feet from the west line of Section 101, Block 1, AB&C Survey, Bravo County, Texas, and reserving to the Grantor and Grantor's heirs or assigns all minerals more than 50 feet above and below such geologic horizon,

The last depth description presents an interesting question whether the description would meet the requirements of the statute of frauds. There are no cases which discuss the applicability of the statute of frauds to a geologic formation, but the general rule by which to test the sufficiency of any description is whether the writing furnishes, within itself or by reference to some other writing, the means and data by which the land to be conveyed may be identified with reasonable certainty.[175] If enough appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient.[176] This is referred to as the "nucleus of description" theory.[177] Under this theory of construction, "[w]ords of description are given a liberal construction in order that a conveyance may be upheld."[178]

8.d. Legal Description - Legal description incorporated by reference

A reference to a prior instrument may be made solely to incorporate a legal description, or to incorporate prior exceptions and reservations and thereby quantify the extent of the present grant or reservation. A present deed which harks back to prior instruments coupled with the phrase reference to which is made for "all purposes" or "all legal purposes" will result in incorporation by reference of the prior instrument, with its grant, exceptions, and reservations, to determine the extent of the grant or reservation in the present instrument.[179] This can protect the grantor (the reference in the deed may operate much like a subject-to clause),[180] but it can also result in a lawsuit to construe the result of a present deed with prior deeds. An actual case provides a good example:

Hypothetical Case 5: A deed from American National Insurance Company (the Johnson deed) reserves "an undivided 1/2 of 1/8 of all the oil, gas and other mineral royalty in and under and that may be produced from the above described land (said 1/2 of said 1/8 royalty being a 1/16 of all the oil, gas and minerals produced from said land)." American National Insurance Company later conveys a royalty by the "Hill Deed" which reads "An undivided 1/4 interest in and to all of the oil royalty, gas royalty" in certain lands described by reference to the Johnson Deed using the words, "reference to which deed is here made for all purposes." A lease is made for a 1/4 royalty and a lawsuit is filed to construe the Hill Deed.

Query: Is the royalty payable pursuant to the Hill deed a 1/64 royalty or a 1/16 royalty

Result: The royalty is a 1/64 royalty.[181] The court said that "Inspection of the Johnson deed would disclose that American National Insurance Company owned by reservation 1/2 of 1/8 royalty. In the Hill deed there is described 1/4 of 'the royalty' and as a part of the description reference is made to the Johnson deed 'for all purposes.' Thus, the Hill deed conveyed 1/4 of 1/2 of 1/8 royalty, instead of an undivided 1/4 of the 1/4 royalty provided by the lease."

In deciding Hypothetical Case 5 (which is obviously not hypothetical) the court based its decision on the fact that "Appellants were, of course, charged with notice of the Johnson deed not only because it was a muniment in their title and of record, but also because it was expressly referred to for all purposes in the Hill deed, under which they hold." The first ground of the holding is not based on sound law because, absent the

[175] *Norris v. Hunt*, 51 Tex. 609 (Tex. 1879); *Osborne v. Moore*, 247 S.W.2d 498 (Tex. 1923); *Smith v. Sorelle*, 87 S.W.2d 703 (Tex. 1935); *Pickett v. Bishop*, 223 S.W.2d 222 (Tex. 1949); *Hoover v. Wukasch*, 254 S.W.2d 507 (Tex. 1953); *Broaddus v. Grout*, 258 S.W.2d 308 (Tex. 1953); *Rowson v. Rowson*, 275 S.W.2d 468 (Tex. 1955); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972).

[176] *Gates v. Asher*, 280 S.W.2d 247, 248-49 (Tex. 1955).

[177] *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 909 (Tex. 1982).

[178] *Gates*, *supra* at 248.

[179] See *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798, 800 (1956), a suit brought to construe a deed which made its general warranty subject to "all restrictions and reservations" contained in another deed "…to which said deed and the record thereof reference is hereby made for all legal purposes." The court held that the reference back to prior deeds was "more than a reference to mere legal description of the lands, it incorporated all reservations and exceptions and quantified the present grant." *Id* at 800.

[180] *Id*.

[181] *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192 (Tex.Civ.App.-Galveston 1954, writ ref'd n.r.e.)(note the mixing of the fraction of royalty with the follow on explanation of what the phrase does, a practice condemned by the forms suggested in this article).

reference to the prior deed for all purposes, the Appellants would be entitled to the benefits of the *Duhig* rule.[182] The Hill deed conveyed "An undivided 1/4 interest in and to all of the oil royalty, gas royalty" in certain lands. The grantee had no such interest to convey. If the deed had not continued with "reference to which deed is here made for all purposes" the *Duhig* rule would have been triggered despite the presence of constructive notice. Constructive notice has never been held to deny a recovery to a grantee suffering from breach of warranty. Such a grantee has always been allowed to recoup as much title as possible from the grantor under *Duhig* without reference to constructive notice; indeed, if constructive notice played a role in such cases an injured grantee would never have a claim under *Duhig*.

If the reference to the prior instrument is for the sole purpose of incorporating a legal description, it is important that the language be clearly confined to that purpose to avoid litigation based on claims of ambiguity.[183] The qualifier "…reference to which is made solely to incorporate the legal description of said lands herein, and not for any other purpose" will accomplish incorporation of a legal description without ambiguity. However, just as in *Remuda Oil Co. v. Wilson*, *supra*, references to prior instruments in the chain of title may protect the grantor from the operation of the *Duhig* rule.[184] Of course, the broad form subject-to clause,[185] by looking back to the same record, may do the same. The problem becomes that, by incorporating the substance rather than the legal description of prior deeds within the granting deed, the attorney---who may not bother to read the prior deeds---may set ambiguities into the deed being drafted. The lesson to be learned from Hypothetical Case 5 is, before using a reference back to a prior deed for all purposes: read the prior deed.

8.e. Legal Descriptions – Grants and reservations of near surface minerals

At Commentary Paragraphs 7.e and 9.g the use of the term "oil, gas and other hydrocarbon minerals" was suggested as one means of dealing with the problem of near surface minerals and extraction methods that result in surface destruction. It was suggested that, despite case law that now appears to put such issues to rest, there are still ambiguities inherent in the use of the term "near surface" and there is still room for litigation over the wording of deeds. But there is another side to the issue---some deeds may actually involve the grant or reservation of near surface minerals or royalty on near surface minerals as the core purpose of the transaction. Near surface minerals are generally held to be a part of the surface estate.[186] Royalty is a right appurtenant to the mineral estate and, since near surface minerals are a part of the surface estate and not the mineral estate, a nonparticipating royalty interest will not ordinarily apply to near surface minerals.[187] However, a specific grant of a near surface mineral will cause that mineral to become a part of the dominant estate, subjecting the surface estate to the usual rules of servient user.[188] In order to structure a deed containing a grant or reservation of near surface minerals or royalty in near surface minerals, use the following forms:

Use Forms Paragraphs 1 – 6
and
quantum of interest language from Forms Paragraphs 9.e or 12. a & b
and

- building stone
- limestone
- caliche
- surface shale
- sand and gravel
- near surface lignite
- iron

---

[182] For an explanation of the *Duhig* rule see Commentary Paragraph 7.b, *supra*.

[183] See for example *Gulf Oil Corporation v. Shell Oil Company*, 410 S.W.2d 260, 268 (Tex.Civ.App.-Beaumont 1966, writ ref'd n.r.e.)(held that the statement "The land hereby conveyed consists of an undivided one third of two hundred and twenty one and two fifth (221 2/5) acres out of said Clayton Harper League and for a further description of the same reference is made to the deed records of said Liberty County Book E page 421 which description is hereby made a part of this deed," was limited to descriptive purposes and not meant to be an adoption or election by the grantor to bind himself to the terms of the referenced instrument, *citing Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153 (Tex. 1952). *See also Taylor v. Kerlin*, 327 S.W.2d 793 (Tex.Civ.App.-San Antonio 1959, writ ref'd n.r.e.)(held that statement "It is hereby intended to convey to the Grantees hereunder a one-third (1/3) of the three-fourths (3/4) of one-eighth (1/8) royalty interest conveyed to the grantor herein by Continental Oil Company by royalty deed dated March 15, 1946, to which royalty deed and its contents reference is here made and it is expressly understood that this deed is subject to the conditions and reservations contained in said royalty deed...." referred to the character and quality of interest rather than the quantify of land conveyed).

[184] *Monroe v. Scott*, 707 S.W.2d 132, 135 (Tex.App.-Corpus Christi 1986)("[A] reference "for all purposes" to previous deeds puts grantees on notice that a grantor is only apportioning his remaining interest after the previous instruments are given effect."), distinguishing *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956) and *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192 (Tex.Civ.App.-Galveston 1954, writ ref'd n.r.e.).

[185] Forms Paragraph 13.b.

[186] *Moser v. United States Steel Corporation*, 676 S.W.2d 99 (Tex. 1984).

[187] *Farm Credit Bank of Texas v. Colley*, 849 S.W.2d 825 (Tex.App.-Texarkana 1993).

[188] *Wilderness Cove v Cold Spring Granite Co.*, 62 S.W.3d 844 (Tex.App.-Austin 2001).

- coal
- uranium

and [for a mineral grant or reservation]
in or on and that may be produced from (
or [for a royalty grant or reservation]
produced, saved and sold from
and
the lands herein (conveyed)(described).
or
Section 100, Block 1, AB&C Survey, Bravo County, Texas.

Using the format set out above, an example of a conveyance of an interest in sand and gravel, for example, might be worded:

> Unto John Doe, Jr., whose address is ___, an undivided _/_ of the sand and gravel in, under or on and that may be produced from Section 100, Block 1, AB&C Survey, Bravo County, Texas.
> **and (optional)**
> There is reserved unto Grantor, and Grantor's heirs or assigns, the executive right in the sand and gravel herein conveyed to Grantee,

Likewise, a reservation of a royalty in near surface minerals might be stated:

> There is reserved unto Grantor, and Grantor's heirs or assigns, an undivided _/_ royalty in the following near surface minerals, regardless of whether or not they are near or a part of the surface estate, to wit: building stone, limestone, caliche, surface shale, sand and gravel, near surface lignite, iron, coal, uranium produced, saved and sold from the lands herein conveyed.

It should be pointed out that expressions of royalty in near surface minerals may be quite different from oil and gas. For example, a royalty in sand and gravel may be based in part on the size and quality of the particles comprising the material, or the extraction method used to obtain it. Use of the broad term "royalty" is preferable to any attempt to particularize the elements of the royalty grant or reservation in near surface minerals.

Like other grants or reservations, term limitations can be inserted into the conveyance.[189] It should be kept in mind that any conveyance or reservation of a near surface mineral may result at some point in extraction by surface destruction methods.

8.f. Legal Descriptions - Mother Hubbard clauses

There is a story that early Texas surveyors did their work from horseback in order to make a rapid escape in the event hostile Indians came upon them and this led to errors when adjacent survey lines didn't match up, thereby creating vacancies. That story was probably made up by surveyors to excuse their mistakes. At any rate, the purpose of the Mother Hubbard clause is to prevent leaving out of a deed or lease small pieces or strips and gores of land which may exist without the knowledge of one or both of the parties by reason of incorrect surveying, careless location of fences, or other mistake.[190] The language of Forms Paragraph 8.f is, of course, a broad form. It is based on oil and gas lease forms.[191] A Mother Hubbard clause may not be necessary. It has long been held that a deed conveying land specifically described and containing no Mother Hubbard clause will, in the absence of a clear expression of a contrary intention, operate to convey strips and gores and small strips of land bordering the described tract or tracts.[192] On the other hand, the argument has been made and rejected that large tracts adjacent to a described tract ought to be covered under a deed's Mother Hubbard clause.[193] When it comes to minerals and royalty, small strips could be very valuable and many cautious attorneys still add the Mother Hubbard clause to deeds. It should also be noted that one recent decision rejects a county-wide Mother Hubbard transfer which contained the language "all oil, gas and other minerals in the above named county or counties, whether actually or properly described herein or not,…" The decision held that this was a Mother Hubbard clause and that such clauses applied only to small strips and gores, rejecting earlier case law that held such clauses to be valid conveyances.[194]

9. Reservation of Minerals

Forms Paragraph 9 deals with the conveyance of the surface, reserving all or a portion of the minerals. A reservation entails rights appurtenant to the reserved minerals, but if the reservation is followed by a clause reserving appurtenant rights, that redundant clause may change the quantum or character of appurtenant rights reserved, or give them up in some way, or amount to an express agreement as to rights which is different from the appurtenant rights implied in the reservation

[189] See Forms Paragraph 14 for panoply of life estate and other term language.

[190] *Gulf Production Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452; *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442 (1935).

[191] *Sun Oil Co. v. Burns*, *supra*,; *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W.2d 447 (1935); *Gulf Production Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452 (1935). See generally 1 William and Meyers, Oil & Gas Law, Section 221.1, p. 300.14.

[192] *Strayhorn v. Jones*, 157 Tex. 136, 300 S.W.2d 623 (Tex. 1957); *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912; *State v. Arnim*, 173 S.W.2d 503, 508, (Tex.Civ.App.-San Antonio 1943, writ ref'd w. o. m.).

[193] *Smith v. Allison*, 157 Tex. 220, 301 S.W.2d 608 (Tex. 1956).

[194] *Greer v. Moore*, 72 S.W.3d 436 (Tex.App.-Corpus Christi 2002).

language.[195] Express agreements and reservations, and the related topic of unbundling rights appurtenant to minerals is taken up in Commentary Paragraph 11. What should be kept in mind when using the clauses recommended for reservations is that there is no need to attempt language explaining what rights appurtenant to minerals accompany the reservation.

9.a Reservation of Minerals - Reservation in grantor

The mineral reservation in these forms immediately follows the grant and legal description, commencing with the words "There is reserved unto Grantor, and Grantor's heirs or assigns …." This reservation is placed at this point in the instrument rather than being placed farther down to assist ease of reading and interpreting the grant and the reservation together. By way of example, from the forms:

> "HAVE GRANTED, SOLD and CONVEYED, and by these presents do hereby GRANT, SELL and CONVEY unto John Doe, III, whose address is ___, Grantee, Section 100, Block 1, AB&C Survey, Bravo County, Texas. There is reserved unto Grantor, and Grantor's heirs or assigns, an undivided 1/4 of all oil, gas and other minerals in and under and that may be produced from the lands herein conveyed."

Any mention of a grantor in a reservation in the forms includes the words "and grantor's heirs or assigns." This surplus language is probably not necessary. There was once the very real possibility that a reservation of a property right in a grantor, but not in the "heirs or assigns" of the grantor, might be held to terminate with the death of the holder of the right. The possibility was made remote by the Texas Supreme Court's decision in *Day & Company, Inc. v. Texland Petroleum, Inc.*[196] in which the court overruled *Pan American Petroleum Corporation v. Cain*.[197] It was held in Cain that an executive right was a specie of contract right in the nature of a power, the duration of which was a matter of the parties' intent, and upon the death of the holder of the right, the right expired.[198] The court of appeals in *Cain* noted that the reservation was to the grantor but not his "heirs, successors and assigns"[199] and the Supreme Court held that this omission terminated the power upon the death of the holder.[200] The court reversed itself in *Day*, overruled *Cain*, and said that the executive right is a property interest subject to principles of property law, whether bundled with the other rights and attributes comprising the mineral estate or severed from those rights and attributes.[201] The *Day* court did not specifically mention the omission of the words "heirs or assigns." These forms include the phrase. At worst, it is mere surplusage. At best, it may be insurance against the future decision that changes the rules again.[202]

9.b Reservation of Minerals - Reservation in favor of a stranger

Note that the reservation language of Forms Paragraph 9.a states "There is reserved unto Grantor, and Grantor's heirs or assigns,…" There can be no other recipient of a reservation. A reservation of minerals or royalty may not be made in favor of third parties who are strangers to the transaction.[203] Here are some examples of reservations that simply will not work:

- There is reserved unto Grantors and their seven children...[204]
- There is reserved unto the children of the Grantor
- There is reserved unto my brother, John Jones
- Save and except, and there is reserved unto Grantor and his wife, Janey Doe

If any stranger is to have an interest in the premises, that must be accomplished by a separate instrument as

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[195] *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (Tex. 1953).

[196] 786 S.W.2d 667 (Tex. 1990).

[197] 163 Tex. 323, 355 S.W.2d 506 (Tex. 1962).

[198] *Id* at 510.

[199] The omission of words of inheritance led the court of appeals to conclude that the reserved interest terminated with the death of the grantor. *Pan Am. Petroleum Corp. v. Cain*, 340 S.W.2d 93, 97 (Tex.Civ.App.-Amarillo 1960).

[200] "In our opinion the executive right terminates with the death of the original holder unless there is something to indicate that the parties intended that the power should survive and be exercised by others." 355 S.W.2d at 509.

[201] 786 S.W.2d at 669.

[202] For now, the executive right is a property interest standing alone; however, naked possession of the executive right without any other incident of ownership may prevent development of the mineral estate and leave the minerals worthless, a situation that the courts do not abide well. Courts in such a situation may be inclined to enact a rule of reverter as to the executive right or a rule terminating the executive right or even placing it in receivership if it is not exercised in a reasonably prudent manner or as a fiduciary or under some other standard. Stripping out the executive right is discussed more fully at Commentary Paragraph 11.b.

[203] "[I]t is elementary law, stated in every text book on the subject that a reservation or exception in favor of a stranger to a conveyance is * * * inoperative." *Joiner v. Sullivan*, 260 S.W.2d 439, 440 (Tex.Civ.App.- Texarkana, 1953, writ ref'd). See also *Jackson v. McKenney*, 602 S.W.2d 124, 126 (Tex.Civ.App.-Eastland 1980, writ ref'd n.r.e.).

[204] This is basically the language dealt with in *Joiner v. Sullivan, supra*: at 439 (holding that reservation in deed that "It is understood and agreed that all oil, gas and mineral rights in and to the within described tract of land is herein retained to grantors and their seven children, share and share alike, together with the right of ingress and egress" was ineffective to vest any title in children.).

an independent conveyance.[205] The rule that a recital will not establish title in a stranger to the conveyance applies to a spouse. For example, where a wife conveys separate property, reserving an interest in minerals to herself and her husband, the reservation vests no interest in the husband.[206] Of course, if the property is community property, the reservation may be for the life of the husband and wife grantors, and the survivor of them, with remainder to vest in the grantee.[207] The corollary to the rule that a reservation in a deed cannot be made in favor of a stranger is that a recital within a reservation will convey nothing to a stranger. Here is an example of a remainder reservation that will not work:

- Save and except, and there is reserved unto the Grantor for life an undivided one-third of the minerals in and under and that may be produced from the premises, with remainder to Grantor's brother, John Jones.[208]

All attorneys are familiar with the basic testamentary clause that leaves Blackacre to John Doe for life, with remainder to Richard Roe. The life estate and remainder are established by a granting clause in the will, and the same effect may be accomplished by a granting clause in a deed. But a deed requires words of grant[209] and a reservation of a life estate in a deed does not contain words of grant and is not be sufficient to vest a present, executory, or remainder interest in a remainderman. It cannot act as a conveyance. The solution is to deed the property by one deed reserving the mineral interest rather than a life estate in the mineral interest, and by separate instrument deed the reserved interest to the third party reserving a life estate in the Grantor.

9.c Reservations – Reservation in grantor using "save and except"

Many reservations quoted in the case law commence with the words "Save and except, and there is reserved…" and this language continues to be used in drafting today. While it is not favored by this writer, it is included as a nod to its traditional useage. However, the term "reserved" is the operative language of a reservation. The term "save and except" may also connote an exception that prevents breach of warranty and operation of the *Duhig* rule when it identifies prior severances in the chain of title, i.e. "Save and except, and this grant is subject to...." A reservation retains an interest in the grantor. A "subject to" exception does not retain anything in favor of the grantor. Thus, while the predicate "save and except" may introduce a reservation or an exception, it is the follow-on terms "reserved" or "subject to" which are the operative language and which distinguish the reservation from the exception. Because either follow-on term is, within itself, the operative wording, there is really no use for the words "Save and except." It is, in essence, surplusage, and it is not recommended.

9.d Reservations – Reservation in grantor using "except"

While courts do not favor reservations by implication,[210] the word "except" may constitute a reservation. The phrase "except an undivided 1/32 royalty" appears to be a "subject-to" exception applicable to prior severances, not a reservation in favor of the grantor. But if there are no outstanding royalty interests in the chain of title, it becomes a reservation. It is a reservation because *Pich v. Lankford*[211] says it is. The use of the term "except" applied to an identified interest will prevent that specific interest from passing to the grantee. The use of the term "except" when there is no prior severance in the chain of title converts the interest excepted to a reservation by the very action of not passing the interest to the grantee.[212] These forms do not recommend the use of the sole word "except" to create a reservation. The preferred form is set out at Forms Paragraph 9.a.

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[205] The corollary rule is that strangers to the deed have no right to set up its recitals as estoppel. *Woldert v. Skelly Oil Co.*, 202 S.W.2d 706 (Tex.Civ.App.-Texarkana 1947, writ ref'd n. r. e.).

[206] *Canter v. Lindsey*, 575 S.W.2d 331, 335 (Tex.Civ.App.-El Paso 1978, writ ref'd n.r.e.); *Woldert v. Skelly Oil Co.*, 202 S.W.2d 706, 709 (Tex.Civ.App.-Texarkana 1947, writ ref'd n.r.e.).

[207] *Deviney v. NationsBank*, 993 S.W.2d 443, 451 (Tex. App.-Waco 1999, pet. denied); *Reagan v Marathon Oil Company*, 50 S.W.3d 70 (Tex.App.-Waco 2001).

[208] See discussion of reservations of life tenancies and remainder interests at Commentary Paragraph 14.

[209] *Harris v. Strawbridge*, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).

[210] *Ladd v. Dubose*, 344 S.W.2d 476, 479 (Tex.Civ.App.-Amarillo 1961, no writ).

[211] 157 Tex. 335, 302 S.W.2d 645, 648 (Tex. 1957). *Contra Coyne v. Butler*, 396 S.W.2d 474 (Tex.Civ.App.-Corpus Christi 1965, no writ)(where the grantor "excepted" the interest in question from his grant, the court held that no new interest was created since no words of reservation were used in the instrument). See also *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923); *State National Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940).

[212] *Patrick v. Barrett*, 734 S.W.2d 646, 648 (Tex. 1987) explains *Pich v. Lankford* in these words: "The keystone of this opinion is a clear understanding of the distinctions between an exception and a reservation. It is manifest that an exception does not pass title itself; instead it operates to prevent the excepted interest from passing at all. *Pich v. Lankford*, 157 Tex. 335, 339-40, 302 S.W.2d 645, 648 (Tex. 1957). On the other hand, a reservation is made in favor of the grantor, wherein he reserves unto himself royalty interest, mineral rights and other rights. *Benge v. Scharbauer*, 152 Tex. 447, 451-52, 259 S.W.2d 166, 167-68 (Tex. 1953)."

9.e Reservations – Quantum of minerals reserved

The quantum of mineral interest reserved is expressed in these examples:

- the oil, gas and other minerals
- an undivided _/_ of the oil, gas and other minerals
- an undivided _/_ of Grantor's _/_ undivided interest in oil, gas and other minerals
- an undivided _/_ of Grantor's undivided interest in oil, gas and other minerals
- an undivided ___ net mineral acres of oil, gas and other minerals

  and

  in and under and that may be produced from the lands herein (conveyed)(described).

Note that the first option is the entire mineral estate while the next three options are fractions of the mineral estate. If the attorney cannot ascertain the mineral interest owned by the grantor, the fourth option should be used to avoid the *Duhig* rule, and the attorney should remember that a subject-to clause is also necessary to protect the reservation. The use of the term "mineral acres" is acceptable.[213] Finally, note that the choice between "lands herein (conveyed)(described)" is inherent in a mineral reservation, although the choice can be avoided by use of the phrase in and under and that may be produced from "Section 100, Block 1" or simply "the premises."

9.f. Reservations – Reservation of "oil" or "gas"

In the event the grantor is reserving constituent hydrocarbons rather than the broader "minerals," simply use the same fractions supplied in Forms Paragraph 9.e but replace the words "oil, gas and other minerals" with either "oil and casinghead gas" or "natural gas, including condensate and natural gas liquids associated with natural gas," in and under and that may be produced from the lands herein conveyed. If the attorney has a question whether to use the terminology lands herein "described" or "conveyed", he or she should consult § I.C, D, and F.

9.g Reservations – Restricting reservation to hydrocarbon minerals

In Commentary Paragraph 7.e the grant of "hydrocarbon" minerals was discussed in connection with protecting the surface estate from extraction of near surface minerals. It was said there that, although near surface minerals are now considered to be a part of the surface estate, there may be room for argument. As with grants that protect the grantor by limiting the minerals granted to oil, gas and other "hydrocarbon" minerals, a reservation in favor of a grantor with the same language protects the grantee from grantor's extraction of minerals by use of methods involving surface destruction. If this phrase is used, helium, nitrogen and carbon dioxide (which are not hydrocarbon minerals in science) should be made hydrocarbon minerals by contract. Natural gas is often accompanied by these inert substances in quantities great enough to have value.

10. <u>The Broad Form Ingress And Egress Clause</u>

The Commentary at Paragraph 7 dealing with conveyances of minerals states that a mineral deed conveys the greatest estate possible and the common practice of reciting appurtenant rights is unnecessary. The exception to this rule is the right of ingress and egress. This article recommends inclusion of a broad form ingress and egress clause within a deed that coveys or reserves surface or minerals of a land locked tract or more than one tract of land to assure future ingress and egress over the various tracts to reach inaccessible tracts when mineral development occurs.

<u>Hypothetical Case 6</u>: Assume that John Doe wishes to convey a ranch consisting of Sections 101, 102, 103, and 104 to Richard Roe, reserving the minerals. Section 103 is situated at the back of the ranch and cannot be reached by any road, so access must be from County Road 16 over Sections 102 or 104. The lands are bordered on three sides by other owners:

<table>
<tr><td rowspan="3">Johnson Ranch</td><td colspan="3">Travis County School Lands</td></tr>
<tr><td>101
Unleased</td><td>103
Leased to Deep Reef Drilling Co.</td><td rowspan="2">Smith Tract</td></tr>
<tr><td>102
Unleased</td><td>104
Unleased</td></tr>
</table>

----County Road 16----------

The clause setting out the right to ingress and egress is omitted from the instrument because the attorney drawing the deed assumes that the reserved minerals will include the appurtenant rights. The minerals in Section 103 are subsequently leased to Deep Reef Drilling Company, which contacts a subsequent grantee (who owns no minerals) to discuss entry and surface damages and the like. Deep Reef's foreman is told not to cross any part of the ranch to reach Section 103. Under what theory would Deep Reef Drilling Company have the right of ingress and egress across the surface of lands in which it owns no interest to reach lands that it does?

There is no easy answer to this question. The ready response is an easement of necessity. Texas law

[213] *Pan American Petroleum Corporation v. Texas Pacific Coal and Oil Company*, 340 S.W.2d 548, 557 (Tex.Civ.App.-El Paso 1960).

establishes that when a grantor conveys part of a tract of a tract of land while retaining the remaining acreage, an implied reservation of a right of way by necessity over the land conveyed exists if there is no other access to the land.[214] Our grantor conveyed the surface and reserved the minerals. Would this fit the easement of necessity requirements? Three elements must exist to establish an implied easement by necessity: (1) unity of ownership prior to separation; (2) access must be a necessity and not a mere convenience; and (3) the necessity must exist at the time of the severance of the two estates. A covenant of warranty is not required.[215] The first two elements---unity of ownership in the dominant and servient estates, and necessity---appear to be present, but it could be argued that the third element---that the necessity must exist at the time of the severance of the two estates---did not exist at the time the surface was severed from the minerals because no oil and gas leases were then in effect. The rebuttal is that upon severance of the surface estate from the mineral estate, necessity is instantly created for all time due the dominant nature of the mineral estate; i.e., the necessity was created with the severance by virtue of Texas law that the mineral estate is the dominant estate and requires so much of the surface as is necessary for reasonable development and that the right of ingress and egress applies not just to the tract leased, but to the surrounding tracts originally conveyed. There are two cases that deal with present necessity but they do not deal with severance of the mineral estate from the surface estate.[216] Deep Reef Drilling Company is now forced to address difficult issues of first impression simply because the author of the deed did not affirmatively set out the right of ingress and egress *across all the lands subject to the deed* at the time the conveyance was made. Had the scrivener done so, *Rushin v. Humphrey*,[217] would have been a strong case in point favoring Deep Reef. This hypothet underlies the language of Forms Paragraph 10's ingress-egress clause for use in multiple tract conveyances which specifically ties ingress and egress "*...across and to any or all of the lands herein described.…*"

The second scenario that requires an ingress and egress clause involves but one tract of land conveyed or reserved, but which is landlocked. Again, the comments above apply. The deed should contain an express agreement or grant of an easement across adjacent lands to reach the landlocked tract being conveyed, and the lands subject to the easement should be described in a manner that satisfies the state of frauds:

> "It is expressly agreed that Grantee shall have a perpetual non-exclusive easement and right of way over and across Sections 101 and 103, both in Block 1, AB&C Survey, Bravo County, Texas, in order to exercise the right of ingress and egress to the lands herein conveyed.
>
> **or**
>
> "There is reserved unto Grantor, and Grantor's heirs or assigns, a perpetual non-exclusive easement and right of way over and across the lands herein conveyed in order to exercise the right of ingress and egress to Section 100, Block 1, AB&C Survey, Bravo County, Texas,

11. Reservations and Express Agreements

At this point in the forms it is appropriate to address reservations and express agreements that alter or reapportion rights appurtenant to minerals. Recall that rights appurtenant to minerals are those identified in *Schlittler*[218] and *Altman*[219] as (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments. These rights may be altered, relinquished or reserved, or reapportioned, by express agreement. Likewise, surface protections may be added to a deed by express agreement. When appurtenant rights are altered or reapportioned, the greatest estate rule and the apportionment rule no longer apply; instead, the express agreement controls. The rule that a grant will carry with it the greatest estate possible, and the corollary presumption that a reservation preserves all rights appurtenant to the minerals reserved, are aided by the presumption that the appurtenant rights are proportional to the estate granted or reserved.[220] In other words, bonus, rentals and royalty are automatically apportioned to the minerals conveyed or reserved, but reservations and express agreements can be used to alter the greatest estate rule or to reapportion appurtenant rights.[221]

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[214] *Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984).

[215] *Id.*

[216] *Heard v. Roos*, 885 S.W.2d 592 (Tex.App.-Corpus Christi 1994, no writ); *Machala v. Weems*, 56 S.W.3d 748 (Tex.App.-Texarkana 2001).

[217] 778 S.W.2d 95 (Tex.App.-Houston (1st Dist.) 1989, writ den'd).

[218] *Schlittler v. Smith*, 128 Tex. 628, 630-31, 101 S.W.2d 543, 544 (1937).

[219] *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986).

[220] *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (Tex. 1953).

[221] "As a general rule, there is a presumption that royalty interests should be proportionate to the mineral estate received. *Benge v. Scharbauer* 152 Tex. at 451-53, 259 S.W.2d at 168-69. However, all that is necessary to overcome this presumption of proportionate shares is that the parties plainly express an intention to convey different shares. *Benge* at 452-53, 259 S.W.2d at 169. Patrick satisfied this requirement by specifically excepting from the grant to the Barretts a 1/16th royalty interest which was identified as previously being reserved by the Tuers. Therefore, we hold that Patrick has overcome the presumption that royalty

One way in which appurtenant rights were originally altered was called the "two-grant" theory. Unless early scriveners appended to the subject-to clause a statement of the grantor's intention that the grantee would share in existing lease benefits such as rentals and royalty, the courts refused to recognize the implied apportionment and penalized the grantor for failure to include express language apportioning rights appurtenant.[222] Scriveners then began to use a granting clause and a follow up clause which attempted to state what bonus, royalty and rentals would accompany the grant under both existing and future leases.[223] From these attempts to conform conveyance language to bad law came not just "two-grant" constructions dealing with apportionment of existing rights, but interpretations made necessary by "future lease" clauses which incorporated the assumption that the "usual" or "standard" one-eighth royalty would endure for all time.[224] Along the way, express agreement clauses became recognized. These clauses also attempted to explain the grant or state the intention of the grantor. This type of language led to much litigation in which both established and newly created canons of construction were employed to bring about a resolution of the conflicts within a deed. A reading of this commentary makes it obvious that one common theme is a granting clause followed by clauses describing or explaining the grant or a reservation or attempting to predict future royalty or bonus or stating the intention of the grantor, with the end result being a conflict between the clauses.[225]

One of the rules of construction that the courts adopted to deal with such problems was the "express agreement." The courts found that a clause which might appear to conflict with another clause did not, in fact, present a conflict; instead, it was an express agreement that modified the prior clause.[226]

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interests should equal mineral shares." *Patrick v. Barrett*, 734 S.W.2d 646, 648 (Tex. 1987).

[222] See *Caruthers v. Leonard*, 254 S.W. 779 (Tex.Com.App. 1923) and *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm'n App.1925, holding approved).

[223] See, for example, *Pan American Petroleum Corporation v. Texas Pacific Coal and Oil Company*, *supra*, which presents an interesting case of a present mineral grant coupled with a royalty grant under existing leases, and a grant of an unspecified royalty under future leases. The court used the first half of the two-grant theory to find the grantee's present royalty, and then calculated future royalty "in the unleased lands amounting to 1/32nd of 1/8th, or 1/256th, of all the oil and gas that might be produced under subsequent leases...." Fortunately, the court prefaced its calculation with the statement that it "assumed" that the future royalty would be 1/8 rather than simply holding that 1/256 would be the future royalty.

[224] An example of the trap set for the unwary grantee is found in *Neel v. Killam Oil Co., Ltd.*, 88 S.W.3d 334 (San Antonio--2002). A royalty owner under a two-grant deed which vested him with a 1/16 royalty under an existing lease and a 1/16 royalty under future leases deeded a "one-half interest" in royalty to his grantee. The grantee was held to own only a 1/16 royalty under a lease that provided a 1/4 royalty.

[225] See *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904 (Tex. 1957) (Granting clause conveyed 1/64 interest in minerals, subsequent clauses provided 1/8 of all rental or royalty due, and 1/8 of future rentals and other mineral privileges); *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex.Civ.App.-Texarkana 1937, writ ref'd)(Granting clause used 1/16 interest in the minerals, subsequent clauses used 1/2 interest in benefits under the existing lease, a 1/2 interest in the possibility of reverter and executive right, and a 1/2 interest in all benefits under future leases), *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991) (Granting and warranty clauses of royalty deed designating a 1/32 royalty brought into conflict with existing lease clause and subsequent leases clause using term "one fourth", when the existing one eighth royalty lease terminated and a new one sixth royalty lease was made); and *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1991) (Granting clause of 1/16 interest in minerals conflicted with paragraph in the deed dealing with an existing lease and stating that the parties intended that the grantee "receive 1/16 part of the oil, gas or other mineral" produced under the lease then in effect and that the grantors intended to convey "one-half of the interest they now have in such production under said lease); *Concord Oil Company v. Pennzoil Exploration and Production Company*, 966 S.W.2d 451 (Tex. 1998) (Granting clause of mineral deed described interest conveyed as a 1/96 interest in minerals, but subsequent clause used 1/12 of all rentals and royalty of every kind and character, holding that deed constituted a grant of a 1/12 interest in any rights or benefits under the lease in existence at the time of the grant and the possibility of reverter of a 1/12 interest in the mineral estate). The Texas Supreme Court in *Concord Oil* began its opinion with the remark that "This case presents an issue with which this Court, other courts, and practitioners have struggled for many years: What interest has been conveyed in an oil and gas property when two differing fractions appear within the conveying instrument?" *Luckel* became a landmark case because the Texas Supreme Court held that the primary objective in construing mineral and other grants is to determine the intent of the parties from all the language in the instrument, 819 S.W.2d at 461, and recognized that the intent of the parties must be determined from what they expressed in the instrument, read as a whole, rather than "subjective intent." *Id.* at 462. The Court rejected reliance on labels given to clauses such as "granting," "warranty," "habendum," and "future lease." and expressly overruled its decision in *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984), "which had elevated the granting clause over another provision in the conveying instrument and had given it controlling weight." *Luckel*, 819 S.W.2d at 464. The Court stated that, with the exception of *Alford*, its decisions contain a unifying principle that the entire document must be examined to glean the parties' intent and apparent inconsistencies in the conveying instrument must be harmonized, if possible, looking at the document as a whole. ." *Luckel*, 819 S.W.2d at 462.

[226] *Benge v. Scharbauer* 152 Tex. at 451-53, 259 S.W.2d at 168, 169 (1953)("As a general rule, there is a presumption that royalty interests should be proportionate to the mineral

The modern "express agreement" clause is not a vehicle to restate the results of a grant or reservation, nor should it be used to state the intention of the grantor or predict royalty under future leases or otherwise explain or clarify language used in a preceding paragraph. If the paragraphs are correctly worded, there is no need for a subsequent explanation, prediction of royalty outcome from leasing, nor statement of intent; rather, the express agreement may be engrafted into the deed to *alter* results, not *confirm* them. For example, a statement that grantee shall receive a like share of the bonus, rentals and royalties" accompanying the grant of minerals is duplicative and unnecessary. Likewise, the statement that "It is understood and agreed that Grantee shall have use of so much of the surface as is reasonably necessary to develop the minerals herein conveyed," is unnecessary because that is the law anyway, and this language may even constitute a limitation upon the mineral estate being conveyed. On the other hand, this express agreement might be appropriate in a deed:

> "It is expressly understood and agreed that rights of ingress and egress to develop the mineral estate shall not include the right to enter the premises from any direction that requires crossing Bravo Creek."

The usage of the "express agreement" is that it may state in plain language an additional facet of the transaction that would be awkward to shoehorn into a paragraph constructed of traditional language or a paragraph pertaining to a different subject matter. The express agreement should stand alone, as a separate sentence or paragraph.

Some express agreement clauses begin with the statement "It is expressly understood and agreed..." This is acceptable form. A deed is a contract.[227] The agreement may take the form of an express agreement rather than a reservation, an exception, a limitation upon the estate granted, or other feature of the conveyancing or reserving language.

11.a Reservations and Express Agreements - The executive right

It is recommended that the attorney drafting a deed granting or reserving minerals keep the executive bundled with the other rights appurtenant to minerals. Severance of the executive right for a term may be a solution to certain problems, but putting the executive right in a third party permanently will create complex and unforeseen problems for both the executive and the non-executive.

The executive right is the second appurtenant mineral right mentioned in *Altman*.[228] The case law says it can be treated narrowly or broadly,[229] and the definition of the executive right at Forms Paragraph 11.a (5) provides optional language that expands the right into not just leasing but development. This form acknowledges case law that the executive right is a property interest which entails the right to make a lease which, in turn, implies a grant of the right to develop with the correlative right of ingress and egress.[230]

One of the principal reasons given in support of the severance of the executive right is the preservation of the surface estate. A mineral grantor is said to be able to protect his or her surface by reserving the leasing right. But the executive must not retain any benefit not shared by the non-executive and placing restrictions on surface use and exacting surface damages may be argued to be a breach of the executive's fiduciary duty. Further, this objective can be achieved by other means, principally being the retention of a part of the minerals so that leasing is not possible except by all interest owners, and express covenants in the deed pertaining to surface use.

A narrowly defined executive right which does not mention the development right may create a conflict with a non-executive who, though she cannot make a lease herself, wishes to develop the minerals. There is no case law that holds that the non-executive is or should be precluded from development of the mineral estate. For example, the non-executive who owns an undivided 1/2 of the unleased minerals in the 640 acre tract comprising Section 100 might enter into a joint operating agreement with the lessee of the other 1/2 of the minerals to drill a well as a mineral co-tenant. Under this scenario, where does the previously severed executive right fit? In dictum, the Texas Supreme Court

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estate received. However, all that is necessary to overcome this presumption of proportionate shares is that the parties plainly express an intention to convey different shares."). See also *Elick v. Champlin Petroleum Company*, 697 S.W.2d 1 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.) (Grantor reserved an undivided 1/32 royalty interest, and the language of an "express agreement" gave grantor one half of the bonus and rentals and the right to join in the execution of any future oil, gas or mineral lease).

[227] *Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982).

[228] *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). See generally Paragraph I.B *supra*.

[229] *Union Pacific Resources Company v. Hutchison*, 990 S.W.2d 368, 371 (Tex.App.-Austin 1999, writ den'd). "Narrowly considered, an 'executive right' is simply another name for an exclusive power to execute an oil and gas lease, from which the lessor will not derive all the usual lease benefits, namely bonus, rental, and royalty. If the lessor retains only a royalty, an interest subject to the power to lease is called a non-participating royalty, indicating that the royalty owner does not share in bonus or rental, nor in the right to execute leases or to explore or develop. In a broad sense, 'executive right' may also refer to any managerial power over the lease or the mineral estate, including power over exploration and development. See 8 MARTIN AND KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW, "Exclusive leasing power," "Executive right," "Non executive mineral interest," "Nonparticipating royalty." (1998).

[230] *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, at 798 (Tex. 1995) (Footnote 1).

has said that the executive right includes the right to develop.[231] However, the right of development is articulated in *Altman* as a separate right, not a right subordinate to the executive right. There is no case law that holds that the executive right is an exclusive right,[232] although for orderly leasing and certainty of title to occur it should be. On the other hand, the non-executive is a mineral co-tenant and the body of case law gives a mineral co-tenant the right to self-develop. A cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants.[233] But "this rule is founded on the distinctive legal relationship existing between cotenants: each cotenant has a right to enter upon the common estate and a corollary right to possession." [234] If the executive right carries with it the right of ingress and egress in order to develop the minerals (as it must for it to have any value to a lessee) then the executive right must exclude the co-tenancy right of development. On the other hand, there may arise an urgent need to develop which may not be answered by an executive with no other interest in the minerals than the leasing rights. The basis of the co-tenancy rule was stated in *Burnham* to be this:

> "It seems to us that the peculiar circumstances of a cotenancy in land upon which oil is discovered warrant one cotenant to proceed and utilize the oil, without the necessity of the other cotenants concurring. Oil is a fugitive substance and may be drained from the land by a well on adjoining property. It must be promptly taken from the land for it to be secured to the owners. If a cotenant owning a small interest in the land had to give his consent before the others could move towards securing the oil, he could arbitrarily destroy the valuable quality of the land."

This reasoning certainly applies to an executive right owner. The non-executive is a cotenant. As a practical matter, development entails the expenditure of funds to drill, test, complete, and equip a well. The executive without a coupled interest in the minerals has no right to develop the minerals and receive net income and therefore no incentive to undertake such a project, either alone or pursuant to an operating agreement with a cotenant lessee. The non-executive, on the other hand, by having at least an equal right to develop, and having entered into an operating agreement, and having filed a form W-1, and proceeding under the authority of the Texas Railroad Commission, should be entitled to participate in the drilling of a well that will produce the same benefits that a lease executed by his or her executive owner would bring; at least, in the absence of the exercise of the executive right by its owner.

The dilemma created by the severance of the executive right not coupled with an interest in the minerals is compounded if the well jointly drilled by a lessee and the non-executive co-tenant is completed in the 640-acre Section 100 in a field governed by 80-acre proration units, with optional 40-acre spacing. In that scenario, who has the power to lease and develop the remaining acreage outside of developed proration units?

There is yet another aspect of the executive right that makes severance highly undesirable, and buttresses the right of development in the non-executive---the inevitability of succession. When the owner of the fee simple executive right dies, the right is likely to become vested in heirs, possibly several heirs. Must they all join in a lease, or can a lease by one executive right owner vest 100% of the acreage in the lessee? If several persons own the executive in undivided ownership, the uncertainty of its use and the lack of incentive for its use is compounded. The group has nothing to gain from exercise of the executive right and may not be convinced to exercise it at all. Some of the group may disappear during successions over time. Failure to exercise the executive right is certainly one way of avoiding liability to third parties.[235] The rights appurtenant to minerals are apportioned in accordance with the quantum of minerals granted or reserved but the executive right has never been expressly held to be apportionable. Since it is a right to lease and not a right to receive a share of any benefit, it should not be held to be apportionable. The better rule might be that any executive may exercise the right as to the minerals subject to it, without joinder of all executives. Of course, this does not resolve a situation where two executives of the same minerals are determined to make different leases. The ultimate result of such situations might be a receivership.

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[231] *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, at 798 (Tex. 1995) (Footnote 1: "The court of appeals held that the deed was silent as to the conveyance of the right to develop and therefore, that right was impliedly transferred to the grantee. This conclusion is incorrect for two reasons. First, the right to develop is a correlative right and passes with the executive rights." *Citing Day & Co. v. Texland Petroleum*, 786 S.W.2d 667, 669 n. 1 (Tex. 1990).

[232] In *Cain* the deed reservation itself characterized the executive right as exclusive to the reserving grantor. *Pan American Petroleum Corporation v. Cain*, 340 S.W.2d 93, 97 (Tex.Civ.App.-Amarillo 1960).

[233] *Byron v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986); *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965); *Burnham v. Hardy Oil Co.*, 147 S.W.330, 335 (Tex.Civ.App.-San Antonio 1912), aff'd on other Grounds, 195 S.W. 1139 (Tex. 1917).

[234] *Byron v. Pendley, supra; Burnham v. Hardy Oil Co., supra.*

[235] *In re Bass*, 113 S.W.3d 735, 745 (Tex. 2002)("What differentiates this case from Manges, however, is that no evidence of self-dealing exists here. Bass has not leased his land to himself or anyone else. Bass has yet to exercise his rights as the executive. Because Bass has not acquired any benefits for himself, through executing a lease, no duty has been breached.")

Finally, there is always the possibility that an executive owner without an interest may try to mulct the non-executives, or gain some advantage from a lessee, and the executive owner with royalty, bonus or rental rights may seek an advantage by subordinating the non-executives rights to some interest the executive is seeking to promote in the leasing transaction.[236] Human nature being what it is, there are a variety of temptations to the owner of the executive right and the attorney should consider these issues before permanently severing the executive right from the other appurtenant rights.[237] Of course, there is also a high degree of protection for the non-executive. The holder of the executive right owes a fiduciary duty to the non-executive in the exercise of the right.[238] The duty of utmost good faith requires the executive right holder to execute the same type of oil and gas lease on the same terms as he would have done in the absence of an outstanding, nonparticipating interest in a third party,[239] and if a lease is made to a relative or insider, both the owner of the executive right and the lessee can be held liable.[240]

These are complex issues that are presented in support of this article's recommendation to avoid permanently severing the executive right. In fact, it is recommended that a person who receives a permanent executive right not coupled with any interest in minerals reattach the executive right to the minerals from whence it came by a conveyance of the executive right back to the mineral owner. On the other hand, if severance must be done, these questions can be largely answered by the use of the suggested forms.

11.a (1) – Reservations and Express Agreements - Grantee to own executive right in minerals reserved by grantor in transaction supported by consideration

This form presents a transaction supported by consideration in which the grantor reserves minerals but allows the grantee to have the executive right in the minerals reserved. The suggested paragraphs may also be adapted for use with Forms ¶¶ a (2) – (4).

11.a (2) – Reservations and Express Agreements - Grantee to own executive right in minerals reserved by grantor in gift transaction

This form is necessary within a gift transaction if the grantor reserves minerals but gives the executive right in the minerals reserved to the grantee. A gift is a voluntary transfer of property by one party to another without consideration.[241] A deed is a contract[242] and requires consideration to support it. Express agreement clauses should not be used in gift deeds because gifts involve no consideration for the grant. Express agreements within a gift deed can be argued to require consideration; therefore, the transfer of the executive right in reserved minerals in a gift deed must be made by separate gift and not by express agreement.

11.a (3) Reservations and Express Agreements - Grantor to reserve executive right in minerals conveyed to Grantee

This form offers both a fee and a term severance of the executive right in favor of a grantor. The admonition against using the form for permanent severance of the executive right is worth repeating. On the other hand, there may be good reasons to temporarily sever the executive right. Perhaps a parent would do this in order to control leasing rights for a child for a period of time. Forms Paragraph 11.a (3) addresses the issue of who should have executive rights and for how long. It is suggested that a parent, a trust department or a committee might be an appropriate holder of the executive right, for a fixed period of time. If the grantor gives minerals to a minor, Forms Paragraph 11.a (3) may be used to avoid the necessity of a guardianship or an ad litem in leasing transactions. The grantor should, however, look to the possibility that he or she might die during the fixed period of the executive term and a provision should be made for succession of the executive right. While the grantor may reserve the executive right by express agreement, the suggested forms in this article use a reservation clause. If for some reason the attorney wishes to use an express agreement instead, this form will suffice:

It is expressly agreed that Grantor, and Grantor's

[236] It is generally held, at least as to non-participating royalty, that the owner of the executive right may not negotiate for and obtain an advantage that is not shared with the non-executives in proportion to their titular interests. *Griffith v. Taylor*, 156 Tex. 1, 291 S.W.2d 673 (1956); *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341 (1957); *Delta Drilling Company v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960); *Lane v. Elkins*, 441 S.W.2d 871, 874 (Tex.Civ.App.-Eastland 1969, writ ref'd n. r. e.).

[237] See generally "Problems Presented by the Separation of the Exclusive Leasing Power from the Ownership of Land, Minerals, or Royalty," 2 SW Legal Fdn Oil and Gas Inst. 271 (1951).

[238] *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543, 545 (1937); *Luecke v. Wallace*, 951 S.W.2d 267, 274 (Tex.App.-Austin 1997, no writ); *see also* Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L.REV. 371, 372 (1985); 1 ERNEST E. SMITH & JACQUELINE LONG WEAVER, TEXAS LAW OF OIL AND GAS § 2.6(F), at 70-71 (1997).

[239] *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

[240] *Mims v. Beall*, 810 S.W.2d 876, 881, (Tex.App.-Texarkana 1991); *Kimsey v. Fore*, 593 S.W.2d 107 (Tex.Civ.App.-Beaumont 1979, writ ref'd n.r.e).

[241] *Woodworth v. Cortez*, 660 S.W.2d 561 (Tex.Civ.App.-San Antonio 1983, writ ref'd n.r.e.).

[242] *Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982).

heirs or assigns, shall own and exercise the executive right in the minerals herein conveyed to Grantee,

and

(for a term of ____ years)(until the (18th)(25th) birthday of the Grantee), whereupon the executive right shall vest in Grantee and Grantee's heirs or assigns,

and

provided, should the Grantor die prior to the end of this term, the executive right shall vest in the Grantee, and Grantee's heirs or assigns, to be exercised during the Grantee's minority as provided by law.

11.a (4) – Reservations and Express Agreements - Grant of executive right in minerals to third party

This form creates a severance of the executive right in favor of a grantor with a subsequent granting of that right to a third party. It uses two grants because a deed may not contain a reservation in favor of a stranger to the transaction.[243] The form does not suggest what would seem to be a critical element of the transaction---consideration to the grantee receiving the executive right and protections afforded the grantee in exercising the right. Given the inconvenience of owning the executive right and the fiduciary responsibility involved in its exercise, most financial institutions will require both an indemnity agreement and a fee arrangement. The suggested form mentions an agency agreement which would be the vehicle to set out the responsibilities of the executive owner. The forms also provide a power of attorney which may be a separate document or which may be incorporated within the deed itself. A power of attorney contained in a deed constitutes a power coupled with an interest which may not be revoked at the will of either party.[244] This arrangement will also prevent partition of the mineral estate.[245]

11.a (5) Reservations and Express Agreements - Executive right defined

This form offers both a narrow definition of the executive right and a definition more broadly drawn to include the right of development and ingress and egress.[246] It is suggested that the broad form be used to avoid some of the problems associated with severance of the executive right, discussed at Commentary Paragraph 11.a above.

11.a (6) Reservations and Express Agreements – Ratification by non-executive

It was pointed out above that an executive owner with royalty, bonus or rental rights may seek an advantage by subordinating the non-executives rights to some interest the executive is seeking to promote in the leasing transaction. Leasing involves bonus, royalty, term, and the form of the lease. Everything is negotiable. Some lessors negotiate for an escalating royalty that starts at 3/16 and escalates to 1/4. Some will attempt to limit the term of the lease. If a surface owner is fortunate enough to own a share of the minerals, he or she will certainly want to incorporate tough terms to protect the surface. Each undivided owner of the executive right will negotiate for himself. But consider, for example, the unbundling of bonus created by the express agreements set out in Forms Paragraph 11.b. Bonus is the up-front money paid to acquire the lease. Bonus ranges from $50 to $500 an acre depending on the desirability of the acreage, the royalty reserved in the lease, and other lease terms. To understand the bonus-royalty dichotomy, picture a set of scales. As dollars are added to the bonus side, royalty is reduced in the other dish, and vice versa. Then add the lease term to the equation. The longer the lease term, the higher the bonus generally. If there is as standard in the neighborhood, it might be $150+3/16+3 years. But negotiations may reduce the bonus in favor of a shorter term or a higher royalty. Negotiations might result in a combination of $75+1/5+3 years. Where bonus has been severed to another, the owner of the executive right may sacrifice bonus for higher royalty, a shorter lease term, or surface covenants. For example, is an owner of the surface and the executive right in the undivided minerals liable to the non-executive for placing surface protections in the lease at the expense of royalty? Another example is rental. Many oil and gas lease contain the provision that "[T]his lease is paid-up and rentals shall not be required.[247] If the right to rental is severed, does the executive owner have the duty to negotiate for some rental, and if so, how much? The potential for abuse (or claimed abuse) of the executive right when it is either (1) not connected with an interest in the land, or (2) is connected to some but not all of the appurtenant rights, is great. The attorney should be aware of and advise the client that one of the

[243] See Commentary Paragraph 9.b, *supra*.

[244] *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 230 S.W.2d 346, 352 (Tex.Civ.App.-Eastland 1950), aff'd, 240 S.W.2d 281 (Tex. 1951); *Odstrcil v. McGlaun*, 230 S.W.2d 353, 354 (Tex.Civ.App.-Eastland 1950, no writ).

[245] *Odstrcil v. McGlaun*, 230 S.W.2d 353, at 354-55 (Tex.Civ.App.-Eastland 1950, no writ).

[246] See 8 MARTIN AND KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW, "Exclusive leasing power," "Executive right," "Non executive mineral interest," "Nonparticipating royalty." (1998).

[247] And to this exemption it would be wise to add "provided, the failure to require rentals shall not be construed to excuse any drilling or development covenants that are contained herein and shall not excuse the breach of an express or implied covenant to reasonably develop or protect the leasehold estate against field wide or cross-boundary drainage or other harm to the mineral estate or leasehold estate herein granted."

consequences of unbundling appurtenant rights is that the holder of the executive right will be held to the same standard of utmost good faith mandated in *Manges v. Guerra*,[248] where the Texas Supreme Court dealt with a nonparticipating royalty and specifically equated that standard with a fiduciary obligation. On the other hand, there exists the possibility that the executive will simply fail or refuse to lease because the terms (offered equally to the executive and non-executive) are not deemed by the executive to be satisfactory. This is not a breach of fiduciary duty[249] but it can be very frustrating to the non-executive. These are difficult questions, but there is one final answer that avoids litigation when the deal is done. It is a ratification. The definition of the executive right supplied at optional Forms Paragraph 11.a (5) states the obvious, that the right is exercisable "without the joinder or ratification of the Grantee." However, that clause will not insulate the owner of the executive right from potential liability. The ratification will.

Ratification of Oil and Gas Lease

The undersigned hereby ratifies the above and foregoing oil and gas lease.

or

The undersigned, being knowledgeable of the contents of the foregoing oil and gas lease, and the bonus consideration paid for it, hereby ratifies such lease.

or

The undersigned, being a non-executive owner of bonus/rentals and being knowledgeable of the contents of the foregoing oil and gas lease and the bonus consideration paid for it, hereby ratifies such lease.

_____

non-executive
notary

This ratification may be appended to the oil and gas lease, or it may be a separate document that refers to the lease. The final question becomes, what happens if the non-executive refuses to ratify, or seeks a consideration for ratification? There is no single answer, but the question highlights the problems created by severing the executive right and serves to remind the owner of mineral rights that the executive right may best be left bundled.

11.b Reservations and express agreements – bonus or rentals

It was noted above that a grant carries with it the greatest estate possible and a reservation preserves all rights appurtenant to the minerals reserved, both in proportion to the estate granted or reserved. In other words, bonus, rentals and royalty are automatically apportioned to the minerals conveyed or reserved and attempts to describe them or their quantum sometimes leads to needless confusion in the instrument.[250] The rule stated in *Duhig* is equally applicable to reservations as it is to grants,[251] but does not apply to express agreements. Thus, while a breach of the warranty in a deed may be caused by a prior severed interest coupled with the omission of the subject-to clause, the grantor may be saved, albeit inadvertently, from the consequences by an express agreement. For example, in *Benge v. Scharbauer*,[252] grantors who owned only 3/4 of the minerals purported to convey 100% of the minerals, specifically reserving to themselves 3/8 of the minerals. Under the *Duhig* rule grantors lost 2/8 of what they attempted to reserve and were left with 1/8 of the minerals. The deed vested the executive right in the grantee with the right to make leases without the joinder of grantors, but provided that "…said leases shall provide for the payment of three-eighths (3/8ths) of all the bonuses, rentals and royalties to the grantors."[253] The Petitioners sought a ruling that the grantor was entitled to only 1/8 of these rights. In rejecting the Petitioners' arguments, the Supreme Court held that this language was an express agreement that varied the automatic apportionment of appurtenant rights and removed bonus, rentals and royalty, from operation of the rule expressed in *Duhig*.[254] The court reasoned that *Duhig* did not unalterably fix the fractional part of bonuses, rentals and royalties to equal the fractional mineral interest owned if the parties agreed otherwise. The court said "It is well settled that the owners of land may reserve to themselves minerals or mineral rights, including the oil or any right or ownership therein [authorities omitted] and that a grantor may reserve unto himself mineral rights, and he may also reserve royalties, bonuses and rentals-either one, more or all. [authorities omitted]. An instrument may convey two separate estates in the minerals, one of which may be a full mineral interest and the other a royalty, or other

[248] 673 S.W.2d 180 (Tex. 1984).

[249] *Hlavinka v. Hancock*, 116 S.W.3d 412 (Tex.App.—Corpus Christi 2003).

[250] "As a general rule, there is a presumption that royalty interests should be proportionate to the mineral estate received." *Benge v. Scharbauer* 152 Tex. at 451-53, 259 S.W.2d at 168-69. However, all that is necessary to overcome this presumption of proportionate shares is that the parties plainly express an intention to convey different shares. *Benge* at 452-53, 259 S.W.2d at 169.

[251] For a full discussion of the *Duhig* Rule see Commentary Paragraph 7.b, *supra*.

[252] 152 Tex. 447, 259 S.W.2d 166, 168 (1953).

[253] 259 S.W.2d at 167.

[254] *Id* at 168.

interest in the minerals."[255] Thus, the grantor was left with a 1/8 interest in the minerals, but received 3/8 of bonus, rent and royalty.[256] This case demonstrates that an express agreement may be used to vary the apportionment of royalty, bonus or rentals.

11.b (1) Reservations and express agreements – express agreement pertaining to disproportionate division of bonus/rentals in transaction based on consideration

This form is for use in a transaction in which consideration supports the deed. It recites the fact that apportionment of the appurtenant rights (bonus/rentals) will be altered by agreement and proceeds to reapportion the rights. While it refers to future leases, it may be adapted to present leases subject to the caveat that such an adaptation may constitute a revivor of the lease.[257]

11.b (2) Reservations and express agreements – Gift of bonus/rentals in minerals reserved to grantor in gift transaction

This form is for use in a gift transaction involving a reservation of minerals to the donor. It is used in lieu of an express agreement because no consideration is involved in a gift. It allows the reserving owner to give all or any part of the bonus or rental rights appurtenant to the reserved minerals to the donee.

The same consideration that supports a deed granting the executive right or a right in bonus and rentals will support an express agreement; however, because gifts involve no consideration for the grant, it may be argued that an express agreement in a deed of gift is void or voidable for failure of consideration.[258] Therefore, an express agreement clause is not recommended for deeds of gift; rather, the gift deed should address the additional subject matter by affirmative grant. The following example is provided:

Hypothetical Case 6: Assume that John Doe wishes to give the surface of Section 100 to his niece, Sally Doe, reserving the minerals, but he also wishes to give 1/4 of his bonus and rental rights to all of his nieces and nephews. He cannot reserve bonus and royalty rights to the other nieces and nephews who are strangers to the transaction, and an express agreement that the other nieces and nephews will have bonus and rental rights may be infirm for want of consideration. Thus, John Doe cannot use an express agreement in the gift context. He must use the two-grant theory rather than an express agreement:

> That I, John Doe, not joined herein by my wife for the reason that I am dealing with my separate property, for and in consideration of the love and affection held by Grantor for Grantees, HAVE GRANTED, GIVEN and CONVEYED and by these presents do GRANT, GIVE and CONVEY unto Sally Doe, Grantee, whose address is ____, Section 100, Block 1, AB&C Survey, Bravo County, Texas.
>
> There is reserved unto Grantor, and Grantor's heirs or assigns, the oil, gas and other minerals in and under the land herein described.
>
> I John Doe, for the same consideration, HAVE GRANTED, GIVEN and CONVEYED and by these presents do GRANT, GIVE and CONVEY unto my nieces and nephews, Sally Doe, Molly Doe, James Doe, and Rolly Doe, to each an undivided 1/16 of all bonuses and delay rentals payable under any future lease covering lands herein described.[259]

11.b (3) Reservations and express agreements – reservation of bonus/rentals

This is a simple reservation of bonus/rental rights that may be used in any deed. Like the express agreement at 11.b it may be adapted to present leases subject to the caveat that such an adaptation may constitute a revivor of the lease.[260]

11.b (4) Reservations and express agreements – reservation of executive right, bonus and rentals

When using reservations or express agreements to alter or reapportion appurtenant rights, the act of stripping out all appurtenants rights except royalty will

[255] *Id* at 169. It would have been better if the supreme court had not used the term "reserve" in this statement. The court went to great lengths to characterize the clause reserving bonus, rentals and royalty to the grantee as an express agreement--a contract rather than a reservation--because the court in *Benge* and in later cases does make that distinction.

[256] The scrivener of the deed in *Benge* may be criticized because the parties knew that there was outstanding a 1/4 mineral interest and no "subject to" clause or other exception was made in the deed. It is doubtful that the scrivener knew what he or she was doing by taking that extra step that is so common in contested documents of that era and including an explanatory statement that "...said leases shall provide for the payment of three-eighths (3/8ths) of all the bonuses, rentals and royalties to the grantors." The construction placed on the deed by the supreme court did not and could not reach the intent of the parties because the subject-to clause was omitted and there was no explanation why the fraction 3/8 was stated. So, the court did the best it could with the deed and the canons of construction it had available and the grantor simply "lucked out" through sloppy drafting. See and compare *Patrick v. Barrett*, 734 S.W.2d 646 (Tex. 1987).

[257] See Commentary Paragraph 13.c.

[258] See Commentary Paragraph 11.a *supra* as it discusses gifts of bonus and rentals.

[259] Note the use of the term "lands described" and compare Hypothetical Case 4.

[260] See Commentary Paragraph 13.c, *infra*.

leave but a fraction of royalty as the result.[261] In *Watkins* the grantor reserved "a 1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land."[262] This is the language of a mineral reservation, but the grantor then gave up all rights in the minerals except royalty. The Supreme Court held that upon stripping out the rights appurtenant to the mineral estate, only a royalty interest was reserved. In *French*, the court dealt with a deed that conveyed a mineral interest, used an explanatory clause to call it a royalty interest, and stripped the mineral interest of all rights appurtenant except royalty. The Supreme Court held that a deed which conveys a mineral interest and strips it of all appurtenant rights except royalty actually conveys a fraction of royalty. The same result---a fraction of royalty---is reached even if the interest stripped of all appurtenant rights is called a mineral interest.[263] This litigation involving a deed that disclaimed all appurtenant rights except the right to royalty reaffirms that words of art should be employed even in a paragraph that mixes a reservation with express agreements. The wording used[264] in the instrument gave rise to a number of arguments that the reservation was an undivided 1/16 royalty interest rather than a 1/16 mineral interest (which would have been the equivalent of a 1/16 fraction of royalty).[265] The court of appeals held that a mineral interest stripped of many of its component parts remains a mineral interest absent additional evidence showing a contrary intention but as to the contention that stripping away all rights except royalty leaves a royalty interest, the court quoted Bruce M. Kramer[266] that "While the court was correct in looking at the entire granting clause, the result in [Slaughter] is probably inconsistent with the modern view that a grantor can transfer a mineral estate stripped of many of its component parts." *French*, *Bank One* and the modern view all reach the same result, however, because, as the court concluded in *Bank One*, a 1/16 mineral interest without appurtenant rights will result in a fraction of royalty.[267] Thus, all appurtenant rights may be stripped out by reservation or agreement, but the result is still a mineral interest and it will still generate a fraction of whatever royalty is provided in a lease.

11.c. Reservations and express agreements – development rights and surface protections

It has been held that the development right automatically accompanies the executive right.[268] This seems inconsistent with the holding in *Altman* that the executive right is the right to lease and the development right is the right of ingress and egress.[269] To add further confusion, one court has stated that that the right of ingress and egress is a royalty right.[270] Another case

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[261] *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945); *French v. Chevron U.S.A., Inc*., 896 S.W.2d 795 (Tex. 1995).

[262] *Id.*

[263] *Bank One, Texas, National Association v. Alexander* 910 S.W.2d 530 (Tex.App.-Austin 1995, writ den'd).

[264] The complete text of the reservation read: "Grantors herein reserve for themselves, their heirs, assigns and legal representatives an undivided 1/16 interest in and to all minerals of every kind and description, including oil and gas, in, upon and under said land; but the right to control and manage and make any and all gas and oil leases or other mineral leases upon said land is hereby granted exclusively to grantees herein, their heirs, assigns and legal representatives, and they shall be entitled to any and all cash bonus or bonuses paid on any and all oil and gas leases on said land together with all cash rentals under such leases; but an undivided 1/16 of any and all oil and gas and other minerals developed from said land shall be owned by grantors herein, their heirs, assigns and legal representatives." *Id.*

[265] The non-traditional language gave rise to the following arguments:

- The word "royalty" is not necessary to characterize the interest as a royalty interest.
- The term "developed" is synonymous with an interest in oil and gas after it has been removed from the ground, and is, therefore, a royalty interest.
- The word "developed" means precisely the same thing as "actual production" or "oil and gas produced, saved and made available for market."
- The terms "produced from" and "developed from" are indistinguishable, in that both refer to minerals after they have been removed from the ground.
- A "royalty interest" consists in the right to a fractional share of the mineral production.
- A deed does not have to specifically mention "royalty," if all rights are stripped from the interest except the right to royalty.

[266] Bruce M. Kramer, THE SISYPHEAN TASK OF INTERPRETING MINERAL DEEDS AND LEASES: AN ENCYCLOPEDIA OF CANONS OF CONSTRUCTION, 24 Tex. Tech L.R. 1 Bruce M. Kramer, THE SISYPHEAN TASK OF INTERPRETING MINERAL DEEDS AND LEASES: AN ENCYCLOPEDIA OF CANONS OF CONSTRUCTION, 24 Tex. Tech L.R. 1, 69-70 fn. 321 (1993).

[267] 910 S.W.2d at 535.

[268] *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, at 798 (Tex. 1995) (Footnote 1: "The court of appeals held that the deed was silent as to the conveyance of the right to develop and therefore, that right was impliedly transferred to the grantee. This conclusion is incorrect for two reasons. First, the right to develop is a correlative right and passes with the executive rights." *Citing Day & Co. v. Texland Petroleum*, 786 S.W.2d 667, 669 n. 1 (Tex. 1990).

[269] "A mineral estate consists of the following five rights: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), …" *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). Compare *Bagby v. Bredthauer*, 627 S.W.2d 190, 194 (Tex.App.-Austin 1981, no writ)

[270] In *Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361, 363 (Tex.App.-Amarillo 1990, no writ) the statement is made that "The reservation of ingress and egress for the purposes of storing, treating, marketing and removing, is consistent with a royalty interest and does not include the purposes of exploration and development which are purposes that are normally considered part of the mineral estate." *Citing*

speaks to the executive right as a right incorporating exploration.[271] What these courts are attempting to say is this: the practical effect of the exercise of the executive right is to create a fee simple determinable mineral estate accompanied by the correlative right of ingress and egress in order to explore for and develop the mineral estate. In other words, the exercise of the executive right triggers these correlative rights as well as enabling the other rights appurtenant to minerals---bonus, rentals, and royalty. The development right subsumes the dominance of the mineral estate over the surface estate.[272] This dominance places the surface of the land at the mercy of oil and gas operations which involve caliche or graveled roads, pads for drilling rigs, pump jacks, and storage batteries, pits for drilling fluids, intersected fences, pipe line ditches, and other disturbances of the surface. [273] Sometimes lessors seek to mitigate the damage by lease provisions which establish surface protocols or provide for money damages, but if the ownership of the surface and minerals is severed there is little incentive for the mineral owner to protect the surface owner. To the contrary, most leases of this nature do not encumber operations with any type of surface protection covenants. A grantor of mineral rights would do well to remember this when drafting a deed. If any of the development rights, whether they are termed "correlative" to the executive right, or "appurtenant" to the minerals, are to be altered or varied in order to protect the surface, this section of the deed is the place to do it.

It is important to remember that a clause designed to protect the surface from mineral operations becomes a deed restriction much like a restrictive covenant and may impair the use and value of the mineral estate. Like scriveners who never envisioned that royalty would exceed 1/8 when they drafted their "usual royalty" phrases, drafters of express agreements may place limitations on the surface or mineral estate that will have unintended consequences. The grantee of minerals must take this into consideration when agreeing to accept such a deed. With these thoughts in mind, the following express agreements are available for use in these forms.

11.c (1) Reservations and express agreements - Restriction on water use

The express agreement that surface water will not be used for oil and gas secondary or tertiary recovery or pressure maintenance operations is adopted from the common prohibition to the same effect in oil and gas leases executed by mineral owns who also own the surface. If the surface is to be severed from the minerals, it might be well to include in the deed some restrictions of this nature. Note that the prohibition against using fresh water does not extend to, and should not extend to, drilling and completion operations.

Altman and *Bagby*, *supra*. It is possible that the court was paraphrasing argument of the appellant because the court then said, "In this instance, we are not persuaded that the right of ingress and egress retained is indicative of an intent to reserve a mineral rather than a royalty interest." *Neel v. Alpar Resources, Inc.*, *supra* at 365.

[271] *Union Pacific Resources Company v. Hutchison*, 990 S.W.2d 368, 371 (Tex.App.-Austin 1999, writ den'd). "Narrowly considered, an 'executive right' is simply another name for an exclusive power to execute an oil and gas lease, from which the lessor will not derive all the usual lease benefits, namely bonus, rental, and royalty. If the lessor retains only a royalty, an interest subject to the power to lease is called a non-participating royalty, indicating that the royalty owner does not share in bonus or rental, nor in the right to execute leases or to explore or develop. In a broad sense, 'executive right' may also refer to any managerial power over the lease or the mineral estate, including power over exploration and development. See 8 Martin and Kramer, Williams & Meyers Oil and Gas Law, "Exclusive leasing power," "Executive right," "Non executive mineral interest," "Nonparticipating royalty." (1998).

[272] An "imperative rule of mineral law" is that the owner of the mineral estate has the right to make any use of the surface which is necessarily and reasonably incident to the removal of the minerals. *Moser v. United States Steel Corporation*, 676 S.W.2d 99, 103 (Tex. 1984), *Citing Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 627 (Tex. 1971); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967). The corollary of the mineral owner's right to use the surface to extract his minerals is the rule that the mineral owner is held liable to the surface owner only for negligently inflicted damage to the surface estate. *Moser*, *supra*, *Citing General Crude Oil v. Aiken Co.*, 162 Tex. 104, 344 S.W.2d 668 (1961); *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex.Civ.App.-Amarillo 1941, writ ref'd); 1 H. Williams & C. Meyers, Oil and Gas Law §§ 217, 218.8 (1981).

[273] Early oil and gas leases contained surface users in language such as "Lessor in consideration of One and No/100 Dollars ($1.00) in hand paid, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee, for the purpose of testing by any method for formations or structures and prospecting and drilling for, mining, and producing oil, gas, distillate, sulphur and other minerals, injecting salt water, other fluids, and gas, into subsurface strata, storing minerals and fluids, laying pipe lines, dredging canals, building roads, bridges, docks, tanks, powers, stations, telephone and electric transmission lines, and other structures and facilities including houses for employees, Necessary for producing, saving, caring for, treating, processing, and transporting minerals and conducting said operations, the following described land." See *Texaco, Inc. v. Faris*, 413 S.W.2d 147 (Tex.Civ.App.-El Paso 1967). In later times this language became subject to "addendums" that were attached to the "Producer 88" form leases that circumscribed the use of the surface with conditions and requirements to protect the surface and provide for payment of specific amounts of "surface damages" for roads, locations, pipelines, spills, and other surface use or damage.

11.c (2) Reservations and express agreements - Reservation of commercial water and water rights

A reservation of commercial water rights is a relatively unheard of provision; yet such a clause must be considered in today's climate of active interest in commercial water sales.[274] Because the term "executive right" has been commonly applied to the mineral estate, any reservation of water should include an expansive definition of the executive right in water that includes rights to use the surface for drilling, pumping, transportation, sale, and the right of ingress and egress in order to develop the water estate. This clause has been patterned on the typical ingress and egress clause of the mineral deed and oil and gas lease.

11.c (3) Reservations and express agreements - Non-development surface

The grantor of minerals (like the lessor under an oil and gas lease) may want to consider the effect of oil and gas development on the homestead place, or on acreage which may become valuable for residential or commercial development of the surface. The deed may contain a restriction that prohibits development upon or within a radius of a certain area.

11.c (4) Reservations and express agreements - Restrictions on Ingress and Egress

The grantor of minerals may also want to consider protecting land or improvements by limiting ingress and egress as to lands subject to mineral development. The subject of ingress and egress through multiple tracts of land is dealt with at Forms Paragraph 10.

11.d Reservations and express agreements - Reservations and express agreements – pertaining to seismic rights

Another example of a reservation or express agreement deals with seismic exploration. Oil and gas companies sometimes present owners of minerals with a seismic exploration permit coupled with option to lease and a printed form of lease. The consideration offered for the seismic permit is generally far less than bonus consideration for an oil and gas lease. The results of entering into one of these arrangements can be "heaven or hell" because if the results of the seismic exploration are interpreted favorably, the company will drill a well. If the results are unfavorable, the option is allowed to expire and, the acreage is condemned by the seismic results to unleaseable status or bids at very low bonus and royalty consideration. On the other hand, if seismic exploration results in the completion of a good well (and most wells which are drilled on the basis of today's three dimensional technology stand a better chance of being a good producer), the printed form lease binds the parties for the producing future. New seismic techniques are an economic blessing to producers but many mineral owners refuse to sign seismic options because the general thinking is that it is better to receive the bonus and let the company either take the risk and drill or let the lease expire and open the acreage for another bonus. Seismic exploration also carries the risk of subsurface damage and subsurface trespass.[275]

Undivided mineral owners are tenants in common and they own in severalty the right of exploration. Just as one mineral owner may develop subject to the duty of accounting, it is generally considered that one undivided mineral owner may give a seismic permit that opens the entire tract to seismic exploration.[276] This may not be true, however, because consideration paid for the seismic permit and option (the entry fee) may be apportionable to all of the mineral owners as their interest appears of record, and denial of the right of the co-tenants to share in the proceeds (even though they will not sign a corresponding seismic permit and option) is a rejection of their interest such that the optionor (the co-tenant granting the option) is a trespasser and his or her assignee (the seismic company) are trespassers.[277]

[274] See for example internet references to the efforts of Boone Pickens and his Mesa Water, Inc. to find a buyer for water in Roberts County, Texas.

[275] *Klostermann v. Houston Geophysical Co.*, 315 SW2d 664, (Tex.Civ.App.-San Antonio 1958, writ ref'd); Seismic Explorations v. Dobray, 169 S.W.2d 739, 743 (Tex.Civ.App.-Galveston 1943, writ ref'd w.o.m.); *Dellinger v. Skelly Oil Co., 236 S.W.2d 675 (*Tex.Civ.App.-Eastland 1951, writ ref'd n. r. e.); *Stanolind Oil and Gas Co. v. Lambert*, 222 S.W.2d 125 (Tex.Civ.App.-San Antonio 1949, no writ hist.). For a complete list of Texas cases and treatises on all forms of subsurface trespass see *Railroad Commission of Tex. v. Manziel*, 361 S.W.2d 560 (Tex. 1962).

[276] But see *Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex.Civ.App.-Corpus Christi 1980, no writ)(One co-tenant may not grant an easement or dedicate any portion of the property to a third party without the consent of his co-tenants).

[277] See *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190 (Tex.Comm'n App.1925, judgment adopted), rehearing granted, 291 S.W. 538 (Tex.Comm'n App.1927, holding approved)(A cotenant who denies the rights of another cotenant is a trespasser as to the disputed interest). A non-optioning co-tenant might threaten a lawsuit in trespass if the optioning co-tenant does not share the proceeds. The theory in *Humble* involved a lessee who entered upon the land with the consent of one cotenant and without the consent of the other cotenant, Humble claimed the "exclusive right to the leasehold interest therein." The theory advanced to prevent seismic exploration is (1) the proceeds from the permit must be shared by all co-tenants, (2) if the optioning co-tenant refuses to share the proceeds, that constitutes a rejection of the co-tenancy, and that makes the rejecting co-tenant and the seismic company claiming under him trespassers.

12. Conveyances and Reservations of Royalty

Minerals are characterized by the term "oil, gas and other minerals in and under and that may be produced from"[278] and royalty is sometimes characterized by the term "produced, saved or sold," but use of the word "royalty" has proved to be the best label for royalty, at least in the case law.[279] So, the hallmark of royalty is simply this: the word "royalty." Use of that word usually resolves whatever ambiguity and confusion the instrument may contain within its four corners.[280] Royalty is one of the five property interests which can be separately conveyed or reserved, and which is subject to ownership, severance, conveyance, lease, and taxation.[281] The act of severing royalty from the mineral estate creates a "nonparticipating royalty." It is called a nonparticipating royalty because it does not entitle its owner to exercise or participate in the other rights appurtenant to minerals.[282] Thus, a nonparticipating royalty owner has no right to develop or lease the land or its minerals or share in bonus or rentals.[283] Nevertheless, it is a tradition to place a follow-on paragraph in a royalty deed expressly stating that the royalty is "nonparticipating" and describing it in terms of rights it does not possess.[284] While surplusage, it is not objectionable. While the mineral estate is akin to an exclusive possessory estate in land with all of the powers that go with it,[285] a nonparticipating royalty carries no rights or powers in the land except the right to a stated share of production from the land free and clear of expenses of finding and developing production.[286]

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[278] See full discussion of the definition of minerals and mineral rights at Paragraph I.A.

[279] *Temple-Inland Forest Products Corporation v. Henderson Family Partnership, Ltd.*, 911 S.W.2d 531, 534 (Tex.App.-Beaumont 1995), rev'd 958 S.W.2d 183 (Tex. 1997) (the use of the term "royalty" was ignored by the court of appeals but seized on by the supreme court); and *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex.Civ.App.-Houston 1957, writ ref'd n.r.e.); *Caraway v. Owens*, 254 S.W.2d 425 (Tex.Civ.App.-Texarkana 1953, error ref'd); *Masterson v. Gulf Oil Co.*, 301 S.W.2d 486 (Tex.Civ.App.-Galveston 1957, writ ref'd n.r.e.); *Miller v. Speed*, 248 S.W.2d 250 (Tex.Civ.App.-Eastland 1952, no writ).

[280] *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945).("Had the word 'royalty' appeared in the first clause ... of the deed, by which the 1/16 was reserved-that is, had that clause read "the grantor retains title to a 1/16 royalty interest"-then there could be no contention that the interest reserved was only a mineral fee interest." (cites omitted).

[281] *Schlittler v. Smith*, 128 Tex. 628, 630-31, 101 S.W.2d 543, 544 (1937).

[282] *Masterson v. Gulf Oil Corporation*, 301 S.W.2d 486, 488 (Tex.Civ.App.-Galveston 1957, writ ref'd n. r. e.).

[283] *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex.Civ.App.-Houston 1957, writ ref'd n.r.e.); *Bank One, Texas, National Association v. Alexander*, 910 S.W.2d 530 (Tex.App.-Austin 1995, writ den'd)("A 'royalty interest' consists in the right to a fractional share of the mineral production, the owner of which typically has no share in the development and executive rights relative to the mineral estate; he may not explore for the minerals himself and is not a necessary party to a lease of the mineral estate. In the ordinary case, he simply possesses the right to his specified proportionate share of production once the minerals are produced. His interest is in "land," but since he may not enter the premises for the purposes of exploration and development, his interest is viewed as an incorporeal interest in the land.").

[284] Some examples of the language used can be found in *Bank One, Texas, National Association v. Alexander*, *supra* at 361; *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986); *Neel v. Alpar Resources, Inc.*, *supra* at 362; *Averyt v. Grande, Inc.*, *supra* at 898; *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 211 (Tex. 1968) in Case Footnote 1; and *Martin v. Snuggs*, 302 S.W.2d 676 (Tex.Civ.App.-Fort Worth 1957, writ ref'd n.r.e.). If a statement defining the nonparticipating nature of a royalty interest is needed for a form, the following may be used:

> *It is expressly understood and agreed that the royalty interest herein reserved/conveyed shall be a nonparticipating royalty interest and that Grantor/Grantee, and G___'s heirs or assigns, shall have the sole and exclusive power to make, execute and deliver on behalf of Grantee/Grantor, and G___'s heirs or assigns, all leases, modifications, amendments, extensions of leases, pooling and communitization and other agreements, all of which shall be binding upon but which shall not require joinder of Grantee/Grantor and G___'s heirs or assigns.*
>
> *Additionally, Grantor shall have the right to receive any and all bonuses paid or payable in consideration of the execution and delivery of any lease or leases, and all rentals or other consideration for the right to defer development of the mineral estate, and all shut-in royalties paid in lieu of production from any well or wells that are shut in or completed but not producing for any cause.*

Compare the foregoing clauses to those in *DuBois v. Jacobs*, 533 S.W.2d 149, 150 (Tex.Civ.App.-Austin 1976, no writ). It must be repeated, however, that such clauses are not a part of the forms in this article because they are not necessary.

[285] *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.);*Campbell v. Dreier*, 382 S.W.2d 179, 183 (Tex.Civ.App.-San Antonio 1964, writ ref'd n.r.e.).

[286] *Martin v. Schneider*, 622 S.W.2d 620, 622 (Tex.App.-Corpus Christi 1981, writ ref'd n.r.e.); *Luckel v. White*, 792 S.W.2d 485, 489 (Tex.App.-Houston [14th Dist.] 1990)(...[A] royalty interest is a subset of a mineral interest and a royalty deed conveys the royalty interest as a fee. (Albeit a fee which is far less than a fee simple absolute.) Under a royalty deed the grantee obtains possessory rights only when and if the minerals are produced and readied for market. Unlike the holder of the mineral fee who owns the minerals in place, the royalty owner may not enter the property to explore, develop or produce the minerals, nor may he allow anyone else to do so. As a further logical practice, the royalty interest owner normally takes no part in leasing to others and does not share in rentals or bonus payments. Consistent with his lack of mineral ownership (until brought to the surface and made marketable), the royalty interest owner enjoys

The creation of a nonparticipating royalty may create a temptation in the executive owner to find ways around paying the royalty by weighting a transaction heavily to the bonus side, a problem recognized at an early date as scriveners attempted to control the executive owner to a certain extent by clauses that required the owner of the executive right to make leases for no less that the "usual" or "standard" 1/8 royalty. This only created case law and did not deter abuse of the executive right.[287] This abuse included schemes in which consideration paid to the executive owner was called a production payment or excess bonus rather than royalty.[288] These attempts to circumvent the nonparticipating royalty obligation have generally been unsuccessful but many deeds contain clauses designed to prevent these abuses.[289] These clauses have no teeth compared to the cases which hold such schemes violate the executive owner's duty of utmost good faith.[290] The forms included in this article do not undertake to protect the nonparticipating royalty owner against such abuses. The case law is deemed adequate. However, the law is not so stringent when it comes to another tactic---development of the minerals without a lease. Is the owner of the executive right entitled to exclude the royalty owner from benefits by developing the minerals without a lease or contributing the acreage to an operator in exchange for a non-operating working interest?[291] The answer seems to be "no." The case law has dealt harshly with schemes by the executive owner to circumvent the rights of the nonparticipating fraction of royalty owner,[292] but it should be noted that at least one court has made a distinction between the nonparticipating fraction of royalty and the nonparticipating royalty fraction, holding that the owner of the executive right is not liable to the owner of a royalty fraction for mismanagement of the minerals.[293]

"nonparticipation" in the costs of exploration, development, production, saving, and making ready for sale.).

[287] A classic case of self dealing, and its results, is exemplified in *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984).

[288] *Portwood v. Buckalew*, 521 S.W.2d 904, 912-14 (Tex.Civ.App.-Tyler 1975, writ ref'd n.r.e.)(overriding royalty and cash bonuses characterized as surface damages).

[289] A typical clause reads:

> It is expressly agreed that the owner of the executive right shall make no future lease or any amendment, modification or extension of any existing lease for less than an adequate and fair royalty consideration as customarily paid in contemporaneously lease transactions in the vicinity of the lands herein described, and no lease shall be made for a consideration consisting of a payment of money out of a percentage of production (whether paid in advance to the lessor and later recouped by the lessee, or paid by lessee to lessor contemporaneously with production) and designated a production payment or some other payment in lieu of royalty, unless the non-executive owner participates in such payment as his or her interest shall appear of record

[290] See *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984), in which the Texas Supreme Court used the terminology of "utmost good faith" and specifically equated that standard with a fiduciary obligation.

[291] Consider this scenario: Your clients are the owners of Blackacre, a tract burdened by a 1/10 nonparticipating fraction of royalty. Since they own the executive right, they wish to make a lease to Deep Reef Operating Company for a 1/8 royalty, and by a separate agreement they want to contract for a 1/16 non-operating working interest. Do you advise your clients that they are precluded from taking a working interest by their duty of utmost good faith and fair dealing to the nonparticipating royalty owner, or do you tell them that they have the unfettered right to develop their minerals? Does the fact that other leases in the area are going for a 3/16 royalty have a bearing? Does the fact that their proposed operator generally charges his non-operating partners a "third for a fourth" promote, but your clients are receiving their working interest on a "heads up" basis? It might be wise to counsel the client to make the lease for a 3/16 royalty and then proceed into the working interest relationship if it is still available.

[292] See Note, *Manges v. Guerra: The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV. 189-210 (1986); Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX.L.R.. 371-406 (1985). See also *Dearing, Inc. v. Spiller*, 824 S.W.2d 728, 731 (Tex.App.-Fort Worth 1992, writ den'd) in which the owner of the executive right leased to a wholly owned company because he "wanted to keep it in the family." The court found the facts in *Dearing* analogous to those in *Manges v. Guerra* and affirmed an award of actual and exemplary damages. In both cases the deed stated that the owner of the executive right would make no lease for less than the usual 1/8 royalty and in each case that was the royalty the executive obtained, but in each instance it was less than the property would command on the open market. For a more exhaustive discussion of the standard of the duty owed by the executive owner to the non-executive see 2 Williams & Meyers Oil and Gas Law Section 339.2, page 205 (Lexis Nexis 2002), treating the duty to lease rather than develop, contents of the lease, and timely exercise of the executive right.

[293] *Pickens v. Hope*, 764 S.W.2d 256, 267-268 (Tex.App.-San Antonio 1988, writ den'd)("The non-executive in the *Comanche Land & Cattle Co.* case, reserved a non-participating royalty interest in one-half of the royalties. Here, the non-executive reserved a stated fraction (1/32) of the minerals produced as a royalty. In *Comanche*, the executive could control the amount of production accruing to the royalty owner, and, thus, was in a position to manage and manipulate the share of production to which the non-executive would be entitled and could, by other provisions in a lease, obtain benefits that were not obtained by the non-executive. Such possibilities do not exist in the present case. In the event of production, Hope would receive a 1/64th free royalty, no more and no less, and this irrespective of who manages the lease or upon what terms were contained in a lease.").

Other courts have also limited the extent to which the law will imply pooling covenants.[294]

It is not recommended that the attorney call the royalty "participating" or attempt to make it participating.[295] Granting or reserving other rights than the royalty right must be accomplished by dealing with minerals, not royalty, or by granting or reserving royalty and also granting or reserving other appurtenant rights by separate reservations or express agreements within the instrument.[296] A sample reservation with two rights reserved would appear as follows:

> "There is reserved unto the Grantor, and Grantor's successors or assigns, an undivided _/_ royalty in oil, gas and other minerals produced and saved or sold from Section 100, Block 1, AB&C Survey, Bravo County; and there is further reserved unto the Grantor, and Grantor's successors or assigns, _/_ of all future bonuses paid for any oil and gas lease covering the land herein conveyed.

Likewise, a grant may be twofold:

> That I, John Doe, of Bravo County, Texas, have granted, sold and conveyed and by these presents do hereby grant, sell and convey unto John Doe, Jr. a 1/64 royalty in oil, gas and other minerals produced, saved and sold from Section 100, Block 1, AB&C Survey, Bravo County, Texas, and Grantor further grants, sells and conveys unto John Doe, Jr. 1/64 of all future bonuses paid for any oil and gas lease covering the land herein described.

Finally, the same result may be accomplished by an express agreement:

> "That I, John Doe, of Bravo County, Texas, have granted, sold and conveyed and by these presents do hereby grant, sell and convey unto John Doe, Jr. a 1/64 royalty in oil, gas and other minerals produced, saved and sold from Section 100, Block 1, AB&C Survey, Bravo County, Texas. It is expressly agreed that Grantee shall receive 1/64 of all future bonuses paid for any oil and gas lease covering the land herein described.

The nonparticipating royalty and the bonus are distinct though included within the same clause. With these thoughts in mind, the following comments are offered on the standards forms granting and reserving a nonparticipating royalty.

12.a Conveyances and Reservations of Royalty - Grant of royalty

A grant of royalty is accomplished by use of this form. Both the grant of royalty at Forms Paragraph 12.a and the reservation of royalty at Forms Paragraph 12.b give the attorney the option of using a royalty fraction or a fraction of royalty. A wrong choice of words at this point in the deed will have a devastating impact on the transaction and the future income of the parties. These terms are fully discussed at Paragraph I.E, *supra*, but it bears repeating that "of" is a critical word. The word "of" inserted between two fractions has a mathematical effect. When fractions are multiplied against each other, the interest is reduced. Thus, 1/2 of 1/8 royalty is a fraction of royalty. The term "an undivided 1/16 royalty interest" is also a simple expression. It is a royalty fraction. Forms Paragraphs 12.a and 12.b label the respective types of royalty for the attorney's ease of selection and use. There are, of course, other ways of stating the royalty interest. A deed that conveyed "A non-participating mineral royalty equal to three-eighths (3/8) of all the oil and gas and other minerals that may be on or under and produced and saved" was held to convey a fractional royalty rather than a fraction of royalty.[297] This raises an obvious question: is it possible that the scrivener meant 3/8 **of** royalty? The fraction 3/8 (37.5%) in the deed is so large that, as a royalty, it may prohibit leasing and development of the minerals. The ancillary question is, should that affect the rules of construction?[298] The way to avoid this problem is to understand the difference between the fraction of

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[294] *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368, 373 (Tex. 2001); *HECI Exploration Company v. Neel*, 982 S.W.2d 881, 889 (Tex. 1998)("We have imposed implied covenants only when they are fundamental to the purposes of a mineral lease and when the lease does not expressly address the subject matter of the covenant sought to be implied. See, e.g., *Gulf Prod. Co.*, 103 S.W.2d at 971 (holding that there was no implied covenant to develop when the leases made provision for the drilling of a particular number of wells."); *Browning Oil Company, Inc. Luecke*, 38 S.W.3d 625, 641 (Tex.App.-Austin 2000)(express pooling provisions cannot be extended by implied covenants).

[295] *See McLain v. First National Bank of Fort Worth*, 263 S.W.2d 324 (Tex.Civ.App.-Texarkana 1953, writ ref'd n.r.e.) in which the deed stated "There is reserved for the benefit of grantors one-fourth participating royalty; that is, one-fourth of everything including bonuses and delayed rentals, and one-fourth of one-eighth of the oil produced from the land described herein; and grantors reserve the right of egress and ingress in and to said property to prospect for oil, gas and other minerals; and for the purpose of mining and drilling for oil, gas and other minerals and removing the same therefrom, with all the appurtenances, apparatus, tanks, pipe lines, machinery and other devices necessary and requisite to the exercise of this right." This scrivener meant to create a mineral reservation, the reservation doesn't deal with gas, the reservation doesn't contemplate royalties in excess of 1/8, and the reservation leaves the executive right in ambiguity.

[296] See Commentary Paragraph 11 *supra*.

[297] *White v. White*, 830 S.W.2d 767 (Tex.App.-Houston [1st Dist.] 1992, writ den'd).

[298] *Temple-Inland Forest Products Corporation v. Henderson Family Partnership, Ltd.*, 958 S.W.2d 183, 185 (Tex. 1997)("We note, however, that commentators have suggested that the reasoning in Watkins might not be sound if the fraction were greater than 1/8. See 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.10, at 503 n. 5 (Patrick H. Martin & Bruce M. Kramer eds., 1996))."

royalty and the royalty fraction. Examples of language creating fractions of royalty and royalty fractions are set out at Paragraph I.F, Hypothetical Case 3, *supra*, and the results of a mistaken use of one over the other expressed in real world terms (money) is demonstrated under Paragraph I.H, *supra*.

12.b Conveyances and Reservations of Royalty – Reservation of royalty

A reservation of royalty is accomplished by use of this form. Like the forms for a grant of royalty, Forms Paragraph 12.b gives the attorney the option of using a royalty fraction or a fraction of royalty. These terms are discussed in Paragraph 12.a immediately above and a more in-depth discussion of these words of art appears at Paragraph I.E, *supra.*

Unlike the form for the grant of royalty, which requires a legal description inserted immediately following the granting language (from Forms Paragraph 8), the reservation of royalty occurs in a deed of surface or minerals and therefore refers back to the "lands (conveyed)(described)" choice. This choice will also have a profound effect on the conveyance and it is recommended that the attorney drafting the reservation review Paragraph I.C and D and the examples of usage at Paragraph I.F.

12.b (1) Conveyances and Reservations of Royalty – Royalty acres

Another term that has a clear meaning is "royalty acres." Use of the term will create a fraction of royalty. In other words, if Section 100 is a 640 tract under lease for a 3/16th royalty, a conveyance of 15 royalty acres in Section 100 will generate 15/640 of 3/16 of production as the royalty.[299] The same result is reached with "15/640 **of** royalty in the oil, gas and other minerals produced and saved or sold from Section 100."

12.b (2) Conveyances and Reservations of Royalty – Use of words "royalty interest"

The term "royalty interest" means either a fraction of royalty or a royalty fraction,[300] depending on the operative language in the instrument. There are no cases that zero in on the term "royalty interest" as an ambiguity within itself. The Forms Paragraphs do not use the term "royalty interest" in connection with a fraction of royalty or royalty fraction because it is not deemed necessary to communicate the quantum or nature of the royalty granted or reserved.

12.b (3) Conveyances and Reservations of Royalty – Use of words "the usual 1/8 royalty"

A phrase which has given courts so much construction work is the attempt to define the grant or reservation of a fraction of royalty in terms of the "usual" or "standard" 1/8 royalty. Why this happened so often is no mystery. Picture the typical scrivener of the 1930's without much case law, drafting a royalty clause, knowing that the grantor intended the grantee to have 1/4 of the royalty, and using a fraction of royalty clause. When the clause "an undivided 1/4 of the royalty" or "an undivided 1/4 royalty interest" is set out on paper the inevitable question arises in the scrivener or the client's mind: "What does that really mean?" It seems so open-ended. The question seemed easily answered at the time with the addition of a phrase explaining the royalty in terms of the "usual" 1/8 royalty.[301] We all like certainty in drafting deeds and the extra phrase pinning the royalty conveyed or reserved to the "usual" seemed to provide certainty. Even when not stated in terms of the "usual 1/8 royalty" that fraction has been the basis of language assuming royalty would always be 1/8.[302] Then, of course, came the increases in

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[299] *Temple-Inland Forest Products Corporation v. Henderson Family Partnership, Ltd.*, 958 S.W.2d 183, 185(Tex. 1997) ("One difference between the *French* deed and the conveyance in *Watkins* is that the *French* deed specified a 50-acre interest. The owner of 50 royalty acres out of a 32,808.5 acre tract is entitled to receive 50/32,808.5 of royalty, not a 50/32,808.5 fixed royalty. See generally 1 WILLIAMS & MEYERS, *supra*, § 320.3, at 675 (stating that the owner of 50 royalty acres in a 100-acre tract is entitled to 1/2 of royalty, or a 1/16 royalty where the lease provides for 1/8 royalty); see also *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617, 621 (Tex. 1954) (indicating in dicta that 25-acre interest in royalty out of a 226.88-acre tract would have conveyed 25/226.88 of royalty.").

[300] *Patrick v. Barrett*, 734 S.W.2d 646 (Tex. 1987).

[301] One of the first cases in which 1/8 was judicially noticed as the "usual" royalty was *King v. First National Bank*, 144 Tex. 583, 192 S.W.2d 260, 262 (Tex. 1946). In *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991) the court noted that "One-eighth was the "usual" royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it." *Citing Garrett v. Dils Co.*, 299 S.W.2d 904, 907 (Tex. 1957)(a case resolving the parties' rights under future leases). Justice Phillips' dissent in *Luckel* also discussed judicial notice of the usual royalty of that era. 819 S.W.2d at 466. One court went so far as to characterize a 1/32 royalty as the "equivalent of a 1/4 of the usual 1/8 royalty interest." *Caraway v. Owens*, 254 S.W.2d 425 (Tex.Civ.App.-Texarkana 1953, writ ref'd).

[302] In *Brown v. Havard*, 593 S.W.2d 939, 942 (Tex. 1980), the court construed a reservation that read: "Grantors reserve unto themselves, their heirs and assigns in perpetuity an undivided one-half non-participating royalty (Being equal to, not less than an undivided 1/16th) of all the oil, gas and other minerals, in, to and under or that may be produced from said land…." The court said "We agree with the court of civil appeals that an ambiguity arises from the inclusion of the parenthetical phrase (Being equal to, not less than an undivided 1/16th) in the reservation. If the phrase were omitted, the reservation would read: Grantors reserve unto themselves, their heirs and assigns in perpetuity an undivided one-half non-participating royalty of all the oil, gas and other minerals, in, to and under or that may be produced from said land. This language would reserve 1/2 of all the oil, gas, and

royalty over the years and all of the cases with it. Although the standard royalty was once thought to be 1/8, there is no longer a standard or usual royalty fraction. It would be a mistake for a court to take judicial notice that 3/16 is now the standard royalty. Royalty depends in large part upon the attractiveness of the acreage and the amount of bonus being paid. Royalty and bonus generally have a seesaw effect in most negotiations---the greater the royalty, the less the bonus, and visa versa.[303] Today leases are made for royalties of anywhere from 1/8 to 32% or 35%. Sophisticated landowners also bargain for royalty which escalates to a higher percentage upon payout. A 3/16 royalty is a benchmark of most negotiations but it is by no means standard. [304]

other minerals produced, and not 1/2 of any outstanding or future royalty." *Havard v. Brown*, 593 S.W.2d at 942, *citing Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945); *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543 (1937); 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 327.

[303] See discussion at Commentary Paragraph 11.a(a), *supra*.

[304] Authors note: My personal experience from doing title opinions and record searches in the various county deed records and from visits over the last 33 years with other attorneys engaged in oil and gas practice leads me to conclude that the usual and customary royalty graduated from 1/8 to 3/16 during a twenty year period from approximately 1960 to 1980. Current royalty ranges from 3/16 to 30%. This is not to say that royalty in excess of 1/8 did not exist in some leases prior to that date. It did, but it was usually found in leases drafted by lawyers representing owners of very attractive acreage sometimes within "proven" acreage or adjacent to a new discovery or large tracts. These leases are custom drafted instruments. They are typed rather than printed forms, and many of them contain the three hallmarks of the custom drafted lease: (1) a continuous development clause or a Pugh clause, (2) numerous surface protection covenants, and (3) restrictions on pooling. It is obvious that these leases contain royalty as but one of many other negotiated items. I have seen royalty in excess of 1/8 referred to in division orders or check detail as "excess royalty" so that two line items would appear on check detail---the usual 1/8 and the excess fraction. The same attorneys who bargained for 3/16 on behalf of clients with favored acreage carried the demand for "excess" royalty into other transactions for smaller leases. Of course, farmers and ranchers---men and women who generally make it a part of their business to know what is going on around them in the country----noticed the leases being made. Those with "country smarts" either hired counsel wise enough to incorporate the 3/16 trend or, as was often the case, rather than seeking counsel, they began demanding that lease brokers who knocked on their door add "addendums" to printed form leases, or interline them, to provide for the 3/16 royalty they knew was being placed into custom leases. Thus, the 3/16 royalty spread out of the law office into the general mineral-owning public's consciousness. The written evidence of this trend first becomes noticeable in many county lease records from the years 1970 onward. Royalty still depends on the attractiveness of acreage balanced against the amount of bonus, but a return to the 1/8 royalty as usual and customary is unlikely. To the contrary, with oil and gas prices on a permanent price incline royalties are now more common in the 1/5 to 1/4 range.

12.c Conveyances and Reservations of Royalty - Fixing Pooling Rights

By the very use of the word "royalty" in the granting clause, the grantor of a royalty interest retains all the other appurtenant rights in the minerals. However, just as the executive right accompanies minerals, the right to consent to pooling goes with a grant or reservation of royalty. The holder of the executive right cannot bind the nonparticipating royalty to a pooling agreement.[305] Pooling effects a cross-conveyance among the owners of minerals under the various communitized tracts so that they all own undivided interests in the pooled unit in the proportion that the contribution of each of them bears to the whole, but a mineral owner in a tract cannot convey on behalf of the royalty owner, for as the Texas Supreme Court has said, "The mere reservation of a nonparticipating royalty interest under a tract does not show that the royalty owner intended to give to the holder of the executive right the power to diminish the royalty owner's interest under that tract. Consequently, pooling on the part of the holder of the executive right cannot be binding upon the nonparticipating royalty owner in the absence of his consent."[306]

Forms Paragraph 12.c allocates the pooling power in accordance with whether the transaction is one based on consideration or gift[307] and may be unlimited or for a term. It is suggested that if this separation occurs, the owner of the pooling power will owe a fiduciary duty to the nonparticipating royalty interest much like that discussed in *Manges v. Guerra*.[308] That case dealt with an executive's attempt to benefit from ownership of minerals at the expense of the nonparticipating royalty interest. It did not address the pooling power but the principals would be the same. The executive may not use the pooling power to advance an interest at the expense of the nonparticipating royalty interest, and the executive must be especially aware of the consequences of potential well locations and pooling. Consider the following hypothetical situation: John Doe owns the minerals in Sections 99 and 100 subject to a 1/16

[305] *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968). See also Jones, *Nonparticipating Royalty*, 26 TEX.L.R.. 569, 580--85 (1948) and Elliott, *The Executive Right*, 42 TEX.L.R.. 865 (1965).

[306] *Veal v. Thomason*, 138 Tex. 341, 159 S.W.2d 472 (1942), *Citing Minchen v. Fields*, 162 Tex. 73, 345 S.W.2d 282 (Tex. 1961); *Brown v. Smith*, 141 Tex. 425, 174 S.W.2d 43 (1943); and *Nugent v. Freeman*, 306 S.W.2d 167 (Tex.Civ.App.-Eastland 1957, writ ref'd n.r.e.).

[307] See the discussion in support of Forms Paragraphs 11.b 1-4, *supra*.

[308] 673 S.W.2d 180 (Tex. 1984).

nonparticipating royalty interest in Rick Roe in the North Half of Section 100. Smith Cattle Company owns Section 101. John Doe leases Section 99 and 100 to Deep Reef Drilling Company for a 3/16 royalty under a lease with a pooling clause. Smith Cattle Company also gives a 3/16 lease covering Section 101 with a pooling clause. The plat is shown as follows:

Section 99 640 acres John Doe	Section 100 640 acres John Doe	Section 101 640 acres Smith Cattle Company

John Doe made a mistake by including the North Half of Section 100 with the other acreage under lease instead of making a separate lease as to Section 101. Now Richard Roe may "cherry pick" the situation. Here is how: if a well is drilled on a pooled unit containing the North Half of Section 100, but the well is not located on the North Half of Section 100, Richard Roe will want to be in the well and he may offer to ratify the lease or the pooled unit and receive a royalty carved out of John Doe's royalty (assuming John Doe's lease contains a proportionate reduction clause---if it does not, Deep Reef bears the 1/16 NPR burden). Richard Roe makes this election by an offer to ratify the lease or by bringing a lawsuit for his royalty.[309] On the other hand, if the well is located on the North Half of Section 100, Richard Roe will not want to ratify the lease or the pooled unit because his interest will be a full 1/16 or .0625 royalty carved from John Doe's royalty regardless of the size of the unit.

In seeking to avoid these results, John Doe must consider the fiduciary constraints imposed on the executive dealing with property subject to a nonparticipating royalty have their limits. The executive may lease the burdened tract separately. He may choose to lease or not lease, negotiating whatever terms he may, as to his own lands in which the nonparticipating royalty owner has no interest. The executive may not delay, prevent or prohibit leasing of the burdened tract to the advantage of his other lands, of course,[310] but he is free to negotiate a lease covering the burdened tract with or without pooling and Pugh clauses, and where the nonparticipating royalty is a royalty fraction the executive may seek any consideration he wishes for leasing the burdened tract. As to his own lands, he is not answerable to the nonparticipating royalty owner. Once the executive is vested with the power to pool the nonparticipating royalty interest, however, these limits may be removed. The executive may no longer be free to select which acreage will be leased with pooling provisions, or how such provisions will operate, for if they operate to the advantage of the unencumbered acreage the executive may be liable to the royalty owner. Basically, a deed which divests the pooling consent power of the nonparticipating royalty owner also divests the new executive of a certain amount of discretion in making oil and gas leases---especially, the power to discriminate in pooling provisions as to the lands; even, perhaps, those lands of the executive not encumbered by the nonparticipating royalty interest---and this is a consideration that should be carefully discussed with the client before including this clause in a deed.

13. The Subject-to Clause

In Commentary Paragraph 9 it was pointed out that exceptions deal with prior severances and prevent breaches of warranty and operation of the *Duhig* rule. It was said that the term "except" may introduce language that constitutes a reservation, and the term may also introduce an express agreement, a second grant, or other matter not truly an exception. The suggested forms do not recommend the use of the words "save and except." Traditionalists may not favor the omission of the words "save and except," but as an introductory term for either a reservation or exception, the phrase adds nothing of substance to the deed. In these forms, the true exception commences with the words "This deed is subject to…" and the exception that follows is limited to prior severances such as previously conveyed undivided interests in royalty or minerals or rights appurtenant to minerals and existing encumbrances such as oil and gas leases, options, areas of mutual interest, covenants running with the land, and the like. If a true reservation is intended, the suggested forms supply the words "There is reserved unto grantor…" without a "save and except" preamble. [311] It should also be noted that a statement that the deed is "subject to" certain items such as prior reservations is not a reservation itself. [312]

The phrase "subject to" in a mineral deed means

[309] *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 211 (Tex. 1968).

[310] If the executive has a homestead or headquarters on the burdened tract, for example, it might be a breach of fiduciary duty to refuse to lease the land pursuant to a reasonable offer, or to impose a non-development covenant preventing development of the burdened tract to the advantage of the executive's other lands.

[311] See Forms Paragraph 9 for reservations.

[312] Consider the lesson of *Wright v. E.P. Operating Ltd. Partnership*, 978 S.W.2d 684, 688 (Tex.App.-Eastland 1998)("The language stating that the conveyances were made subject to any and all reservations presently of record including without limitation that property reserved by the Wrights does not reserve any mineral interest in Oregon's predecessors in title, but rather recognizes that reservations have been made in the past and are in the chain of title. This language is more in the form of limiting the warranty than reserving an interest.")

"subordinate to," "subservient to," or "limited by,"[313] and it constitutes an exception or exclusion from the grant with a principal function of protecting the grantor against a claimed breach of warranty."[314] It neither conveys nor reserves an interest; rather, it addresses prior severances and encumbrances.[315] It limits the estate granted but does not retain anything in favor of the grantor.[316]

It was once customary to use the subject-to clause to describe an oil and gas lease and then state what rights appurtenant to the minerals granted or reserved would apply under the existing and future leases. This usage of the subject-to clause was developed in direct response to the decision in *Caruthers v. Leonard* [317] which held that, in the absence of a statement that the grantee would receive benefits under an existing lease, the grantee of a tract under lease had no right to share in present rentals payable under the lease. That decision was expressly overruled in *Hager v. Stakes*[318] and again, for good measure, in *Harris v. Currie*.[319] It is now clear that a grant of minerals carries with it the right to share in present and future lease benefits apportioned to the minerals granted, reserved, and outstanding. But during the interim, the two-grant clause and the future lease clause resulted arose from the difficult drafting exercise made necessary by the *Caruthers* decision. For example, in *Hoffman v. Magnolia Petroleum Co.*[320] the deed had a granting clause which conveyed an undivided 1/2 mineral interest under a specific 90-acre tract carved out of a larger tract of 320 acres. The subject-to clause made the mineral conveyance subject to an existing lease covering the 320-acre tract and stated that the deed covered and included 1/2 of the royalty to be paid under "said lease." The controversy occurred when production was obtained on acreage in the 320-acre tract from a well not on the 90 acre tract and the grantee claimed 1/2 of the royalties payable under the 320 acre lease. The court used a "two-grant theory" to resolve the conflict, holding that the deed actually contained two separate grants: (1) the granting clause conveyed "an undivided one-half interest in the possibility of a reverter of the oil in place under the 90 acres"; and (2) the subject-to clause conveyed "a one-half interest in the royalty to accrue under the terms of the lease as an entirety [on the 320 acres]".[321]

This case suggested that, while the subject-to clause suggested in this article may be adapted to incorporate more than one grant or reservation or to explain future lease benefits, it must be done carefully. The Forms Paragraphs do not contain a form that allows this usage. The subject-to clauses suggested in these forms only act as exceptions to prior severed interests. Despite criticism of the two-grant theory as a tool of construction of instruments with inherent conflicts,[322] the rule of construction is firmly fixed in the case law. See *Richardson v. Hart,*[323] *Benge v. Scharbauer,*[324] and *Woods v. Sims.*[325] The two-grant theory may also be put to use in these forms as a tool for deed promulgation. There is no reason why two subject matters in a conveyance cannot be incorporated as two grants within one deed as long as the follow up clause does not merely attempt to explain the previous grant. The same is true of reservations. For example, this carefully crafted express agreement does not appear to create any confusion:

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[313] *Rosse v. Northern Pump Company*, 353 S.W.2d 287, 293 (Tex.Civ.App.-Austin 1962, writ ref'd n.r.e.).

[314] *Walker v. Foss*, 930 S.W.2d 701, 707 (Tex.App.-San Antonio 1996 no writ), *Citing* Ernest E. Smith, The "Subject To" Clause, 30 ROCKY MTN.MIN.L.INST. 15-1, 15-2 (1985).

[315] *Klein v. Humble Oil & Refining Company*, 67 S.W.2d 911 (Tex.Civ.App.-1934), reversed on other grounds, 126 Tex. 450, 86 S.W.2d 1077 (1935), but specifically approving the holdings of the Court of Civil Appeals on the meaning and effect of the reservations and exceptions; *Pich v. Lankford*, 157 Tex. 335, 302 S.W.2d 645 (Tex. 1957).

[316] *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 894 (Tex. 1986).

[317] 254 S.W. 779, 782-83 (Tex. Comm'n App.1923, judgm't adopted).

[318] 116 Tex. 453, 294 S.W. 835, 838 (1927).

[319] 142 Tex. 93, 176 S.W.2d 302, 305-06 (1943). The Texas Supreme Court expressly rejected the holding of *Caruthers* by holding that a grant of minerals, made subject to an existing lease, conveyed by operation of law the possibility of reverter and a share of the existing lease's royalty and delay rentals in proportion to the conveyance of the mineral estate.

[320] 273 S.W. 828 (Tex.Comm'n App.1925, holding approved).

[321] *Id*. at 830

[322] Williams, *Hoffman v. Magnolia Petroleum Co.: The Subject-To Clause in Mineral and Royalty Deeds*, 30 TEX.L.R.. 395 (1952); Elliott, *The Fractional Mineral Deed "Subject-To" a Lease*, 36 TEX.L.R.. 620 (1958); Meyers & Williams, *Hoffman v. Magnolia Petroleum Co.: A Further Comment*, 35 TEX.L.R.. 363 (1957).

[323] 143 Tex. 392, 185 S.W.2d 563, 564-65 (1945)(granting clause conveyed 1/128th mineral interest "consistent" with a subject-to clause granting 1/1024 royalty).

[324] 152 Tex. 447, 259 S.W.2d 166, 168 (1953)(reservation of 3/8 mineral interest reduced to 1/8 under *Duhig*, but grantors entitled under an express agreement clause in the deed to 3/8 of lease benefits). There was no subject-to clause in the deed construed in this case, just a granting clause and an express agreement clause. It is pointed out in this article that express agreement clause may appear inside subject-to clauses or as stand alone clauses.

[325] 154 Tex. 59, 273 S.W.2d 617 (1954)(each granting clause in three identical deeds conveyed an undivided 25/200 mineral interest in a tract thought to contain 200 acres but which actually contained 226.88 acres, with subject-to clauses stating that the deeds included 25/200 of the existing lease's royalty: held that grantees owning 47.5/226.88 acres of the mineral estate acquired 47.5/200 of royalty).

"This deed is subject to an Oil, Gas and Mineral Lease recorded at Volume 65, Page 90 of the Oil and Gas Lease Records of Bravo County, Texas,

and

and it is expressly agreed that all royalties due and payable, if any, under or by virtue of the present lease shall be paid 3/4 to Grantor and 1/4 to Grantee (rather than being apportioned between Grantor and Grantee as their undivided ownership will appear of record as a result of the granting clause of this deed).

The foregoing clause intentionally alters the natural apportionment of royalties under the lease. The clause is silent as to future leases and therefore the granting clause will control as to apportionment of rights under futures leases. If the attorney is uncomfortable leaving it apportioned by implication, this language may be used:

"…and upon termination of the lease covering the premises, all future rights appurtenant to the premises shall thereafter be apportioned between/among Grantor/s and Grantee/s as their undivided ownership appears of record.

Here is another example of an express agreement contained in the subject-to clause:

"This deed is subject to an Oil, Gas and Mineral Lease recorded at Volume 65, Page 90 of the Oil and Gas Lease Records of Bravo County, Texas, and all royalties paid under or by virtue of the present lease are reserved by and shall be owned and payable to Grantor during the term of the oil and gas lease.

Another danger presented by a subject-to clause is the possibility that it may convert an incorrectly identified prior severance into a present reservation rather than an exception. One of the first hard cases to make questionable law was the Kentucky case *Gibson v. Sellars.*[326] The court dealt with deed language that stated "It is expressly understood and agreed by the parties that the coal and mineral rights underlying said tract of land have been heretofore sold by the First Party and are not intended to be conveyed by this deed and are expressly excluded herefrom." The court noted that while the coal had been sold, the other minerals underlying the lands had not, and the language of the exception constituted a reservation. The court said it was not concerned with the reasons for the "exception" and that the recital of erroneous circumstances or the reason for an exception does not limit the exception. The court did not care that the clause recited incorrect facts, it was only concerned with the "words of reservation." A similar result came about in *Pich v. Lankford,*[327] This decision was distinguished twenty years later by *Miller v. Melde*[328] in which the exception clause did not use the word "reserved." In that case Miller claimed one half of the minerals and a 3/4 royalty interest under the following chain of conveyances:

- Allen to Miller (all minerals) with no reservations or exceptions.
- Miller to Bergstroms with incorrect recital "...there is reserved and excepted in prior conveyances one-half (1/2) of the oil, gas and other minerals in or under said premises for a term of fifteen (15) years from the date of said reservation."
- Bergstroms to Melde, with two exceptions: "There is reserved and excepted in prior conveyances one-half (1/2) of the oil, gas and other minerals in or under said premises for a term of fifteen (15) years from the date of said reservation," and "The said Grantors herein reserve unto themselves, their heirs and assigns, an undivided one-fourth (1/4) interest in royalty in the oil, gas and other minerals in and under the above described land.

The *Miller v. Melde* Court held that the incorrect recital did not except and *reserve* any interest in "clear and unambiguous language" and because the warranty deed must pass the greatest estate possible unless reservations or exceptions reduce the estate conveyed, the deed from the Bergstroms to Melde conveyed one-half of the mineral estate, reserving a 1/4 royalty interest in the Bergstroms, with the remaining 3/4 royalty passing to Melde. The lesson of these cases is simple: when drafting an exception of prior severances and encumbrances, use the words "subject to" rather than "reserved" and make the exception specific to identified prior severances or use the broad form subject-to clause suggested in the forms. When a reservation is intended, use the word "reserved."

The forms do not mention mortgages. Mortgages cannot be excepted. The instrument must either recite the assumption and promise to pay by grantee of the promissory note or other evidence of indebtedness underlying the mortgage, lien or deed of trust, or the conveyance must be accompanied by a partial release of the mortgage, lien or deed of trust insofar as it affects the interest of the grantee.

13.a The Subject-To Clause - Specific subject-to clause

Current exception practice in oil and gas conveyancing is divided between subject-to clauses which identify specific matters and a form of Mother Hubbard subject-to clause which attempts to cover all matters of exception without identifying any particular matter. Some examples of a specific subject-to clause

[326] 252 S.W.2d 911 (Ky.Civ.App. 1952, no writ).

[327] 157 Tex. 335, 302 S.W.2d 645, at 649 (Tex. 1957)("The giving of a false reason for an exception from a grant does not operate to alter or cut down the interest or estate excepted, nor does it operate to pass the excepted interest or estate to the grantee.").

[328] 730 S.W.2d 12 (Tex.App.-Corpus Christi 1987, no writ).

are:

- This deed is subject to an undivided one half mineral interest vested in John Jones.
- This deed is subject to an undivided one half mineral interest more fully described in Mineral Deed dated January 10, 1956 from Jenny Jones to John Jones, recorded at Volume 55, Page 80 of the Deeds Records of Bravo County, Texas.
- This deed is subject to an Oil, Gas and Mineral Lease recorded at Volume 65, Page 90 of the Oil and Gas Lease Records of Bravo County, Texas.

A specific reference to an exception in the subject-to clause will absolutely protect the grantor from claims of breach of warranty and from the *Duhig* rule as to the matter described as an exception. Is the same true as to all defects swept up into a broad form clause? From a reading of various conveyancing documents in the courthouses we know that the broad form subject-to clause is generally stated as "all valid, outstanding mineral interests," or "all previously severed minerals," or "all mineral and royalty interests not owned by grantor," and a hundred other variations of this kind of language. When it is not possible to know what minerals or royalty the grantor has or what severances and encumbrances are outstanding in the chain of title, and it is not economically feasible to find out, many attorneys resort to a cover-all subject-to clause. The following subject-to clause is a broad form drawn from numerous deeds.

13.b The Subject-To Clause - Broad form subject-to clause

The majority of mineral deeds recorded in Texas contain some type of broad-form exception language and the courts have never applied the *Duhig* rule to such language.[329] All of the rules of construction mandate that every clause have some import, and none can be disregarded. At first reading it might seem that there is a disharmony between the warranty clause and the Mother Hubbard subject-to clause. The warranty in a deed is subject to exceptions listed in the subject-to clause. Prevention of breach of warranty and operation of *Duhig* is the accepted outcome. The question arises, does the warranty clause trump the subject to-clause, or does the subject-to clause trump the warranty clause? The answer is that the parties may agree upon any clause in a deed for it is a contract as well as a conveyance. The broad form of subject-to clause, therefore, makes the warranty subject to every possible defect in the chain of title, but this is not inconsistent with the legal proposition that the warranty does not constitute a part of the conveyance nor strengthen or enlarge the title conveyed, and extends only to what is granted, or what purports to be granted, by the deed[330] and because the property or property right excepted or reserved is never included in the grant, such property is not covered by the warranty. The grantor still warrants that whatever title is conveyed will be defended. So the broad from subject-to clause is not in disharmony with the warranty clause. It will not invalidate the conveyance, it simply neutralizes the warranty as to defects.

It should be noted that the broad form may include specific exceptions if they are known to the attorney drafting the instrument. This allows use of the broad form subject-to clause and the specific exception if known, as the following example demonstrates:

> This deed is subject to (a) all interests in minerals or royalties previously severed or vested in third parties and not currently owned by Grantor, *(including, but not limited to, a 1/16 nonparticipating royalty reserved in a mineral deed recorded at Volume 100, Page 101, of the Official Public Records of Bravo County, Texas)*, (b) all valid oil and gas leases, (c) all valid royalty agreements, pooling agreements and designations of pooled units, (d) all valid encumbrances of every kind and character, *(including, but not limited to, a right of first refusal as to oil and gas leasing in favor of John Jones duly recorded at Volume 100, Page 102, of the Official Public Records of Bravo County, Texas)*, (e) discrepancies in acreage; (f) the rights of any person lawfully in possession of the premises, whether by recorded or unrecorded instrument or otherwise.

Note that the broad form of Mother Hubbard subject-to clause mentions encumbrances. Encumbrances include liens, of course, but the case law also mentions encumbrances as delinquent taxes,[331] rights of first refusal and options,[332] non-partition agreements, pooling agreements, easements,[333] and other agreements or covenants which restrict use of the land or free transfer of title.[334] A disclaimer of the general warranty of title will not necessarily include a disclaimer of the statutory covenant against encumbrances.[335] This covenant is implied from the use

[329] Though there are many cases which mention the clause, there are no cases which uphold or condemn the broad form subject-to clause.

[330] *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781, 786, 787 (Tex. 1956).

[331] *Black v. Johnson*, 404 S.W.2d 382 (Tex.Civ.App.-El Paso 1966).

[332] *E. I. DuPont de Nemours & Co. v. Zale Corp.*, 462 S.W.2d 355 (Tex.Civ.App.-Dallas 1970).

[333] *Bowen v. Briscoe*, 453 S.W.2d 287 (Tex. 1970).

[334] City's use of the surface of the land as an airport constitutes an encumbrance as to the mineral estate. *Texas & Pac. Ry. Co. v. El Paso & N. E. R.R. Co.*, 156 S.W. 561, 565 (Tex.Civ.App.-El Paso 1913, writ ref'd).

[335] TEX.PROP.CODE § 5.023 provides "(a) Unless the conveyance expressly provides otherwise, the use of "grant"

of the words "grant" or "convey" in a transfer of a fee simple estate, unless the express terms of the conveyance negate that implication.[336] Specific exceptions in most deeds do not usually mention the implied covenant against encumbrances. The covenant against encumbrances is distinct from a warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed.[337] Such a covenant is automatically breached upon the execution and delivery of the deed if there encumbrances that affect title to the land.[338] Thus, a disclaimer should be worded broadly enough to disclaim both the warranty of title and the covenant against encumbrances. One might argue from the fact that because covenants of quiet enjoyment and of warranty are virtually identical in operation, whatever constitutes a breach of one covenant is a breach of the other, that the same rule is applicable to the general covenant of title and the statutory implied covenant against encumbrances.[339] The argument should fail. The implied covenant against encumbrances is created by statute which expressly states that "An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance."[340] Therefore, the suggested Mother Hubbard subject-to clause makes the grant subject to implied covenants against encumbrances.

13.c The Subject-to Clause – Disclaimer Clause

It is strongly recommended that this disclaimer clause be appended to either the specific or broad form subject-to clause. References in a subject-to clause to an existing lease have an inherent danger---lease revivor. Regardless of whether the specific subject-to clause suggested by Forms Paragraph 12.a or the Mother Hubbard subject-to clause suggested in Forms Paragraph 12.b is selected, Forms Paragraph 12.c is suggested to assure that by mention of some instrument in the chain of title (most often as oil and gas lease) the subject-to clause does not become an acknowledgment or ratification, adoption or revivor of any expired or terminated interest. There is case law which holds that a subject-to clause, in ordinary usage, will not "even hint at the creation of affirmative rights."[341] But there is also case law that seems to indicate that a mention of an oil and gas lease may revive it. In *Kokernot v. Caldwell*[342] the court of appeals said that "'Subject to' in its ordinary sense means 'limited by' or 'subordinate to' and does not have the effect of creating any affirmative rights.... In conveyances, "subject to" is a term of qualification and does not create new interests." But in *Loeffler v. King*[343] the court of appeals held that revivor occurred as a result of a descriptive clause in a deed that stated "It is distinctly understood and herein stipulated that said land is under an Oil and Gas Lease providing for a royalty of 1/8 of the oil and certain royalties or rentals for gas and other minerals, and that Grantee herein shall receive 1/12th of the royalties and rentals provided for in said lease; but he shall have 1/12th part of the annual rentals paid to keep said lease in force until drilling is begun." The Fort Worth Court of Appeals held that the phrase "that said land is under an oil and gas lease" alone did not make for ratification of the lease. In a decision which sows confusion into use of the terms "ratified" and "revived," the Texas Supreme Court reversed the Court of Appeals and held that by the execution and acceptance of the royalty deed the grantees "ratified and gave new life" to the lease.[344] The Court also uses the terms "ratified and adopted."[345] The terms "revived" or "revivor" is not mentioned in the cases, yet that is the effect because a terminated oil and gas lease cannot be ratified or adopted. Nor are the words "except" or "subject to" used in these cases; nevertheless, the revivor of an oil and gas lease occurred by its very mention in a deed. The subject-to clause by its very nature requires mention of such matters. On the other hand, the courts have been reluctant to find revivor from fuzzy language.[346] A recent case held that a special warranty deed which provided that the conveyance of the property was subject to "[a]ll valid and subsisting, outstanding and duly recorded oil and gas leases, which are vested in parties other than Grantor as of the date hereof," but which did not identify any valid and

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or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns: (1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and (2) that at the time of the execution of the conveyance the estate is free from encumbrances. (b) An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance."

[336] *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 448, 453 (1947).

[337] *Id.*

[338] *City of Beaumont v. Moore*, at 156 S.W. 565.

[339] 21 Corpus Juris Secundum, Covenants, Section 48, p. 334.

[340] TEX.PROP.CODE § 5.023(b).

[341] *Cockrell v. Texas Gulf Sulphur Company*, 157 Tex. 10, 299 S.W.2d 672 (Tex. 1957).

[342] 231 S.W.2d 528, 531 (Tex.Civ.App.-Dallas 1950, writ ref'd).

[343] 228 S.W.2d 201 (Tex.Civ.App.-Fort Worth 1950), rev'd 236 S.W.2d 772 (Tex. 1951).

[344] *Loeffler v. King*, 149 Tex. 626, 236 S.W.2d 772, 774 (Tex. 1951).

[345] *Id* at 775.

[346] See a compendium of cases on revivor discussed in *Westbrook v. Atlantic Richfield Co.*, 502 S.W.2d 551 (Tex. 1973).

subsisting leases nor refer to any specific leases did not revive a lease.[347]

In a well researched and reasoned decision the Amarillo Court of Appeals based revivor on intent of the parties.[348] The lessee contended that a lease had been revived through the execution of documents "specifically acknowledging and agreeing that the gas lease was . . . valid and subsisting . . . . " The Amarillo Court of Appeals noted that revivor was created by the subsequent execution of a formal document, even to a third person, recognizing in clear language the validity of a lifeless deed or lease.[349] The Amarillo Court of Appeals said that encompassed within revivor is the requirement that the document supposedly reviving the lease expressly refer to the lease, and that the document clearly evince an intent to grant a new estate in land or to revive the old one.[350] Conversely, the Court said that a casual reference to an earlier lease does not show that intent where the reference is made for some reason unrelated to an intent to reinvest the lessee with an estate. The Amarillo Court of Appeals then examined the various types of instruments which might contain words of revivor, including division orders, royalty transfer or payment orders, and royalty deeds. With regard the latter, the court noted the language that the conveyance was "'subject to all prior, recorded reservations and conveyances of oil, gas, or other minerals, and all valid, recorded oil, gas and other mineral leases'" did not accomplish a revivor. The court distinguished *Loeffler v. King* by noting that the *Loeffler* document contained the statement that "[i]t is distinctly understood and herein stipulated that said land is under an Oil and Gas lease . . . providing for a royalty.... " The Amarillo court said "The royalty deed before us lacks such terminology, nor does it mention the particular lease to which the deed is subject. Moreover, a plain reading of the passage "subject to . . . all valid, recorded oil, gas and other mineral leases" simply evinces that the parties recognized that the conveyance was subject to any valid lease that may exist. The concept of "may exist" does not equate with "does exist" and, consequently, the words fall short of not only stating that the parties agreed to revive the lease, but also of illustrating that they intended to revive it.[351]

14. Term Limitations

Limits on the term of a grant of minerals or royalty can take the form of a life tenancy, a fixed period of time, a term linked to an oil and gas lease, or any other measure of time. A remainder estate is a vested estate from the moment it is created.[352] However, one of the significant problems dealt with in this section is the vested remainder in unascertainable remaindermen and the executive right. This section also deals with pooling powers, and preservation of bonus, and royalty.

When the client wants to reserve a life tenancy in royalty the only issue for discussion is who will own the pooling power that accompanies the royalty? The attorney must remember that a grantor may convey a life estate and remainder interest to anyone, but a grantor reserving a life estate may not convey the remainder by reservation to a third party; the reserved interest vests in the grantee at the death of the grantor.

A conveyance of minerals to a grantee for life with remainder to the grantee's heirs was ineffective under the common law doctrine known as The Rule in Shelley's Case. The rule came to be limited to the word “heirs” and other descriptive words such as “heirs of the body,” “issue,” and “children” were distinguished as words of purchase, rather than limitation, which took the deed out of the rule.[353] Words designed to take the conveyance out of the Rule in Shelley’s Case also had the effect of eliminating adopted children as heirs.[354]

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[347] *Cannon v. Sun-Key Oil Co., Inc.*, 117 S.W.3d 416 (Tex.App.—Eastland 2003).

[348] *Anadarko Petroleum Corporation v. Thompson* 60 S.W.3d 134 (Tex.App.-Amarillo 2000), rev’d 94 S.W.3d 550 (2002).

[349] *Citing Westbrook v. Atlantic Richfield Co.*, 502 S.W.2d 551, 555-56 (Tex. 1973) (quoting *Hastings v. Pichinson*, 370 S.W.2d 1, 4 (Tex.Civ.App.-San Antonio 1963, no writ)); *Exploracion De La Estrella Soloataria Incorporacion v. Birdwell*, 858 S.W.2d 549, 554 (Tex.App.-Eastland 1993, no writ).

[350] *Citing* Bruce Kramer, The Temporary Cessation Doctrine: A Practical Response to an Ideological Dilemma, 43 Baylor L. Rev. 519, 543 (1991); H. Williams, C. Meyers, P. Martin & B. Kramer, Oil and Gas Law § 340.04, p. 256.

[351] *Id*. at 774.

[352] *Rust v. Rust*, 147 Tex. 181, 211 S.W.2d 262, 267 (Tex.Civ.App.-Austin), aff'd, 147 Tex. 181, 214 S.W.2d 462 (1948); *McGill v. Johnson*, 799 S.W.2d 673, 675 (Tex. 1990). In *Rust*, the Austin court of appeals held that a devise by A to B for life with remainder at his death to C creates a vested remainder in C upon the death of A, subject to B's life estate, and the words "at his death" refer to the time when the right of possession begins, not when the remainder vests. *Rust*, 211 S.W.2d at 267, aff’d at 147 Tex. 181, 214 S.W.2d 462 (1948). Accord *McGill v. Johnson*, 799 S.W.2d 673, 675 (Tex. 1990).

[353] *Hancock v. Butler*, 21 Tex. 804, 812-813 (1858); *Simonton v. White*, 93 Tex. 50, 53 S.W. 339, 340-341 (1899); *Finley v. Finley*, 318 S.W.2d 478, 482 (Tex.Civ.App.-Eastland, 1958), error ref. n.r.e., 159 Tex. 582, 324 S.W.2d 551, 552 (1959).

[354] There are many more cases dealing with wills and adopted children, than deeds, but the principles are the same. Adopted children were not presumed to be considered "children" of their adoptive parents in wills executed by third persons, unless the intent to include adopted children was expressed in the will or apparent through circumstances surrounding the execution of the will. *Hoch v. Hoch*, 140 Tex. 475, 481-82, 168 S.W.2d 638, 641 (1943). Courts found avenues around this rule through the sort of interpretation and construction of wills found in *Penland v. Agnich*, 940 S.W.2d 324 (Tex.App.-Dallas 1997 writ denied)(“In choosing the term "lawful issue," Penland rejected other terms, such as "born"

Deeds signed before January 1, 1964 should be scrutinized for violation of the Rule in Shelly's Case, but the rule is abolished after that date by statute.[355] Mention is made of the Rule in Shelly's Case to assure the attorney drafting a deed with a life estate in a grantee and the remainder in the grantee's heirs that such a succession is no longer invalid.

14.a Term Limitations – Grants of life estate in minerals

When the client wants to grant or reserve a life estate in minerals, the attorney must discuss these issues with the client: (a) whether the remainder interest should be distributed on a per stirpes or per capita basis, (b) if the remainder is to be distributed per stirpes, where will the executive right be placed during the life tenancy to avoid problems leasing the minerals; (c) may the life tenant consume all or any part of the bonus and royalty appurtenant to minerals, and (d) if the life tenant must preserve bonus and royalty for the remaindermen, what accounting standards, if any, will be applied to the life tenant?

There are, presumably, good reasons for a parent to want to leave a life estate rather than a fee interest to a child. The life estate is a vehicle that may carry the interest to the grandchildren no matter how spendthrift the son or daughter may be, or the life estate may be vested in a spouse with remainder to children with the expectation that if the spouse remarries the children's inheritance will be safe, or it may secure to a sibling the benefits of the minerals or royalty before vesting in the next generation.

The forms granting a life estate include a form that is successive, that is, each life tenant takes upon the death of the preceding life tenant. There is no need to add that the second life tenant must survive the first; that is implied from the grant. The forms offer a choice of remaindermen: "Grantor and Grantor's heirs per stirpes," **or "**Grantee's heirs per stirpes." The word "heirs" now includes adopted children.[356] The term "per stirpes" means a lineal succession of interest in property.[357] The term "heirs" and "per stirpes" are coupled in these forms as an express method of dividing the property among the lineal descendants (natural or adopted) of the life tenant.[358] If the word "heirs" is used without the defining term "per stirpes" the result may be to include not just children, but a spouse,[359] or the grant of the remainder interest may become a per capita grant. For example, a grant to "John Doe, Jr., with remainder to his children, John Doe, III and Sally Doe," without more, may be argued to be a per capita grant of the remainder. Of course, circumstances surrounding the execution of the deed may support a contrary finding,[360]

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and "of the body," that have commonly been construed to exclude adopted persons."). *Citing Ortega v. First RepublicBank Fort Worth*, 792 S.W.2d 452, 454 (Tex. 1990) (op. on reh'g), *Vaughn v. Vaughn*, 161 Tex. 104, 110, 337 S.W.2d 793, 797 (1960), *Nail v. Thompson*, 806 S.W.2d 599, 602 (Tex.App.-Fort Worth 1991, no writ), and *Tindol v. McCoy*, 535 S.W.2d 745, 749-50 (Tex.Civ.App.-Corpus Christi 1976, writ ref'd n.r.e.), all cases involving grants or bequests using the word "born" as applied to heirs. ("children born to his body" excluded adopted children).

[355] The rule was adopted in Texas as a part of the English Common Law. See *Hopkins v. Hopkins*, 103 Tex. 15, 122 S.W. 15 (Tex. 1909). It was abolished by the Legislature, Acts 1963, 58th Leg., Ch. 199, Sec. 1, p. 542, eff. Jan. 1, 1964, Art. 1291a, Vernon's Annotated Civil Statutes. Important cases decided under the rule include *Sybert v. Sybert*, 152 Tex. 106, 254 S.W.2d 999 (Tex. 1953); *Finley v. Finley*, 318 S.W.2d 478 (Tex.Civ.App.-Eastland 1958), writ refused by per curium opinion, 159 Tex. 582, 324 S.W.2d 551 (Tex. 1959); *Dallmeyer v. Hermann*, 437 S .W.2d 367 (Tex.Civ.App.-Houston (14th) 1969, no writ). The rule, as now codified in TEX. PROP. CODE Section 5.042 remains in effect as to conveyances "taking effect" prior to January 1, 1964.

[356] TEX. FAM. CODE § 162.017 provides that an order of adoption creates the parent-child relationship between the adoptive parent and the child for all purposes and that an adopted child is entitled to inherit from and through the child's adoptive parents as though the child were the biological child of the parents. Subsection (c) states that "The terms 'child,' 'descendant,' 'issue,' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise." Likewise, TEX. PROB. CODE § 40 provides that "…for purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption." While this statutory language applies to wills and inheritance, the same results are reached through equity and rules of construction employed by courts addressing the same issue.

[357] "The term 'per stirpes' denotes the type of distribution required by the common law of descent, each generation representing its parent and taking only what its parent would have taken if living.'" *Kritser v. First National Bank of Amarillo*, 463 S.W.2d 751, 757 (Tex.Civ.App.-Amarillo 1971).

[358] *Kritser v. First National Bank of Amarillo, supra.*

[359] *In re Glasco*, 619 S.W.2d 567, 571 (Tex.Civ.App.-San Antonio 1981)("Heirs" denote those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate."). *Citing* TEX.PROB.CODE ANN. § 3(o) (Vernon 1956).

[360] Such a contention was made in *Hill v. Wallace*, 253 S.W.2d 464, (Tex.Civ.App.-Austin 1952) but the court rejected it, looking to the circumstances surrounding the making of a will to conclude that naming beneficiaries without more did not necessarily make the bequest per capita.

but "findings" and declaratory judgments are what these forms are designed to avoid. The use of the term "share and share alike" is not recommended for use with the term "per stirpes," as it is a per capita term[361] but scriveners continue to use it in a per stripes context.[362] A per capita grant requires that the remainderman survive the life tenant to take a remainder share and excludes a predeceasing remainderman's heirs from that share. Scriveners who use the term "share and share alike, per stirpes" usually mean "in equal shares" with each share to the lineal succession.

The selection of per capita or per stirpes is a critical beginning step in the creation of the term grant or reservation. While the per capita selection avoids the problem of unascertainable or contingent remaindermen when it comes to oil and gas leasing, it is not common to see a per capita remainder. The more common per stirpes remainder raises the problems of oil and gas leasing.

At the beginning of this section a suggestion was made that the attorney discuss with the client these issues: (a) whether the remainder interest will be distributed on a per stirpes or per capita basis, and (b) if the remainder estate is to be distributed per stirpes, where will the executive right be placed to avoid problems leasing the minerals. Here is why that discussion is so important. An oil and gas lease must be executed by all interest owners in land. The lessee is free to take a lease from only the life tenant, of course, but none will do so because failure to obtain a lease from a remainderman will create a co-tenancy between the lessee and the remaindermen.[363] Thus, a mineral conveyance to the grantee for life with remainder to heirs per stirpes will require that the heirs ratify or join in the execution of the oil and gas lease.[364] In order to accomplish, the identity of the heirs must be ascertainable.

A remainder in a class described as "heirs per stirpes" or "children" or "heirs of the body" or "issue" will create a class of vested but contingent and unascertainable remaindermen and leasing under this circumstance will be possible only through a receivership.[365] This is because the class may increase or change during the life tenancy. In other words, until the life tenant dies, there may be more children born or a child may die leaving heirs. Ratification of the oil and gas lease by existing remaindermen will not solve the problem of contingent remaindermen. This state of affairs will require a receivership. Even where the life tenant is elderly and the remaindermen are children who no longer expect additional siblings to enter the class, the contention that the life tenant is no longer capable of bearing more children does not resolve the problem for the common law allows no such presumption; to the contrary, it entertains the presumption of the "fertile octogenarian."[366]

Surprisingly, this was and continues to be a rather common problem, created in no small measure by wills (some of them holographic) as well as by deeds. The solution to the problem, as stated above, is a receivership. In 1949 the Texas Legislature enacted Article 2320c, Texas Revised Civil Statutes, which provided that upon application of a person with a vested, contingent, or possible interest in land subject to

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[361] *Vogt v. Meyer*, 169 S.W.2d 745 (Tex.Civ.App.- Amarillo, 1943, no writ)(the term "share alike" construed to give five granddaughters an equal share with four daughters). The words 'to be equally divided and to share and share alike' indicate a clear intention to divide an estate equally among the persons or parties mentioned. *McMullen v. Block*, 168 S.W.2d 667 (Tex.Civ.App.- Austin, 1943, error ref., w.o.m.).

[362] See *Gutierrez v Rodriguez*, 30 S.W.3d 558 (Tex.App.- Texarkana 2000) and *Jackson v. Stutt*, 737 S.W.2d 597 (Tex.App.-Fort Worth 1987) in which the instruments were worded "…share and share alike, per stirpes."

[363] *MCZ, Inc. v Smith*, 707 S.W.2d 672, 676 (Tex.Civ.App.- Houston (1st Dist.) 1986, writ ref'd n.r.e.)("Both parties acknowledge the general proposition stated in, that neither a life tenant nor a remainderman can alone execute a valid mineral lease without the joinder of the other ... *Kemp v. Hughes*, 557 S.W.2d 139, 142 (Tex.Civ.App.-Eastland 1977, no writ). However, the proposition is not the equivalent of a holding that a lease by either the life tenant or the remainderman, without the joinder of the other, is a nullity. In effect, the execution of a lease of mineral conveyance by either the life tenant or the remainderman merely effects a transfer to the lessee or transferee of the veto power of the grantor on development by the other. A lessee of the life tenant alone may not develop the minerals, but he may prevent development by the owner of the future interest or by his lessee.").

[364] If leasing is possible at all under this scenario, rentals payable under the lease are treated as income, and bonus and royalty are treated as corpus to be saved and preserved by the life tenant. *Mitchell v. Mitchell*, 151 Tex. 1, 244 S.W.2d 803 (Tex. 1951); *Davis v. Bond*, 138 Tex. 206, 158 S.W.2d 197 (1942); *Hamilton vs. Clyde*, 405 S.W.2d 850, (Tex.Civ.App.- Waco, 1966), reversed on other grounds, 414 S.W.2d 434 (Tex. 1967); *Johnson v. Messer*, 437 S.W.2d 643 (Tex.Civ.App.- Amarillo, 1969, writ ref'd n.r.e.). The theory behind this case law is that the bonus is the consideration for the "sale" and royalties are a substituted corpus. Both must be preserved for the benefit of the owner of the future interest until it becomes possessory.

[365] *Kemp v. Hughes*, *supra*.

[366] *Frost National Bank of San Antonio v. Newton*, 554 S.W.2d 149 (Tex. 1977)(holding that the common law "fertile octogenarian rule," that is, that a person is conclusively presumed to be able to have issue as long as he or she is alive, is now experiencing a trend toward relaxing the doctrine so as to allow rebuttal of the presumption, *Citing* RESTATEMENT OF PROPERTY § 274 (1940) which recognizes the presumption of fertility but recognizes that "this presumption can be rebutted by relevant evidence as to such person and by past experience concerning births to persons of like age and physical condition.). But it must again be pointed out, the forms are meant to keep people out of court, not guide them through a declaratory judgment action.

a contingent future interest, a district court of the county in which all or a part of the land is located may appoint a receiver responsible for development of minerals through leasing with the obligation to report to and account to the court in connection with development of the mineral estate.[367] The receiver appointed under this law may make leases, receive and hold bonus and royalty, and invest these funds to provide income to the life tenant and preserve the corpus until the remaindermen are entitled to possession of their vested interest. It is good law, but it involves attorney's fees, receiver fees, accountings, applications to lease, and worst of all, the farthest thing from the mind of the person who drafted the instrument was to require an oil and gas receivership. The per stirpes grant does not, however, have to create a receivership. The solution, as suggested in Forms Paragraph 14.a & b, is to fix the executive right with certainty. The language for the vested executive right is found at Forms Paragraph 11.a. The executive right may be vested in the grantor (assuming the life estate is based on the grantor's life rather than some third person), or it may be vested in a grantee (even if the grantee is the life tenant), or in a class that is assured of outlasting the life tenancy, or in a financial institution, using the language of Forms Paragraph 11.a (4).

The per capita remainder grant is not a solution to the problem of unknown and unascertainable remaindermen. First, the grantor of a life estate will probably not want the grant to vest in remaindermen per capita. That scenario may disinherit lineal descendants. Second, if a per capita remainder is required, the language would be similar to this:

> "with remainder to vest in Grantee's children, John Doe, III and Sally Doe, or the survivor of them, per capita and not per stirpes."

The remainder goes to the last man standing, but if all of the remaindermen die before the life tenant, that puts the remainder into the same limbo created by unknown and unascertainable heirs. Are the heirs of all the named remaindermen to take, or only the heirs of the "last man standing? Who are the heirs? Are they contingent?

Nevertheless, if the per capita grant is used, the use of the phrase "and not per stirpes" is recommended in light of case law that treats the term "survivor" as both a per capita and a per stirpes grant. The term "survivors" has been held to mean a class of persons who, if each of them survived the life tenant, took on a per capita basis.[368] But this interpretation of the term "survivor" or "survivors of them" was rejected in *White v. Moore*[369] in which the Texas Supreme Court construed a will which provided "I hereby give, devise and bequeath all of my property, real, personal and mixed to my six children ... and to the survivor or survivors of them at the time of my death, share and share alike...." The court held that the language was actually per stirpes language.[370] The court also held that if it were found that the testator did intended to disinherit her grandchildren, the anti-lapse statute would not prevent this result.[371] If the grantor truly wishes to make the remainder grant a per capita grant with unambiguous language, the suggested form language "…or the survivor of them, per capita and not per stirpes," accomplishes this by emphasizing the "per capita" nature of the grant and by excluding the possibility of a per stirpes interpretation.

In summary, a remainder in minerals may be vested in a life tenant per stirpes or per capita. Either may require a receivership to in order to make leases and hold bonus and royalty for contingent remaindermen. The problem may be avoided by fixing the executive right pursuant to Forms Paragraph 11.a which provides a number of options as to ownership of the executive right. Though not a part of the forms, the executive right may also be placed into trust. The forms pertaining to the executive right conclude with a definition of the right, although this is not deemed essential to a deed.[372]

14.b. Term Limitations –Reservations of life estate in minerals

The comments in Paragraph 14.a are equally applicable to reservations, but one further statement is necessary. While a deed may *grant* a life estate with remainder to anyone, a deed may not *reserve* a remainder to anyone.[373] Upon the death of the life tenant, the reserved life estate automatically vests in the remaindermen.[374]

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[367] That statute is now codified as Section 64.092, TEXAS CIVIL PRACTICE AND REMEDIES CODE.

[368] *Gregg v. Jones*, 699 S.W.2d 378, 379 (Tex.App.-San Antonio 1985, writ ref'd n.r.e.).

[369] 760 S.W.2d 242 (Tex. 1988).

[370] The court could not accept that the testator intended to disinherit her grandchildren. "We cannot hold, as a matter of law, that this language unambiguously expresses an intention by the testator to disinherit her grandchildren under the will." The court sent the case back to the district court to hear evidence on the ambiguous will.

[371] *Id*. "This statute [TEX.PROB.CODE ANN. § 68 (Vernon 1980)] provides: Where a testator shall devise or bequeath an estate or interest of any kind by will to a child or other descendant of such testator, should such devisee or legatee, during the lifetime of such testator, die leaving children or descendants who shall survive such testator, such devise or legacy shall not lapse by reason of such death, but the estate so devised or bequeathed shall vest in the children or descendants of such legatee or devisee in the same manner as if he had survived the testator and died intestate....We hold that our statute does not override survivorship provisions intended as such...."

[372] Forms Paragraph 11.a(5).

[373] See discussion of reservations in favor of strangers to the transaction at Commentary Paragraph 9.b.

[374] *Id*.

14.c. Express agreement pertaining to bonus and royalty

This set of forms allows the life tenant to consume bonus and royalty. If the deed is silent, bonus and royalty will be treated as corpus to be preserved for the remaindermen. [375] An attorney should never create a life estate in a deed or a will without advising the client that the life tenant does not have the right to make an oil and gas lease without joinder of the remaindermen nor the right to consume bonus and royalty.[376] The law that bonus and royalty are considered corpus to be preserved by the life tenant (who will receive only the interest income it generates) may be a very disappointing revelation and may generate some very difficult questions from the client (or the client's children) to attorney. The cautious attorney will point out to the client that, unless otherwise handled, the life tenant (whether a spouse or children) will not receive the lion's share of lease benefits. The solution is to incorporate an express agreement within the conveyance that gives the life tenant the right to consume all or a part of the bonus and royalty. The first form under Forms Paragraph 14.c---that the life tenant shall have the right to receive and consume the bonuses and royalties---is the most common form and sufficient for this purpose. The second form, dividing bonus and royalty between the life tenant and the remainderman, returns the attorney drafting the deed to the problems of contingent or unascertainable remaindermen discussed in Commentary Paragraph 14.a above.

14.d Grant of life estate in royalty

14.e Reservation of life estate in royalty

These two sets of forms lay out the basic language of a grant and a reservation of a life estate in royalty. The forms suggest alternative language for royalty fractions and fractions of royalty. Unlike minerals, a grant or reservation of a life estate in royalty presents no issues that would require a receivership. The remainder interest, like the life estate, is nonparticipating and the owner of the royalty has no executive right.

14.f Other term limitations

This set of forms makes the term of the grant or reservation concurrent with the term of an oil and gas lease. This type of limitation is usually applied to reservations of royalty within a deed. There is no need to worry about pooling because the term of the interest is concurrent with the term of an existing lease. The most common issue involved in this type of grant or reservation is when does it expire?

When the term limitation of a grant or reservation of a life estate is tied to production (i.e. ten years, and for so long thereafter as oil, gas or other minerals is produced from said land, or lands pooled therewith,...) the same questions and issues that are presented by the term clause of the typical oil and gas lease arise. Does "production" mean "production in paying quantities" and what happens if there is a temporary cessation of production? Does force majeure play a role? The whole body of lease termination law is engrafted into the deed. The oil and gas lease is both a contract[377] and a conveyance of minerals,[378]just as the deed is a contract[379] and conveyance of a right in a mineral or royalty estate. If the term limitation in the deed is predicated upon the same events and results as an oil and gas lease, it would be reasonable to expect the same legal principles to apply. For example, does the term "produced" in the deed mean "production in paying quantities" as it does in the oil and gas lease?[380]. *Garcia v. King* established that the clause in an oil and gas lease that the lease will continue after the primary term "for so long thereafter as oil, gas and other minerals is produced" meant paying production, or production in paying quantities.[381] This meant that the well could not be held by the operator for speculation with little or no production. *Clifton v. Koontz* established that without a specific definition of the time period to measure production-in-paying-quantities, it was measured over a reasonable period of time and that other "savings clauses," such as continuous operations, did not come into effect until production in paying quantities had ceased.[382] If the term in a deed is based on "production" these same rules should apply, and so should the rules on temporary cessation of production. Texas courts have repeatedly found that a "temporary cessation" for a "reasonable period of time" will not terminate a lease[383] unless the lease defines the period for which

[375] The only exception to this rule is the Open Mine Doctrine which, for the purposes of this article, is considered inapplicable. Woodward, *The Open Mine Doctrine in Oil and Gas Cases*, 35 Tex.L.R.. 538 (1957).

[376] *MCZ, Inc. v Smith*, 707 S.W.2d 672, 676 (Tex.Civ.App.-Houston (1st Dist.) 1986, writ ref'd n.r.e.).

[377] *Browning Oil Company, Inc. Luecke*, 38 S.W.3d 625 (Tex.App.-Austin 2000) ("An oil and gas lease is a contract and must be interpreted as one."). *Citing Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 503 (Tex.App.-Waco 1997, writ denied).

[378] *W.T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929); *Avis v. First National Bank of Wichita Falls*, 141 Tex. 489, 174 S.W.2d 255 (1943); *Short v. W.T. Carter & Brother*, 133 Tex. 202, 126 S.W.2d 953 (1938).

[379] *Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982).

[380] The two leading cases on production in paying quantities are *Garcia v. King*, 139 Tex. 578, 164 S.W.2d 509 (1942) and *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (Tex. 1959).

[381] *Garcia*, 164 S.W.2d at 513.

[382] *Clifton*, *supra* at 690.

[383] *Midwest Oil Corp. v. Winsauer*, 159 Tex. 560, 323 S.W.2d 944, 946 (Tex. 1959); *Guinn Investments, Inc. v. Ridge Oil Company et. al.*, No. 02-00-055-CV, slip op. at 10 (Tex. App. Fort Worth March 15, 2001, no pet. h.).

production-in-paying-quantities is to be measured.[384] Cessation of production for the number of consecutive days stated in the deed's term limitation clause will automatically terminates the interest.[385] Attempting to incorporate oil and gas lease terms into a term limitation in a deed is both a formidable and unnecessary task and this article adapts the common practice of linking the term of the deed to the term of the lease without more, as suggested in Forms Paragraph 14.f.

The suggestion to use the term of a future oil and gas lease does present potential for abuse by the owner of the executive right---short term delay by the executive in leasing lands covered by a term interest soon to expire. The owner of the executive right may see a term royalty interest about to expire and defer negotiations or closing until the term interest has expired.[386] Finally, note that a term interest clause will need to have the habendum clause amended to strike the term "forever."

14.g Fixing the Pooling Power

It has been pointed out that a nonparticipating royalty interest carries with it the right to consent to pooling and that the holder of the executive right cannot bind the nonparticipating royalty to a pooling agreement.[387] This is true whether the nonparticipating royalty interest is a fee or term interest. The suggested forms at paragraph 14.g separate the pooling power from the nonparticipating royalty interest just as the forms suggested at Forms Paragraph 12.c do, the only difference being the addition of a term limitation. It suggested that the full text of Commentary Paragraph 12.c be consulted prior to inserting a provision on pooling powers into a deed.

15. Habendum

The statutory deed form's habendum clause uses the words "to have and to hold the above described premises…," by which is meant the property being conveyed to the grantee, whether it is surface, minerals, one of the rights appurtenant to the mineral estate, or a royalty interest. This is a modern, and limited definition of premises.[388] The habendum also lends itself to different succession descriptions, depending on the preference of the attorney drafting the language, such as:

- heirs or assigns (for individuals)
- successors and assigns (for entities)
- heirs, successors and assigns (common clause entities)
- heirs, successors, executors, administrators, assigns, legal representatives, etc. (older traditional long form)

There is no case law to suggest that choice of these phrases alone will create an ambiguity. The short clause "heirs or assigns" is sufficient for individuals, although it seems that "heirs, successors and assigns" is used more often. The word "successors" embodies the necessary succession language for entities such as corporations and, of course, the term "heirs" is omitted. Whenever there is a term limitation imposed on the grant the words "heirs or assigns" should be omitted from behind the name of the grantee in the habendum and warranty clauses. Note that a separate property recitation may be appended to the name of the grantee[389] and may also be included as a part of the habendum. Finally, the habendum flows into the warranty, if one is given with the deed.

16. Warranty

The Texas deed form statute states that "A covenant of warranty is not required in a conveyance" and "The parties to a conveyance may insert any clause or use any form not in contravention of law."[390] The warranty provides a cause of action for breach. If no express warranty is included in the deed, one is implied from the words "grant" or "convey".[391] Ridding the conveyance of a general warranty of title and the implied warranty against encumbrances requires an express disclaimer. The covenant of general warranty has been characterized as an agreement by the warrantor that upon the failure of the title which the deed purports to convey, either for the whole estate or part only, he will make compensation in money for the loss sustained. There are times when a party does not wish to give a warranty; when a disclaimer of warranty is sought. That should be resisted. The warranty does not necessarily assure the buyer's title, it assures the seller's title and, like all warranties, provides a basis for a claim of damages. Oil and gas is a valuable commodity, as a mineral in place and when severed, and its value will only increase over time, making the drafting of instruments of conveyance an important

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[384] *Natural Gas Pipeline Co. of America v. Pool*, 30 S.W.3d 639, 647 (Tex. App.-Amarillo 2000, pet. filed); *Bachler v. Rosenthal*, 798 S.W.2d 646, 650 (Tex. App.-Austin 1990, writ denied.).

[385] To the same effect as with an oil and gas lease--see *Bachle v. Rosenthalr*, *supra* at 650.

[386] *Comanche Land & Cattle Co. v. Adams*, 688 S.W.2d 914, 916 (Tex.App.-Eastland 1985, no writ)(owner of executive rights violated duty of utmost good faith when it purposely entered into agreement calculated to defeat rights of nonparticipating term royalty interest owners).

[387] Commentary Paragraph 12.c

[388] At common law, the term "premises" as it was used within a deed meant the granting clause, the naming of the grantor and grantee, the expression of consideration, and a description of the land conveyed. These could not be supplied by resort to other portions of the deed. The habendum clause served to define the estate granted. *Harris v. Strawbridge*, 330 S.W.2d 911, 912 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).

[389] See Forms Paragraph 6.a.

[390] *Id*.

[391] *Blanton v. Bruce*, 688 S.W.2d 908(Tex.Civ.App.-Eastland, 1985), *Citing* TEX. PROP. CODE Sec. 5.023.

task. A general warranty means "...that the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee, and that the property is free from encumbrances...and it is said to be the broadest and most effective covenant, and the only one in general use in Texas."[392] This statement is no longer altogether accurate, because there is now a statutory implied warranty against encumbrances that is distinct from the statutory warranty of title.[393]

17. Signature

The signature of the grantor should exactly conform to the name first used in the instrument as grantor at Forms Paragraph 2. There is no requirement that a grantee sign a deed. Examples of signatures are:

John Doe, Jr.

or

Doe Corporation
By: John Doe, Sr.
Title: President

or

John Doe, Jr.
John Doe, Jr.
Trustee of the John Doe, Sr. Testamentary Trust

or

John Doe Family Limited Partnership,
By Doe Corporation, Its General Partner
By: John Doe, Sr.
Title: President

18. Acknowledgment

An instrument may not be recorded if it is not acknowledged.[394] Various statutes and forms of acknowledgement are set out at 1 Texas Real Estate Forms Manual, State Bar of Texas, Chapter 4 (1999).[395] The name of the grantor in the acknowledgment should exactly conform to the name first set out in the instrument as grantor. The short form acknowledgement may be used for natural persons, natural person acting by attorneys in fact, partnerships, corporations, public officers, trustees, executors, administrators, guardians or other representatives.[396] Acknowledgements for an entity not listed above should use the long form certificate. Some county clerks now refuse to accept embossed seals and require ink-stamped seals. Many notaries do not maintain records of acknowledgments. It is recommended that a law office keep a bound book for acknowledgments as required by statute.[397]

19. Special Conveyance - Partition of Surface Reserving Minerals

Under common law, a partition was not a conveyance or grant of interest in real property, it was simply a division of the property in kind between two or more owners. However, the deed records are full of "Partition Deeds" which have, by custom and usage, made a partition at least look like a conveyance. The same result can be accomplished by an agreement duly

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[392] *Compton v. Trico Oil Co.,* 120 S.W.2d 534, 537 (Tex.Civ.App.-Dallas 1938, error refused).

[393] A mere disclaimer of warranty of title will not reach the implied covenant against encumbrance provided by TEX.PROP.CODE ANN. § 5.023(a)(2). The covenant is implied from the use of the words "grant" or "convey" in a transfer of a fee simple estate, unless the express terms of the conveyance negate that implication. *City of Beaumont v. Moore*, 146 Tex. 46, 202 S.W.2d 448, 453 (1947). The covenant against encumbrances is distinct from a warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed. *Id.* (Moore's mineral royalty interest burdened by the City's use of the surface of the land as an airport); *Texas & Pac. Ry. Co. v. El Paso & N. E. R.R. Co.*, 156 S.W. 561, 565 (Tex.Civ.App.-El Paso 1913, writ ref'd). Such a covenant is automatically breached upon the execution and delivery of the deed if there are encumbrances that affect title to the land. *City of Beaumont*, 146 Tex. at 53, 202 S.W.2d at 453; *Texas & Pac. Ry. Co.*, 156 S.W. at 565. Thus, a disclaimer should be worded broadly enough to disclaim both the warranty of title and the covenant against encumbrances.

[394] TEX. PROP. CODE ANN. §§ 11.004(a)(1), 12.001 (Vernon 1999).

[395] The long form of an acknowledgment is set out in the TEXAS CIVIL PRACTICE AND REMEDIES CODE. TEX.CIV.PRAC.REM. CODE § 121.007 states that "The form of an ordinary certificate of acknowledgment must be substantially as follows:

"The State of __,
"County of ____,

"Before me ___ (here insert the name and character of the officer) on this day personally appeared ___, known to me (or proved to me on the oath of ___ or through ___ (description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed. (Seal) "

Given under my hand and seal of office this ___ day of ___, A.D., ___."

[396] TEX.CIV.PRAC.&REM.CODE ANN. § 121.008 (Vernon 2004). The short form is:

"The State of __,
"County of ____,
The foregoing instrument was acknowledged before me by ___ (in the capacity stated).

_____
Notary Public-State of Texas
Date___

Author's note--I also add this language:

Note: Please use an ink-stamp notary seal. Embossed or impression seals are not accepted for recording by some county clerks.

[397] TEX.GOV'T CODE § 406.014.

executed and acknowledged and filed of record. The forms set out a partition deed simply for the convenience of the practitioner who knows that even though a partition is a not a conveyance, it is an instrument of custom and usage that serves the purpose of setting out who now takes what in kind from now on.

20. Special Conveyance - Estate or Trust Distribution

Forms Paragraph 20 is a device which may be useful to an attorney handling the termination of a long-term estate or trust. A decedent's estate which is administered for a number of years by an executor who retains control of the assets presents two problems: first, was the executor empowered to sell real property and make oil and gas leases without court order, and second, have heirs who should have taken under the estate died during administration leaving successors who must be identified as a matter of record? The second problem also affects long term trusts coming to termination. In both situations, the ultimate distributees of estate assets and trust corpus can be determined through probates filed of record, but this requires the services of a title attorney. Oil and gas companies do not retain title attorneys to figure out their royalty owners' decimals of interest. It is generally the royalty owner's burden to demonstrate his or her entitlement to royalty and the share. Even when all of the probate information is recorded and assembled for the benefit of a division order analyst, that person is often unable to come to a decision who the new royalty owners should be and what percentages of royalty should be credited to them in a transfer order. Many title analysts who deal with oil and gas properties do not accept the last will and testament as the final document in this regard. They argue (and perhaps rightfully) that the administrator of the estate may have sold the minerals during the course of administration, or that a deed must be filed of record in order to evidence the conveyance from the decedent's estate to the heirs. One can argue back that the deed of distribution is, as a matter of record, totally unnecessary. The TEXAS PROBATE CODE provides that upon the death of a person, his or her estate immediately vests in heirs at law or under will.[398] But as a matter of practical necessity, it is a wonderful tool because it meets the needs of the division order analyst and allows royalty to be transferred and calculated simply and efficiently.

The attorney should not attempt to draw the instrument unless he or she is certain of the interests to be distributed. Where original heirs under the will or trust have died, the instrument should recite the death and succession of interest much like an affidavit of heirship. Each of the grantees should ratify the interests being distributed to the grantees and thereby all may be bound to the distribution of the estate or trust corpus. The argument can be made that, as to an estate, the same result may be accomplished by the closing report for independent administrations[399] or the final account closing the estate,[400] and this is true. Clearly, the deed of distribution is ancillary to the closing report and signed receipts from the distributees and the closing affidavit of the executor, and they should be consistent with each other. An estate or trust deed of distribution should not change the chain of title running through the estate or trust, it should only summarize it for the benefit of those who cannot or will not spend the time, money and effort to ascertain owners and interests from the official records of the probate case.

V. CONCLUSION

As the old saw goes, "lawyers publish their mistakes."[401] Published Texas case law on conveyances of minerals and royalty has grown from a fertile bed of mistakes, inaccuracies, ambiguities, misuse of vocabulary, and lack of knowledge of oil and gas law. This is the backdrop for the forms and commentary suggested in this article. While experience is helpful in drafting instruments, resort to forms in mineral conveyancing is usually necessary. Most attorneys may never see or need many of the variances and situations discussed in this article, but the basics are here, together with the exotics. There is no doubt that an organized group of oil and gas specialists could produce a similar work with far superior organization. But the goal is the same---the perfect deed[402]---and this work is offered toward that goal.

[398] TEX.PROB.CODE Sec. 37.

[399] TEX.PROB.CODE Sec. 151.

[400] TEX.PROB.CODE Sec. 405.

[401] The complete maxim is: "Doctors bury their mistakes, lawyers publish theirs."

[402] The perfect deed is one that will forever reside in the official public records without objection or curative requirements from landmen and title attorneys, safe from the pleadings of trial lawyers, assuring merchantable title to the grantee.

Appendix 1
The Imperfect Deed

How many mistakes can possibly be incorporated into a mineral deed? The following deed is offered to test your knowledge.

Hypothetical Case 7. John Doe and Janey Doe, husband and wife, own the surface and an undivided 3/4 of the minerals in Section 100, Block 1, AB&C Survey, Bravo County, Texas. John Doe desires to convey his undivided one-half interest community property interest in to his children for life with remainder to their children, reserving a full 1/64 royalty for life estate with remainder to his wife. John Doe wants to control leasing while he is alive and he wants all of the bonus payments. The land is subject to an oil and gas lease that has produced sporadically for several years with numerous cessations of production of over 90 days. The production is so poor that John Doe will give the kids the rest of the 3/16 royalty payable under the lease less his reserved 1/64. Section 100 is tucked in the middle of other lands and the only access to it is over trails across Sections 99 and 98, that also belong to Mr. and Mrs. Doe. Bravo Creek flows through Section 99 and Mr. Doe does not want roads crossing Bravo Creek nor an oil and gas well near his 80-acre homestead in the south half of the northwest quarter of Section 100. Because John Doe isn't sure who owns the outstanding 1/4 of the minerals he does not want to give a warranty in the deed.

Deed

State of Texas
County of Bravo
Know All Men By These Presents:

That I, John Doe, of Bravo County, Texas, not joined herein by my wife for the reason that I am dealing with my undivided one-half community interest in the lands described herein, for the love and affection I have for my children, have granted, sold and conveyed and by these presents do hereby grant, sell and convey unto John Doe, Jr. and Johnnie Sue Doe, for life with remainder to their heirs per stirpes, all of Section 100, Block 1, AB&C Survey, Bravo County, Texas, except an undivided 1/64 of the royalty in oil, gas and other minerals produced and saved or sold from the lands herein conveyed.

Save and except, and there is reserved unto Grantor the executive right and, upon Grantor's death, such executive right shall vest in my wife, Janey Doe for her lifetime, and upon the death of Janey Doe, the executive right shall vest in my children, or the survivors of them, per stirpes.

It is stipulated that the land herein described is subject to an oil and gas lease recorded at Volume 100, Page 101 of the Oil and Gas Leasing Records of Bravo County, Texas and the royalty from this lease shall be payable to the children of John Doe, Jr. and Johnnie Sue Doe. Grantor shall receive all bonus payments from future leases.

It is expressly agreed that ingress and egress to Section 100 shall not be exercised over and upon any route that crosses Bravo Creek.

It is expressly agreed that the South Half (S/2) of the Northwest Quarter (NE/4) of the lands herein described shall be considered as a non-surface use site for oil and gas development, and may not be used in connection with development of the mineral estate, including use of the surface for drilling or completion operations, storage of equipment or product, pipeline transmission of product, compression or treating facilities, or other usage of any kind or character. This provision shall not prohibit subsurface operations necessary to develop the mineral estate below the surface, including directional or horizontal drilling.

To have and to hold unto the said Grantees for and during their life times, and thereafter unto the said remaindermen in fee simple absolute.