



Texas and New Mexico Title: Understanding the Similarities and Differences

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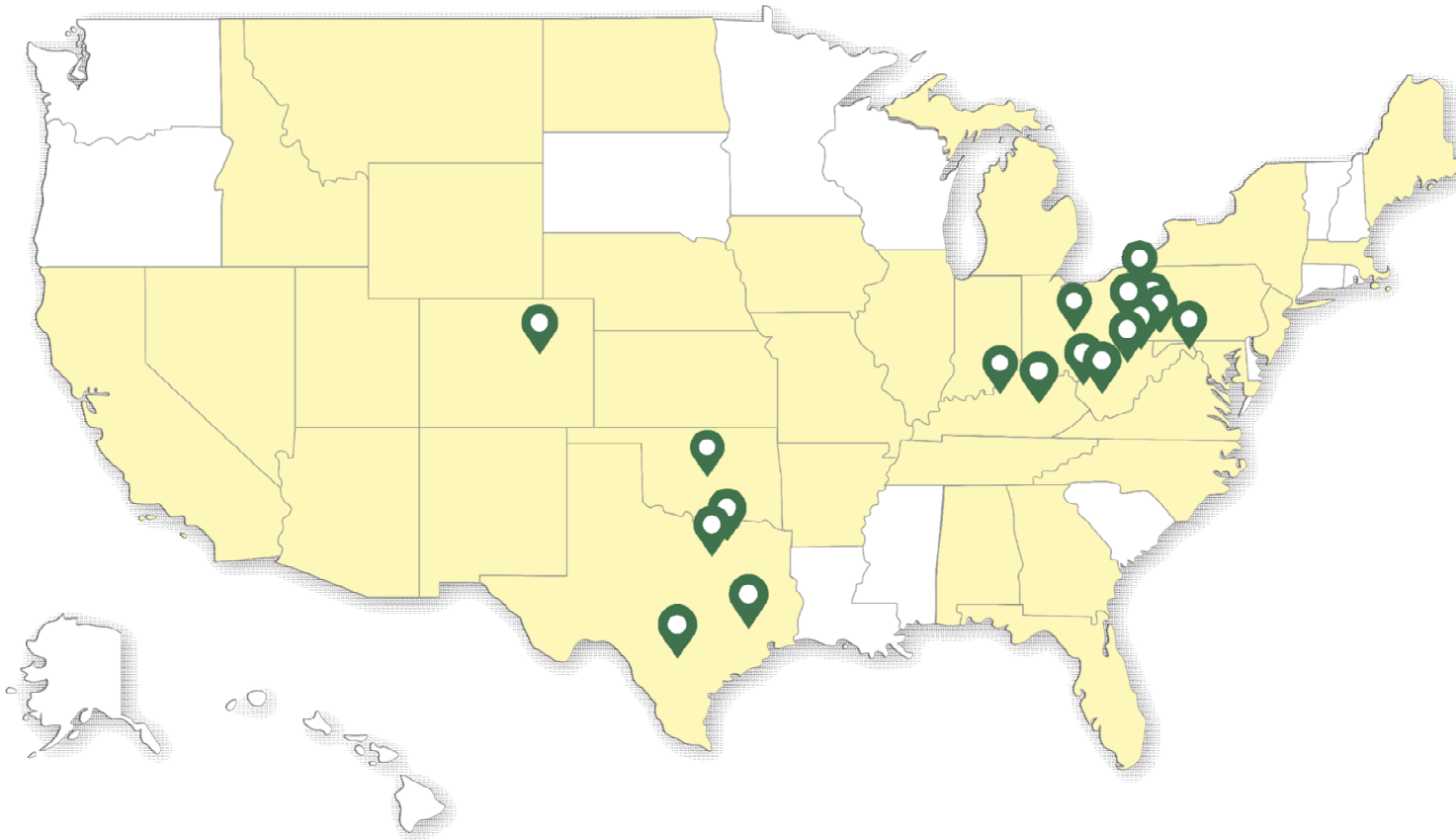
Permian & Mid-Con Energy Series: Upcoming Sessions

- Litigating Oil & Gas Cases in Texas and New Mexico (May 24, 2023)
- Deals & Contracts in the Permian and Mid-Con (June 28, 2023)
- Legal Considerations for Renewable Energy Projects (July 26, 2023)
- Managing & Responding to Emergencies in the Energy Industry (August 23, 2023)
- The Other Side of the Fence: Litigating Surface Disputes & Managing Landowner Relations (September 27, 2023)

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Ohio
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 States where Steptoe & Johnson attorneys are licensed

Overview

- Probate and Intestate Succession
- Community Property
- State and Federal Lands
- Forced Pooling
- Miscellaneous Title Issues

Probate and Intestate Succession

Texas Probate

- Will must be admitted to probate within 4 years. Tex. Estates Code § 501.001.
- Types of probate proceedings
- Holographic Wills
 - A will written entirely in the testator's handwriting
 - Recognized by statute
 - Not required to be attested to by two witnesses
- Affidavits of Heirship

New Mexico Probate

- Will must be admitted to probate within 3 years of death. N.M.S.A. § 45-3-108.
- Holographic Wills
 - No statutory recognition
 - A holographic will is valid if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled.
- An administration of the estate is necessary for lands in New Mexico
- Personal representatives are required to execute a distribution deed to evidence the passage of title from the estate (post-1975)
 - Distribution deeds not required pre-1975
- Affidavits of Heirship – Do not establish marketable title

Texas – Probate of Foreign Wills

- A foreign will can be recorded in the county records if:
 - The will disposes of land in Texas;
 - The will has been probated according to the laws of the state in which it was originally probated;
 - The Order Admitting to Probate is attached; and
 - Both the will and order are exemplified.
- In order to be exemplified, the will and order must:
 - Be attested by and include the signature of the court clerk or other official who has custody of the will or who is in charge of probate records (“certified”)
 - Include a certificate with the signature of the judge or presiding magistrate of the court stating that the attestation is in proper form; and
 - Have the court seal affixed, if a court seal exists.

New Mexico – Probate of Foreign Wills

- No authority to file a foreign will in county records
- To be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the probate court or an adjudication of probate by the district court
- After July 1, 1976, “informal” or “short form” probate is available if:
 - Deceased owned property in New Mexico
 - No probate proceedings filed in New Mexico; and
 - Probate admitted in a different state
- The informal probate authorizes a personal representative to convey property
- Ancillary “formal” probate proceedings required prior to July 1, 1976

Texas – Intestate Succession of Community Property

- Prior to September 1, 1993
 - Surviving spouse retains ½ community property and children vested ½ of deceased spouse
 - No probate proceedings required by statute
- After September 1, 1993
 - Surviving spouse vested with 100% of community property (if all of decedent's children are also children of the surviving spouse)
 - No probate proceedings required by statute

New Mexico – Intestate Succession of Community Property

- **Prior to June 12, 1959**
 - Surviving wife vested with 5/8 of community property; remaining 3/8 to children
 - Surviving husband vested with 100% of community property
 - Wife had no testamentary authority to devise community property
 - No probate proceedings required by statute
- **June 12, 1959, to July 1, 1973**
 - Surviving spouse vested with 100% of the community property
 - Wife had no testamentary authority to devise community property
 - No probate proceedings required by statute
- **After July 1, 1973**
 - Surviving spouse vested with 100% of community property
 - Administration proceedings required to establish marketable title in heir(s)
- N.M. Stat §§ 40-3-12; 45-2-102B; 45-3-101 through 45-3-103

Texas – Intestate Succession of Separate Property

- Surviving spouse, no surviving descendants – 50% to spouse; 50% to parents
- Surviving spouse and surviving descendants – 1/3 Life Estate to spouse; remainder to children
- No surviving spouse or surviving descendants – 100% to parent
 - If parent is survived by descendants - 50% to parent and 50% to descendants

New Mexico – Intestate Succession of Separate Property

- Surviving spouse, no surviving descendants – 100% to spouse
- Surviving spouse and surviving descendants – 3/4 to descendants, 1/4 to spouse
- No surviving spouse or surviving descendants – 100% to parent
- Half Bloods – Take the same as if they were whole blood
- Pre-1993 – Per Stirpes
- Post-1993 – By Right of Representation

Community Property

Texas – Community Property & Separate Property

- Presumption that all property acquired during marriage is community property. Tex. Fam. Code § 3.002.
 - Presumption is rebuttable upon a showing of clear and convincing evidence
- Recognizes sole management community property, which allows one spouse to exercise sole management, control, and disposition of property during the marriage, assuming both spouses are still living. Tex. Fam. Code § 3.102.
- Separate Property
 - Acquired before marriage
 - After divorce decree entered
 - By gift, devise or descent
 - Designated as such by written agreement between the spouses

New Mexico – Community & Separate Property

- Presumption that property acquired during marriage is community property
 - Prior to July 1, 1973:
 - Real property conveyed to a married woman, in her name alone, was presumed to be her separate property
 - Real property conveyed to a married man, in his name alone, was presumed to be his community property (N.M. Stat. Ann. § 40-3-12)
- Separate Property (N.M. Stat. Ann. § 40-3-8)
 - Acquired before marriage
 - After divorce decree entered
 - By gift, devise or descent
 - Designated as such by written agreement between the spouses

Texas – Conveyances of Community Property

- Recognizes sole management community property, which allows one spouse to exercise sole management, control, and disposition of property during the marriage, assuming both spouses are still living (joinder not necessary). Tex. Fam. Code § 3.102.
- The failure of the spouse to join an instrument makes that instrument voidable
- Homestead – must always have both spouses execute conveyances
- Prior to January 1, 1968, the husband was statutorily the sole manager of community property, even if title was only in wife's name
 - Conveyances required joinder of husband and a “privy” acknowledgment by wife

New Mexico – Conveyances of Community Property

- Both spouses must join in the transfer of community property. An attempted conveyance by one spouse is void. N.M. Stat. § 40-3-13(A).
 - An exception is a valid power of attorney appointing one spouse as attorney-in-fact
- Unlike Texas, a void instrument may be ratified by the non-joining spouse. N.M. Stat. § 40-3-13(B).
 - If prior to June 18, 1993 (the date of the statute), then ratification must be joined by both spouses and contain words of present grant
 - Best Practice: Have both spouses join the ratification and include words of present grant in the ratification

State and Federal Lands

Public Lands in Texas

- Very few federal lands in Texas
- State lands and state-owned minerals are common and must be developed in conjunction with the General Land Office
 - Some lands and minerals are owned outright by the state
 - Relinquishment Act Lands
 - The surface owner acts as agent for the state to execute leases, but the royalty and bonus is shared between the surface owner and the state.
 - Minerals owned by the state will be on their own lease form (prohibiting pooling and allocation wells without the lessor's written consent)
 - All instruments are also filed of record in the county where the lands are located

Common Issues Involving Federal Lands

- Recording
 - Federal leasehold instruments are required to be filed with the BLM
 - To establish constructive notice, federal instruments must also be filed in the county records where the lease is located
 - State leasehold instruments may be filed in the State Land Office or recorded in the county records
 - **BEST PRACTICE:** It is important that when abstracting or researching state or federal lands, all three (BLM, State Land Office and County Records) are searched

Federal Lands – Recording Requirements

- The following documents need to be recorded with the BLM
 - Assignments of Record Title Interest
 - Transfers of Operating Rights (Sublease)
 - Overriding Royalty Assignments
 - Mass Transfers
 - Name Changes or Mergers
 - Probate Materials
 - Divorce Decrees

Federal Lands – Record Title and Operating Rights

- Record Title – Primary ownership of an interest in an oil and gas lease that includes the obligation to pay rentals, and the rights to assign and relinquish the lease
- Operating Rights/Working Interest – The interest or contractual obligation created out of the lease (such as a sublease) authorizing the holder of that interest the right to enter the leased lands to conduct drilling and related operations, including production
 - Operating rights may or may not be transferred through an operating agreement; however all transfers of operating rights of federal leases must be filed and approved on the official assignment form

New Mexico State Lands – Recording

- Assignments of record title must be filed for approval with the State Land Office (“SLO”) and no more than two parties can own record title at any given time.
 - There is no requirement that a state oil and gas lease be filed in the county records
- The SLO currently only accepts the filing of three types of Miscellaneous Instruments:
 - Name Changes/Mergers/Corporate Conversions
 - Probate Documents
 - Corporate Dissolutions
- SLO no longer accepts assignments of operating rights/working interests, ORRIs
- Best Practice: file all miscellaneous instruments in the county records and file a courtesy copy of the corporate and probate instruments with the SLO

Forced Pooling

Texas – Forced Pooling

- Mineral Interest Pooling Act (“MIPA”)
 - Only applies to fields discovered after March 8, 1961
 - Requires a fair and reasonable offer
- Allocation wells and production sharing wells are an alternative to forced pooling when the lease lacks pooling authority or has anti-dilution provisions

New Mexico – Compulsory Pooling

- Frequently used
- State participation in pooling (or communitization) permitted
- Unleased owners receive 1/8 royalty interest
- Production costs allocated on a surface-acreage basis
- 30 days to elect to participate
- 200% risk penalty for non-consenting owners within the unit
- Operator must commence drilling Infill Wells within 120 days of the end of the 30-day notice period
- ORRI, NPRI Owners must be pooled

Miscellaneous Title Issues

New Mexico – Surface Owners Protection Act

- Applies to private and state lands (application to federal lands is unclear)
- Notice requirements
- Post bond if surface use agreement not obtained
- Requires restoration of surface to substantially same condition as existed prior to operations

Texas – No Statutory Surface Owner Protection

- Surface Damages Case Law – Absent a specific contractual obligation, a surface owner must prove either:
 - Specific acts of negligence; or
 - Oil and gas operator used more of the surface than was reasonably necessary.
- Accommodation Doctrine

Texas – Blind Trusts

- If property is conveyed to a person as “trustee,” but the conveyance does not identify a trust or the name of a beneficiary, the “trustee” may convey the property without subsequent question by a person who claims to be a beneficiary under a trust, or by the person designated as trustee in that person’s individual capacity.
- Reference to “trustee” without more, does not:
 - Create a trust
 - Give notice or put others upon inquiry that a trust exists
 - Give notice that any person other than the “trustee” has a beneficial interest

New Mexico – Blind Trusts

- No statutory protections for blind trusts
- Reference to “trustee,” without more, does:
 - Give notice or put others upon inquiry that a trust exists
- Unlike Texas, when a conveyance is made to a “trustee”
 - Inquiry must be made into the authority of the trustee
 - A copy of the trust agreement (or certification of trust) should be recorded

Texas – Deed Interpretation

- Texas follows the “four corners” approach
- “The controlling intention is not the subjective intention the parties may have had but failed to express, but the intention actually expressed in the deed; that is, the question is not what the parties meant to say, but the meaning of what they did say.” *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991)

New Mexico – Deed Interpretation

- Courts follow a contextual approach
- Under the contextual approach, even if the terms of the document are not ambiguous, the court can still consider circumstantial evidence to determine the intent of the parties. *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242-43 (N.M. 1991).



Questions?

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