

Daddy Died. Who's Got the Will?

Texas Succession and Probate Law. Rules and Traps for the Petroleum Land Professional

The course will review how a will gets executed and probated in Texas, and discuss the Texas probate system. There will also be a review of inheritance rules when there is no will. The course will emphasize “traps for the unwary and overly honest.”

Jack M. Wilhelm
The Wilhelm Law Firm
1703 West Avenue
Austin, Texas 78701
(512) 236 8400
(512) 236 8404 (fax)
jwilhelm@wilhelmlaw.net
www.wilhelmlaw.net

WILLS, PROBATE

AND INTESTATE SUCCESSION

The Texas Estates Code provides the law governing probate matters, including the making of wills, rules of inheritance without a will, the administration of estates, the establishment of heirs and the appointment of guardians. Even when the transfer of assets does not require a formal procedure in probate court, the Estates Code provides the proper procedures for distribution. TEX. ESTATES CODE §21.001 et seq.

Why Have a Will?

In life there would appear to be two types of people. The first are very organized, they know exactly what is what, where their finances are up to, and what their plans for the future are. The others are pretty disorganized, often very busy people, who are slightly careless with their money and well, a will can wait until tomorrow can't it? Others undoubtedly fall within these camps, but the reality is that some people do not face up to the fact of their own mortality. They do not leave a will and the result is that after they die things become very difficult for those surviving the deceased person.

There are both practical and emotional reasons why you should make a will. Lawyers always cite a practical reason such as if you are a co-habiting couple then if you die, your partner cannot inherit from you. This is a fact, so all non-married couples need to have a will, each.

Lawyers usually cite three reasons for a will:

1. Certain will provisions can minimize federal estate tax (think death tax);
2. Wills can make special provisions for minor children and relatives with special needs;
3. If you want your assets distributed in a manner other than provided for by law (intestate succession, think "default will").

However, there are also emotional reasons to have a will. After someone dies, emotions are often raw and those who are grieving may not be at their most rational or indeed their most understanding. Fights can break out within even the closest families if there is no will and people harbor grievances over who took what, long after the estate has been settled. A will simply sorts out what you wanted and gives people what the testator felt they deserved.

A Valid Will -

Well, it must be in writing. And you (the testator) must be 18 years old, or a minor who is emancipated by reason of marriage or military service, and mentally competent to make a will in Texas. You may distribute all of your property by means of a will, but the will must be in writing and witnessed by two individuals at least 14 years old. If the will is written in your own handwriting, no witnesses are required.

Intestate Succession -

If you die without a will, property is distributed by intestate succession. Stated another way, the Estates Code writes a will for you. Later in the paper, more detail will be furnished on how assets are distributed if there is no will.

The Probate Process -

The probate process begins with an application to probate a will (asking the court to determine that this is the actual, final will of the decedent) and to appoint an independent executor. Attached to this application is the “actual will.” Also there is a Proof of Death and Other Facts, the contents of which are determined by statute, and generally identify the decedent, his or her date of death, probable heirs, marital status, and other specific details.

The proper venue is almost always the last residence of the decedent.

The Application will contain the following information:

1. A representation by the applicant that he or she has an interest (for instance, surviving spouse or child)
2. Date of death of the decedent
3. The *purported* will (emphasis, it is not the actual will UNTIL it is admitted to probate)
4. Certain information about the decedent’s marital and family history (e.g. children)
5. A recommendation that a specific person or entity (e.g. bank or trust company) be named the executor
6. Some additional information if a gift was made to a governmental entity or a charitable organization (special notice will be required)

The application will be accompanied by the “actual purported will” (not a photocopy), an affidavit called a Proof of Death and Other Facts, and a proposed order admitting the will to probate and designating an executor of the estate.

After a short hearing where the applicant is actually put under oath and examined by the probate judge (and perhaps other sworn testimony by third parties), the will is either admitted to probate (approved) or denied probate (a determination that it is not the valid, controlling will). If admitted to probate the court will also designate, by order, the independent executor and there will be the issuance of Letters Testamentary (the Court’s designation of the executor with certain authorities).

Following the order admitting the will to probate, the executor will publish notice of the probate proceedings, give personal notice to heirs, devisees, and creditors, pay outstanding taxes, file an inventory of the decedent’s assets or an affidavit that the inventory has been furnished to the heirs and devisees, and generally wind up the estate and distribute the assets in the estate.

It takes time to wind up an estate, anywhere from 6 months to a number of years. For instance, the federal estate tax, if applicable, is a tax on the value of the estate. For valuation purposes, it can be valued at the lower of 1. The date of death of the decedent; or 2. 6 months after the date of death of the decedent. So, if there is going to be an estate tax liability, for all practical purposes that filing will not be made to the IRS until sometime after 6 months following the decedent's death. Furthermore, the executor of an estate is personally liable for estate taxes if he or she distributes assets prior to the IRS examining the return and issuing a "closing letter." As well, it takes the IRS at least 6 months to issue a "closing letter," so tack on another 6 months before estate assets are distributed.

Why are estates open for a number of years?

1. As noted above, certain things (such as paying taxes) take time;
2. Sometimes it is hard to find all of the estate assets (such as life insurance policies, stock certificates, especially where there has been the dreaded "dividend reinvest" or "DRIP");
3. Sometimes the executor, on his or her own, or with the tacit support of the heirs and devisees, attempts to manage the estate as a separate entity. And this can have far reaching implications.

The powers and duties of the Executor/Administrator

First, what is the difference between an executor and an administrator? An executor is named if there is a will; if there is not a will, there is an administrator designated. The statute no longer identifies gender, e.g. executor or executrix; administrator or administratrix. And some courts, notably Travis County Probate Court, will admonish parties not to use the designations executrix or administratrix.

What are the responsibilities and authorities of the executor/administrator?

TEX. ESTATES CODE Sec. 351.101. DUTY OF CARE. An executor or administrator of an estate shall take care of estate property as a prudent person would take of that person's own property, and if any buildings belong to the estate, the executor or administrator shall keep those buildings in good repair, except for extraordinary casualties, unless directed by a court order not to do so.

TEX. ESTATES. CODE Sec. 351.102. REPRESENTATIVE OF ESTATE SHALL TAKE POSSESSION OF PERSONAL PROPERTY AND RECORDS. The personal representative of an estate, immediately after receiving letters, shall collect and take into possession the personal property, record books, title papers, and other business papers of the estate, and all such in his possession shall be delivered to the person or persons legally entitled thereto when the administration has been closed or a successor has received letters.

TEX. ESTATES CODE Sec. 351.151. COLLECTION OF CLAIMS AND RECOVERY OF PROPERTY. (a) Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the

estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he willfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the value of such property as has been lost by such neglect.

Contrary to many popular myths, the authority of the executor or administrator to act without a specific court authorization (in addition to the letters testamentary) is limited. The following acts cannot be taken (and therefore may not be valid) without a specific court authorization, including:

(1) *Purchase or exchange property (including the execution of oil and gas leases;*(2) Take claims or property for the use and benefit of the estate in payment of any debt due or owing to the estate;(3) Compound bad or doubtful debts due or owing to the estate;(4) Make compromises or settlements in relation to property or claims in dispute or litigation;(5) Compromise or pay in full any secured claim which has been allowed and approved as required by law against the estate by conveying to the holder of such claim the real estate or personalty securing the same, in full payment, liquidation, and satisfaction thereof, and in consideration of cancellation of notes, deeds of trust, mortgages, chattel mortgages, or other evidences of liens securing the payment of such claim;(6) Abandon the administration of property of the estate that is burdensome or worthless. Abandoned real or personal property may be foreclosed by a secured party, trustee, or mortgagee without further order of the court.

Without prior court authority, the executor or administrator can (1) Release liens upon payment at maturity of the debt secured thereby; (2) Vote stocks by limited or general proxy;(3) Pay calls and assessments;(4) Insure the estate against liability in appropriate cases;(5) Insure property of the estate against fire, theft, and other hazards;(6) Pay taxes, court costs, bond premiums.

A Trap –

What about that lease, division order, or pooling agreement that is executed by the executor or administrator of the estate? Well, it may not be binding on the heirs under the will unless it has been approved by the probate court.¹ And that can be a time consuming and expensive process. And it will be “very public.” There is an alternative, have that lease, division order, or pooling agreement executed by the executor and also by the person(s) who inherits the property pursuant to the will.

And note what can happen is there is an “unauthorized” lease:

TEX. ESTATES CODE § 358.251. PROCEDURE WHEN REPRESENTATIVE OF ESTATE NEGLECTS TO APPLY FOR AUTHORITY. When the personal representative of an estate shall neglect to apply for authority to subject property of the estate to a lease for mineral development, pooling or unitization, or to commit royalty or other interest in

¹ Section 358 et seq. of the Estates Code provides a specific process for the notice and approval of oil and gas leases. This statute, which is lengthy, is included in this paper as an appendix.

minerals to pooling or unitization, any person interested in the estate may, upon written application filed with the county clerk, cause such representative to be cited to show cause why it is not for the best interest of the estate for such a lease to be made, or such an agreement entered into. The clerk shall immediately call the filing of such application to the attention of the judge of the court in which the probate proceedings are pending, and the judge shall set a time and place for a hearing on the application, and the representative of the estate shall be cited to appear and show cause why the execution of such lease or agreement should not be ordered. Upon hearing, if satisfied from the proof that it would be in the best interest of the estate, the court shall enter an order requiring the personal representative forthwith to file his application to subject such property of the estate to a lease for mineral development, with or without pooling or unitization provisions, or to commit royalty or other minerals to unitization, as the case may be. The procedure prescribed with respect to original application to lease, or with respect to original application for authority to commit royalty or minerals to pooling or unitization, whichever is appropriate, shall then be followed.

Closing the Estate –

After the taxes have been paid and acknowledged, debts paid, the executor or administrator is charged with distributing the assets of the estate in accordance with the terms of the will. Technically, this distribution has already occurred subject to the executor's authority to maintain possession of assets to settle debts and taxes, and the executor should file an application and report on this distribution with the court. However, often, none of this is done. Even so, distributions in accordance with the will (e.g. executor deeds or merely the passage of time) are usually deemed valid. However, if an executor is distributing real estate (or other properties) in a manner contrary to the terms of the will, without an express court order authorizing that, further investigation, at the very least, is appropriate.

Where there is a will that doesn't cover everything –

Most will have a residuary, catch all, "all else clause" that provides for the disposition of property not specifically mentioned in the will. For example: a will giving my house to my wife and then a provision "and all the rest, residue, and remainder" (which often includes mineral rights) to my three children. But what if the will gives my ring to my wife, my house to my daughter, my car to my son and then is silent on everything else (including those highly valuable mineral rights in Palo Pinto County, Texas)? The "rest" goes according to the laws of intestate succession.

The Concept of Vesting -

TEX. ESTATES CODE Sec. 101.001 PASSAGE AND POSSESSION OF DECEDENT'S ESTATE ON DEATH.

Sec. 101.001. PASSAGE OF ESTATE ON DECEDENT'S DEATH. (a) Subject to Section 101.051, if a person dies leaving a lawful will:

- (1) all of the person's estate that is devised by the will vests immediately in the devisees;
- (2) all powers of appointment granted in the will vest immediately in the donees of those powers; and
- (3) all of the person's estate that is not devised by the will vests immediately in the person's heirs at law.

This can be particularly helpful to the title examiner working with an estate that has been open a number of years. In such an instance, execution of documents by the rightful heirs and donees will, in most instances, protect you.

And, and, and ...

And last, how long can I take to file an application to probate a will? Answer: 4 years from the date of death of the testator unless there is a really “good cause” for the delay. So that will that is 50 years old that was kept in the lock box in Alice, Texas, is probably just plain “no good.” As an aside, a will filed in a foreign jurisdiction (like Louisiana) can be filed at any later time in Texas (known as an ancillary proceeding).

And by the way, how to do you file that foreign will from Louisiana? An ancillary application is made and perfected and finalized by filing an “authenticated copy” of the will and order admitting same from the foreign (Louisiana) jurisdiction in the official records of the county where real estate is located (should file in each county where there is real estate). TEX. ESTATES CODE Sec. 501 et seq.

A will is no good until its author is dead. If the author is living, he can revoke it, ignore it, and, if he or she is unable to act on his or her on behalf, should execute a power of attorney.²

And what is a probate court as opposed to a county court? Large counties, such as Tarrant, Dallas, Bexar, Harris, Travis, have “statutory probate courts” where the courts and judges perform only duties associated with probate courts (will, administration of estates, guardianships of incompetents and minors). Smaller counties, such as Bastrop, Montgomery, Corpus Christi, Tyler (Smith) administer probate proceedings through a county court at large (judge is a lawyer). In small counties like La Salle, McMullen, Karnes, Wilson, Leon, Robertson, Jack, Howard, & Martin, the probate duties fall to the local county court (often the county judge is not a lawyer).

And what is the difference between a certified copy and an authenticated copy? A certified copy is “certified” (stamped) by the clerk of court; whereas an “authenticated” copy is certified (stamped) by the clerk of court and authenticated (stamped) by the presiding judge of the court.

² A sample being attached; see TEX. ESTATES CODE Sec. 752.

The Tricks and the Treats -

1. Can an independent executor execute an oil and gas lease that binds the heirs and devisees of the will?
 - a. Only with court authority. So, have the independent executor and the heirs and devisees execute the document in question.
2. Is a will that has not been admitted to probate valid?
 - a. No. The purpose of the probate application is to determine its validity.
3. What should be filed in the official records of a county where real estate is involved?
 - a. The original or a certified copy of all “powers of attorney”
 - b. An authenticated copy of the will and an authenticated copy of the order admitting the will to probate.

Intestate Distribution -

When an individual dies without a will, the State of Texas, through its probate code provides the rules on who inherits. Stated another way, the State of Texas writes the will. Simplistically, here are the rules.

First, determine if the property is separate or community property. Separate property is that property 1. Inherited, 2. Acquired prior to marriage, or 3. Acquired by the use of separate funds. Community property is property acquired during a marriage and is owned ½ by each spouse. There is a presumption that property acquired during a marriage is community property. The name on the deed is NOT controlling. Example: While married, I acquire a mineral lease in my name only. That mineral lease is the community property of my wife and me.

Separate Real Property:

1. Death with children and spouse: All to children subject to a 1/3rd life estate in spouse.
2. Death with spouse but no children: ½ to spouse and ½ to decedent’s parents or the descendants of the parents (e.g. brothers and sisters, nephews and nieces of decedent).
3. Death with spouse but no parents, brothers or sisters (or their descendants): all to the spouse.

Community Real Property:

1. All community property devolves to the surviving spouse if ³
 - a. No child or other descendant (e.g. grandchild) of the deceased spouse survives the deceased spouse; or

³ Prior to 1993, the decedent’s share of the community devolved to his or her children, not the surviving spouse. This was a significant change in the law.

- b. All surviving children and descendants (e.g. grandchild) are also the surviving children or descendants of the surviving spouse.
2. If the decedent had children who were not also the children of his surviving spouse, then the surviving spouse is entitled to her $\frac{1}{2}$ of the community estate and the balance of the estate (e.g. that portion attributable to the deceased spouse) passes equally to all of *his* children.

EXAMPLE: Sophia Loren and Jack Wilhelm marry and have 7 children. Sophia, recognizing her horrible mistake, divorces Jack.

Jack then coaxes a second woman into marrying him (Ann) and they have 11 children. While married to Ann, Jack purchases mineral rights in Madison County.

Then, Jack dies without a will (no evidence that either Sophia or Ann poisoned him).

The mineral rights in Madison County are the community property of Ann and Jack: Ann gets her community $\frac{1}{2}$; while Jack's community $\frac{1}{2}$ (since he had children who were not the children of Ann) goes to his eighteen children (each getting a $\frac{1}{36^{\text{th}}}$).

What if Jack and Sophia had never had any children? Then all of Jack's children are also the children of Ann. And in that case, Ann gets *all* of the mineral rights in Karnes County.

So What is an Administration and What is An Affidavit of Heirship?⁴

If someone dies without a will, in many instances there will never be a judicial supervision over the distribution of his or her estate. However, if there are extensive debts, complex business arrangements, or dissatisfied or competing heirs, an administration may be established and opened subject to court supervision. As part of this administration, there will be a legal determination by the probate court of the decedent's heirs.

However, as is often the case, there is no will, no extensive debts, no complex business arrangements, and no competing heirs, and therefore an administration is never opened. The task then becomes how to determine who are the heirs?

Texas Model Title Standard 11.70 provides that absent information to the contrary, you may rely upon an *affidavit of heirship* with respect to the family history and the identity of heirs of a decedent. Title examiners commonly rely upon affidavits of heirship when the family history and the identity of the heirs of a decedent are not otherwise known. Recent affidavits are also commonly accepted. In obtaining an affidavit of heirship, it is desirable for the affiant to be a person related to the decedent but who does not inherit from the decedent. If none is available, a person possessing personal knowledge of the decedent is the next choice. If neither is available,

⁴ An example of an heirship affidavit is included in this paper as an exhibit. There is also a judicial proceeding whereby heirship can be established. TEX. ESTATES CODE Sec.202.001 et seq.

an interested heir can be used. In the latter case, it is also desirable to obtain a supporting affidavit from a person who has no interest in the estate.

Heirs can also be determined in an action to declare heirship as provided in TEX. ESTATES CODE Sec. 202.001 et seq. Remember, however, this can be a relatively expensive process for the surviving widow of your royalty owner.

Traps –

1. An heirship affidavit does not control over a will. If the affidavit says there is a will, then it must be examined and its terms will control.
2. If the property owner died intestate, or if the owner died testate but the will is not probated, you should identify the heirs of the decedent, along with the devisees in any unprobated will, and require that *all* of them join in a conveyance of the property of the decedent.
3. Heirship affidavits need to identify spouses with some specificity. The dates of marriage are important in determining whether the property at issue was their community property or the decedent's separate property. How a marriage ended (divorce or death of spouse) can also have significant title implications.
4. Heirship affidavits need to identify children and if a child is deceased, whether he or she died with a will and identify his or her children. If a child survives his parents but then dies, his interests will devolve by will or, if none, by the laws of intestate succession. If a child predeceases his parents, survived by children, these grandchildren will inherit in the intestate environment by what is referred to as representation.

So What is Tenancy in Common, Joint Tenancy, and Tenancy by the Entirety?

Again, each state's law can vary somewhat but here are the general rules:

Tenancy in Common: each owner has an undivided interest. Upon the death of an owner, that owner's fractional interest devolves according to his or her will or according to the laws of intestate succession, if no will. A common example would be property owned by partners or property owned jointly by family members (brothers and sisters).

Joint Tenancy (with right of survivorship): each owner has an undivided interest; upon the death of one owner, the surviving owner(s) acquires the undivided interest of the decedent. Common in bank accounts and among unmarried partners.

Tenancy by the Entirety: property acquired by a husband and wife. Upon the death of a spouse, the other spouse acquires title over the whole.

So, what is a trust?

A trust is a three-party fiduciary relationship in which the first party, the trustor or settlor, transfers a property upon the second party for the benefit of the third party, the beneficiary.

Trusts are often used to avoid or minimize the probate process.

The rules regarding trusts are set forth in the TEX. PROP. CODE Sec. 101 et seq. and by the terms of the instrument creating the trust (the will or the trust agreement).

So What is a Death Deed?

This is a new "creature" of our legislature that assists individuals in transferring their assets without having to go through the probate process.

A transfer on death deed is a non-testamentary instrument. TEX. ESTATES CODE Sec. 114.053. It can be a substitute for a probate proceeding.

A transfer on death deed may not be created through use of a power of attorney. TEX. ESTATES CODE Sec. 114.054.

It must contain the following elements (TEX. ESTATES CODE Sec. 114.055):

1. Contain the essential elements and formalities of a recordable deed;
2. State that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death; and
3. Be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located.

What about revocation (TEX. ESTATES CODE Sec. 114.057):

(A) a subsequent transfer on death deed that revokes the preceding transfer on death deed or part of the deed expressly or by inconsistency; or

(B) an instrument of revocation that expressly revokes the transfer on death deed or part of the deed that contains the following:

(1) is acknowledged by the transferor after the acknowledgment of the deed being revoked; and

(2) is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded.

(C) a will may not revoke or supersede a transfer on death deed.

(D) If a marriage between the transferor and a designated beneficiary is dissolved after a transfer on death deed is recorded, a final judgment of the court dissolving the marriage operates to revoke the transfer on death deed as to that designated beneficiary if notice of the judgment is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed is recorded.

Summary

In summary, the transfer of assets upon the death of an individual is complex and the laws regulating these transfers are complex. As well, you will be dealing with individuals who may be experiencing a significant amount of stress and grief. As well, laws on the probating of will, the validity of wills, and intestate succession can vary, significantly, by state. Texas is blessed to have a relatively straightforward probate procedure; compared to other states, and it is efficient and cost effective.

And last, remember, wills only control when the testator is dead. Until then, he or she, or his or her attorney in fact or legal guardian, is in charge.

APPENDIX

AFFIDAVIT OF FACTS CONCERNING THE IDENTITY OF HEIRS

Before me, the undersigned authority, on this day personally appeared _____ ("Affiant") (insert name of affiant) who, being first duly sworn, upon his/her oath states:

1. My name is _____ (insert name of affiant), and I live at _____ (insert address of affiant's residence). I am personally familiar with the family and marital history of _____ ("Decedent") (insert name of decedent), and I have personal knowledge of the facts stated in this affidavit.

2. I knew decedent from _____ (insert date) until _____ (insert date). Decedent died on _____ (insert date of death). Decedent's place of death was _____ (insert place of death). At the time of decedent's death, decedent's residence was _____ (insert address of decedent's residence).

3. Decedent's marital history was as follows: _____ (insert marital history and, if decedent's spouse is deceased, insert date and place of spouse's death).

4. Decedent had the following children: _____ (insert name, birth date, name of other parent, and current address of child or date of death of child and **descendants of deceased child, as applicable, for each child**).

5. Decedent did not have or adopt any other children and did not take any other children into decedent's home or raise any other children, except: _____ (insert name of child or names of children, or state "none").

6. (Include if decedent was not survived by descendants.) Decedent's mother was: _____ (insert name, birth date, and current address or date of death of mother, as applicable).

7. (Include if decedent was not survived by descendants.) Decedent's father was: _____ (insert name, birth date, and current address or date of death of father, as applicable).

8. (Include if decedent was not survived by descendants or by both mother and father.) Decedent had the following siblings: _____ (insert name, birth date, and current address or date of death of each sibling and parents of each sibling and **descendants of each deceased sibling, as applicable**, or state "none").

9. (Optional.) The following persons have knowledge regarding the decedent, the identity of decedent's children, if any, parents, or siblings, if any: _____ (insert names of persons with knowledge, or state "none").

10. Decedent died without leaving a written will. (Modify statement if decedent left a written will.)

11. There has been no administration of decedent's estate. (Modify statement if there has been administration of decedent's estate.)

12. Decedent left no debts that are unpaid, except: _____ (insert list of debts, or state "none").

13. There are no unpaid estate or inheritance taxes, except: _____ (insert list of unpaid taxes, or state "none").

14. To the best of my knowledge, decedent owned an interest in the following real property: _____ (insert list of real property in which decedent owned an interest, or state "none").

NHAPL
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Houston, Texas

15. (Optional.) The following were the heirs of decedent: _____ (insert names of heirs).

16. (Insert additional information as appropriate, such as size of the decedent's estate.)

Signed this ____ day of _____, ____.

(signature of affiant)

State of _____

County of _____

Sworn to and subscribed to before me on _____ (date) by _____ (insert name of affiant).

(signature of notarial officer)

(Seal, if any, of notary)

(printed name)

APPENDIX

Estate Code: Independent Executors leasing oil and gas rights.

CHAPTER 358. MATTERS RELATING TO MINERAL PROPERTIES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 358.001. DEFINITIONS. In this chapter:

(1) "Gas" includes all liquid hydrocarbons in the gaseous phase in the reservoir.

(2) "Land" and "interest in land" include minerals or an interest in minerals in place.

(3) "Mineral development" includes exploration for, whether by geophysical or other means, drilling for, mining for, development of, operations in connection with, production of, and saving of oil, other liquid hydrocarbons, gas, gaseous elements, sulphur, metals, and all other minerals, whether solid or otherwise.

(4) "Property" includes land, minerals in place, whether solid, liquid, or gaseous, and an interest of any kind in that property, including a royalty interest, owned by an estate.

SUBCHAPTER B. MINERAL LEASES AFTER PUBLIC NOTICE

Sec. 358.051. AUTHORIZATION FOR LEASING OF MINERALS. (a) The court in which probate proceedings on a decedent's estate are pending may authorize the personal representative of the estate, appointed and qualified under the laws of this state and acting solely under court orders, to make, execute, and deliver a lease, with or without a unitization clause or pooling provision, providing for the exploration for and development and production of oil, other liquid hydrocarbons, gas, metals and other solid minerals, and other minerals, or any of those minerals in place, belonging to the estate.

(b) A lease described by Subsection (a) must be made and entered into

Sec. 358.052. LEASE APPLICATION. (a) The personal representative of an estate shall file with the county clerk of the county in which the probate proceeding is pending a written application, addressed to the court or the judge of the court, for authority to lease estate property for mineral exploration and development, with or without a pooling provision or unitization clause.

(b) The lease application must:

(1) describe the property fully by reference to the amount of acreage, the survey name or number, or the abstract number, or by another

method adequately identifying the property and the property's location in the county in which the property is situated;

(2) specify the interest thought to be owned by the estate, if less than the whole, but requesting authority to include all of the interest owned by the estate, if that is the intention; and

(3) set out the reasons the estate property described in the application should be leased.

(c) The lease application is not required to set out or suggest:

(1) the name of any proposed lessee; or

(2) the terms, provisions, or form of any desired lease.

Sec. 358.053. SCHEDULING OF HEARING ON APPLICATION; CONTINUANCE. (a) Immediately after the filing of a lease application under Section 358.052, the county clerk shall call the filing of the application to the court's attention, and the judge shall promptly make and enter a brief order designating the time and place for hearing the application.

(b) If the hearing is not held at the time originally designated by the court or by a timely continuance order entered, the hearing shall be continued automatically without further notice to the same time on the following day, other than Sundays and holidays on which the county courthouse is officially closed, and from day to day until the lease application is finally acted on and disposed of by court order. Notice of an automatic continuance is not required.

Sec. 358.054. NOTICE OF HEARING ON APPLICATION. (a) At least 10 days before the date set for the hearing on a lease application filed under Section 358.052, excluding the date of notice and the date set for the hearing, the personal representative shall give notice of the hearing by:

(1) publishing the notice in one issue of a newspaper of general circulation in the county in which the proceeding is pending; or

(2) if there is no newspaper described by Subdivision (1), posting the notice or having the notice posted.

(b) If notice is published, the date of notice is the date printed on the newspaper.

(c) The notice must:

(1) be dated;

(2) be directed to all persons interested in the estate;

(3) state the date on which the lease application was filed;

(4) describe briefly the property sought to be leased, specifying the fractional interest sought to be leased if less than the entire interest in the tract or tracts identified; and

(5) state the time and place designated by the judge for the hearing.

Sec. 358.055. REQUIREMENTS REGARDING ORDER AND NOTICE MANDATORY. An order of the judge or court authorizing any act to be performed under a lease application filed under Section 358.052 is void in the absence of:

(1) a written order originally designating a time and place for hearing;

(2) a notice issued by the personal representative of the estate in compliance with the order described by Subdivision (1); and

(3) proof of the publication or posting of the notice as required under Section 358.054.

Sec. 358.056. HEARING ON APPLICATION; ORDER. (a) At the time and place designated for the hearing under Section 358.053(a), or at the time to which the hearing is continued as provided by Section 358.053(b), the judge shall:

(1) hear a lease application filed under Section 358.052; and

(2) require proof as to the necessity or advisability of leasing for mineral development the property described in the application and the notice.

(b) The judge shall enter an order authorizing one or more leases affecting and covering the property or portions of property described in the application, with or without pooling provisions or unitization clauses, and with or without cash consideration if considered by the court to be in the best interest of the estate, if the judge is satisfied that:

(1) the application is in proper form;

(2) notice has been given in the manner and for the time required by law;

(3) proof of necessity or advisability of leasing is sufficient; and

(4) the application should be granted.

(c) The order must contain:

(1) the name of the lessee;

(2) any actual cash consideration to be paid by the lessee;

(3) a finding that the requirements of Subsection (b) have been satisfied; and

(4) one of the following findings:

(A) a finding that the personal representative is exempted by law from giving bond; or

(B) if the representative is not exempted by law from giving bond, a finding as to whether the representative's general bond on file is sufficient to protect the personal property on hand, including any cash bonus to be paid.

(d) If the court finds the general bond insufficient to meet the requirements of Subsection (c)(4)(B), the order must show the amount of increased or additional bond required to cover the deficiency.

(e) A complete exhibit copy, either written or printed, of each authorized lease must be set out in the order or attached to the order and incorporated by reference and made part of the order. The exhibit copy must show:

(1) the name of the lessee;

(2) the date of the lease;

(3) an adequate description of the property being leased;

(4) any delay rental to be paid to defer commencement of operations; and

(5) all other authorized terms and provisions.

(f) If the date of a lease does not appear in the exhibit copy of the lease or in the order, the date of the order is considered for all purposes to be the date of the lease.

(g) If the name or address of the depository bank for receiving rental is not shown in the exhibit copy of a lease, the estate's personal representative may insert that information, or cause that information to be inserted, in the lease at the time of the lease's execution or at any other time agreeable to the lessee or the lessee's successors or assignees.

Sec. 358.057. MAKING OF LEASE ON GRANTING OF APPLICATION. (a) If the court grants an application as provided by Section 358.056, the personal representative of the estate may make the lease or leases, as evidenced by the exhibit copies described by Section 358.056, in accordance with the order.

(b) The lease or leases must be made not later than the 30th day after the date of the order unless an extension is granted by the court on sworn application showing good cause.

(c) It is not necessary for the judge to make an order confirming the lease or leases.

Sec. 358.058. BOND REQUIREMENTS. (a) Unless the personal representative of the estate is not required to give a general bond, a lease for which a cash consideration is required, although ordered, executed, and delivered, is not valid:

(1) unless the order authorizing the lease makes findings with respect to the general bond; and

(2) if the general bond has been found insufficient, unless and until:

(A) the bond has been increased or an additional bond given, as required by the order, with the sureties required by law; and

(B) the increased bond or additional bond has been approved by the judge and filed with the clerk of the court in which the proceedings are pending.

(b) If two or more leases of different land are authorized by the same order, the general bond must be increased, or additional bonds given, to cover all of the leases.

Sec. 358.059. TERM OF LEASE BINDING. (a) A lease executed and delivered in compliance with this subchapter is valid and binding on the property or interest in property owned by the estate and covered by the lease for the full term provided by the lease, subject only to the lease's terms and conditions, even if the primary term extends beyond the date the estate is closed in accordance with law.

(b) The authorized primary term of the lease may not exceed five years, subject to the lease terms and provisions extending the lease beyond the primary term by:

(1) paying production;

(2) bona fide drilling or reworking operations, whether in or on the same well or wells or an additional well or wells, without a cessation of operations of more than 60 consecutive days before production has been restored or obtained; or

(3) a shut-in gas well.

Sec. 358.060. AMENDMENT OF LEASE REGARDING EFFECT OF SHUT-IN GAS WELL. (a) An oil, gas, and mineral lease executed by a personal representative under the former Texas Probate Code or this code may be

amended by an instrument that provides that a shut-in gas well on the land covered by the lease or on land pooled with all or part of the land covered by the lease continues the lease in effect after the lease's five-year primary term.

(b) The personal representative, with the approval of the court, shall execute the instrument according to the terms and conditions prescribed by the instrument.

SUBCHAPTER C. MINERAL LEASES AT PRIVATE SALE

Sec. 358.101. AUTHORIZATION FOR LEASING OF MINERALS AT PRIVATE SALE.

(a) Notwithstanding the mandatory requirements of Subchapter B for setting a time and place for hearing of a lease application filed under Section 358.052 and the issuance, service, and return of notice, the court may authorize the making of oil, gas, and mineral leases at private sale without public notice or advertising if, in the court's opinion, facts are set out in the application required by Subchapter B sufficient to show that it would be more advantageous to the estate that a lease be made privately and without compliance with those mandatory requirements.

(b) Leases authorized by this section may include pooling provisions or unitization clauses as in other cases.

Sec. 358.102. ACTION OF COURT IF PUBLIC ADVERTISING NOT REQUIRED.

(a) At any time after the fifth day and before the 11th day after the filing date of an application to lease at private sale and without an order setting the hearing time and place, the court shall:

- (1) hear the application;
- (2) inquire into the manner in which the proposed lease has been or will be made; and
- (3) hear evidence for or against the application.

(b) If satisfied that the lease has been or will be made for a fair and sufficient consideration and on fair terms and has been or will be properly made in conformity with law, the court shall enter an order authorizing the execution of the lease without the necessity of advertising, notice, or citation. The order must comply in all other respects with the requirements essential to the validity of mineral leases as set out in Subchapter B, as if advertising or notice were required.

(c) The issuance of an order confirming a lease or leases made at private sale is not required, but such a lease is not valid until any increased or additional bond required by the court has been approved by the court and filed with the court clerk.

SUBCHAPTER D. POOLING OR UNITIZATION OF ROYALTIES OR MINERALS

Sec. 358.151. AUTHORIZATION FOR POOLING OR UNITIZATION. (a) If an existing lease or leases on property owned by an estate being administered do not adequately provide for pooling or unitization, the court in which the proceedings are pending may, in the manner provided by this subchapter, authorize the commitment of royalty or mineral interests in oil, liquid hydrocarbons, gas, gaseous elements, and other minerals, or any one or more of them, owned by the estate, to agreements that provide for the operation of areas as a pool or unit for the exploration for, development of, and production of all of those minerals, if the court finds that:

(1) the pool or unit to which the agreement relates will be operated in a manner that protects correlative rights or prevents the physical or economic waste of oil, liquid hydrocarbons, gas, gaseous elements, or other minerals subject to the agreement; and

(2) it is in the best interest of the estate to execute the agreement.

(b) An agreement authorized under Subsection (a) may, among other things, provide that:

(1) operations incident to the drilling of or production from a well on any portion of a pool or unit shall be considered for all purposes to be the conduct of operations on or production from each separately owned tract in the pool or unit;

(2) any lease covering any part of the area committed to a pool or unit continues in effect in its entirety as long as:

(A) oil, gas, or other minerals subject to the agreement are produced in paying quantities from any part of the pooled or unitized area;

(B) operations are conducted as provided in the lease on any part of the pooled or unitized area; or

(C) there is a shut-in gas well on any part of the pooled or unitized area, if the presence of the shut-in gas well is a ground for continuation of the lease under the terms of the lease;

(3) the production allocated by the agreement to each tract included in a pool or unit shall, when produced, be considered for all purposes to have been produced from the tract by a well drilled on the tract;

(4) the royalties provided for on production from any tract or portion of a tract within the pool or unit shall be paid only on that portion of the production allocated to the tract in accordance with the agreement;

(5) the dry gas, before or after extraction of hydrocarbons, may be returned to a formation underlying any land or leases committed to the

agreement, and that royalties are not required to be paid on the gas returned; and

(6) gas obtained from other sources or other land may be injected into a formation underlying any land or leases committed to the agreement, and that royalties are not required to be paid on the gas injected when the gas is produced from the unit.

Sec. 358.152. POOLING OR UNITIZATION APPLICATION. (a) The personal representative of an estate shall file with the county clerk of the county in which the probate proceeding is pending a written application for authority to:

(1) enter into pooling or unitization agreements supplementing, amending, or otherwise relating to any existing lease or leases covering property owned by the estate; or

(2) commit royalties or other interests in minerals, whether or not subject to a lease, to a pooling or unitization agreement.

(b) The pooling or unitization application must also:

(1) sufficiently describe the property as required in an original lease application;

(2) describe briefly any lease or leases to which the interest of the estate is subject; and

(3) set out the reasons the proposed agreement concerning the property should be entered into.

(c) A copy of the proposed agreement must be attached to the application and made a part of the application by reference.

(d) The agreement may not be recorded in the judge's probate docket.

(e) Immediately after the pooling or unitization application is filed, the clerk shall call the application to the judge's attention.

Sec. 358.153. NOTICE NOT REQUIRED. Notice by advertising, citation, or otherwise of the filing of a pooling or unitization application under Section 358.152 is not required.

Sec. 358.154. HEARING ON APPLICATION. (a) The judge may hold a hearing on a pooling or unitization application filed under Section 358.152 at any time agreeable to the parties to the proposed agreement.

(b) The judge shall hear evidence and determine to the judge's satisfaction whether it is in the best interest of the estate that the proposed agreement be authorized.

(c) The hearing may be continued from day to day and from time to time as the court finds necessary.

Sec. 358.155. ACTION OF COURT AND CONTENTS OF ORDER. (a) The court shall enter an order setting out the court's findings and authorizing execution of the proposed pooling or unitization agreement, with or without payment of cash consideration according to the agreement, if the court finds that:

(1) the pool or unit to which the agreement relates will be operated in a manner that protects correlative rights or prevents the physical or economic waste of oil, liquid hydrocarbons, gas, gaseous elements, or other minerals subject to the agreement;

(2) it is in the best interest of the estate that the agreement be executed; and

(3) the agreement conforms substantially with the permissible provisions of Section 358.151.

(b) If cash consideration is to be paid for the agreement, the court shall also make findings as to the necessity of increased or additional bond, as in the making of leases on payment of the cash bonus for the lease. Such an agreement is not valid until any required increased or additional bond has been approved by the judge and filed with the clerk.

(c) If the effective date of the agreement is not stipulated in the agreement, the effective date of the agreement is the date of the court's order.

SUBCHAPTER E. SPECIAL ANCILLARY INSTRUMENTS THAT MAY BE EXECUTED WITHOUT COURT ORDER

Sec. 358.201. AUTHORIZATION FOR EXECUTION OF AGREEMENTS. As to any mineral lease or pooling or unitization agreement, executed on behalf of an estate before January 1, 1956, or on or after that date under the provisions of the former Texas Probate Code or this code, or executed by a former owner of land, minerals, or royalty affected by the lease or agreement, the personal representative of the estate being administered may, without further court order and without consideration, execute:

(1) division orders;

(2) transfer orders;

(3) instruments of correction;

(4) instruments designating depository banks for the receipt of delay rentals or shut-in gas well royalty to accrue or become payable under the terms of the lease; and

(5) similar instruments relating to the lease or agreement and the property covered by the lease or agreement.

SUBCHAPTER F. PROCEDURE IF PERSONAL REPRESENTATIVE OF ESTATE NEGLECTS TO APPLY FOR AUTHORITY

Sec. 358.251. APPLICATION TO SHOW CAUSE. If the personal representative of an estate neglects to apply for authority to subject estate property to a lease for mineral development, pooling, or unitization, or to commit royalty or another interest in minerals to pooling or unitization, any person interested in the estate may, on written application filed with the county clerk, have the representative cited to show cause why it is not in the best interest of the estate to make such a lease or enter into such an agreement.

Sec. 358.252. HEARING ON APPLICATION. (a) The county clerk shall immediately call the filing of an application under Section 358.251 to the attention of the judge of the court in which the probate proceedings are pending.

(b) The judge shall set a time and place for a hearing on the application, and the personal representative of the estate shall be cited to appear and show cause why the execution of a lease or agreement described by Section 358.251 should not be ordered

Sec. 358.253. ORDER. On a hearing conducted under Section 358.252, if satisfied from the evidence that it would be in the best interest of the estate, the court shall enter an order requiring the personal representative promptly to file an application to subject the estate property to a lease for mineral development, with or without pooling or unitization provisions, or to commit royalty or other minerals to pooling or unitization, as appropriate

Sec. 358.254. PROCEDURE TO BE FOLLOWED AFTER ENTRY OF ORDER. After entry of an order under Section 358.253, the procedure prescribed with respect to an original lease application, or with respect to an original application for authority to commit royalty or minerals to pooling or unitization, whichever is appropriate, shall be followed.

APPENDIX

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

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

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

Real property transactions;

Tangible personal property transactions;

Stock and bond transactions;

Commodity and option transactions;

Banking and other financial institution transactions;

Business operating transactions;

Insurance and annuity transactions;

Estate, trust, and other beneficiary transactions;

Claims and litigation;

Personal and family maintenance;

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

Retirement plan transactions;

Tax matters.

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

SPECIAL INSTRUCTIONS:

NHAPL
December 14, 2017
Houston, Texas

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

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

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

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

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

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

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

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

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

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the

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revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

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

Signed this _____ day of _____, _____

(your signature)

State of _____

County of _____

This document was acknowledged before me on _____ (date) by

(name of principal)

(signature of notarial officer)

(Seal, if any, of notary) _____

(printed name)

My commission expires: _____

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

THE WILHELM LAW FIRM

- We work for our clients to create an environment that enhances the opportunities for their businesses to thrive.
- We are licensed in Texas, Louisiana, Arkansas, North Dakota, and Illinois. We provide legal solutions nationwide.
- We focus on the following areas of practice: Oil and Gas, State and Federal Taxation, Arbitration/Mediation, Business Start-Ups, Business Sales and Acquisitions, General Corporate, Estate Planning and Probate, Civil Litigation and Lobbying and Administrative Agency Trials.

Jack Wilhelm. Jack Wilhelm is an Austin, Texas, attorney whose office is located within a stone's throw of the General Land Office, the Texas Railroad Commission, the State Comptroller's Office, the State Capitol, and Austin area courthouses. Jack focuses his practice on oil and gas law and state taxation issues before the Texas Comptroller of Public Accounts. Jack's oil and gas clients include Fortune 500 oil and gas companies, privately owned oil and gas independents, and sophisticated landowners. Most of the oil and gas practice focuses on real estate (title examination, acquisitions and divestitures & associated due diligence, and negotiations) and assisting clients with matters before regulatory agencies. In addition to his Juris Doctorate degree, Jack holds a Masters of Energy and Environmental Law from The Tulane University. He is licensed to practice in Texas, Louisiana, Arkansas, and Illinois, and by numerous federal courts, including all Texas and Louisiana federal district courts and the United States 5th Circuit Court of Appeals located in New Orleans, as well as the United States Supreme Court. Oh, and most importantly, Jack is an Eagle Scout.

Edward Wilhelm. Edward Wilhelm is licensed to practice law in Texas, Louisiana, and North Dakota, and focuses his practice on oil and gas law and representing foreign businesses that invest in oil and gas activities. His oil and gas work focuses on the real estate side (oil and gas title examinations, acquisitions and divestitures of oil and gas interests, due diligence, and commercial negotiations). Currently, he is representing a non-operating oil-field working interest owner in a civil matter pending in west Texas that contains issues regarding trespass, adverse possession, and Railroad Commission rules and regulations; and the interpretation of oil and gas joint operating agreements. Edward Wilhelm grew up in Texas and graduated from St. Andrews High School in Austin. He graduated from Hampden-Sydney College, located in central Virginia, with honors, in 2007. While attending Hampden-Sydney, he spent his junior year attending the University of Edinburgh, Scotland, and interned at the Scottish Parliament in the Office of the Majority Whip. Following his graduation, Edward taught English and Western Civilization in Japan through the Japanese English Teachers Program (JET), and then returned to the University of Edinburgh to earn a Masters of Science degree with a focus on international relations. His Master's dissertation explored energy and economic interdependencies between the United States and Venezuela. In 2010, Edward enrolled in The Tulane University Law School in New Orleans, where served as a member of The Tulane Moot Court Board and graduated magna cum laude. While at Tulane, Edward was awarded the CALI Award for excellence in acknowledgement of having obtained the highest grade in the following subjects:

- Ethics
- Federal Courts
- Corporate Law & the Practical Aspects of a Hostile Acquisition.

In acknowledgement of his work in the area of legal ethics, Edward was the recipient of the "David L. Herman Award for High Professional Standards in The Legal Profession (Ethics)". Also, he successfully completed The Tulane - University of Berlin 2011 Mediation-Arbitration Training Program held in Berlin, Germany. Edward's work related experiences include working as a petroleum landman on important Texas Barnett Shale and Eagle Ford Shale projects; serving as a law clerk for the State of Alabama assisting in the preparation of a judicial appeal case before the United States Supreme Court; and interning with three different commercial transaction law firms in New Orleans. Oh, and most importantly, Edward is an Eagle Scout.