Dealing With a Decedent's Mineral Interests

by David W. Kirch and Elizabeth A. Cappillino

This article addresses various options for dealing with a decedent's mineral interests and how to convey underlying mineral interests where an estate has already been opened and closed. It also discusses unique issues that may arise when dealing with a decedent's mineral interests.

When dealing with a decedent's mineral interests, much of the area is controlled by accepted practices, not necessarily by statutes and title standards. This article seeks to advise on what practices to follow when handling a decedent's mineral interests and navigating the unique issues that may arise in connection with such interests.

What the Producer Will Accept and the Producer's Goal

If a mineral interest is leased or a lease has been offered, the first questions to ask are:

1. What document will the producer accept?
2. What is the producer's goal?

The answers will often determine the best approach to take.

Affidavit of Heirship

If the client is concerned only with getting royalty payments on smaller fractional interests, the producer may accept an affidavit of heirship. CRS § 38-35-113 allows affidavits to be recorded and serve as *prima facie* evidence of the facts stated in the affidavits.[1] Though the recorded affidavits cannot convey title, they are useful to explain defects in the recorded chain of title.[2] Producers are becoming less comfortable with nothing more than an affidavit, particularly for larger interests, and certainly if it purports to clear up the title issue. They will insist, in any event, that the affidavit be made by a third party. Producers may have to balance the business risks of accepting an affidavit against the problems of holding royalty payments in suspense. If the mineral interest is small enough that it will not produce enough funding for the family to probate the interest, the producer might accept the affidavit.

There are some advantages to using an affidavit of heirship, including that it avoids the cost of legal proceedings; it may allow for a quick transfer of royalty payments; and it avoids problems that result from the splitting of ownership of the underlying interest into fractional interests, if there are a number of devisees/heirs. However, the affidavit of heirship alone (in the absence of a court order or personal representative's deed regarding the interest) does not convey record or marketable title to the underlying mineral interests. Therefore, it may be useful if the only value of the interest is in getting production payments under an existing lease and there is no other significant value to the interest.[3] Because affidavits do not transfer title or resolve reasonable doubt as to the payee's identity for proceeds, a producer has no legal obligation to recognize the affidavit as putting the transferee in pay status under the proceeds statute.[4] If royalty payments are being held in suspense, a small estates affidavit might be useful.[5]

Conveying Underlying Mineral Interests

Once an estate is opened or reopened, a decedent's mineral interests may be conveyed by deed. The interest also may be leased.

Opening or Reopening an Estate

The first issue that arises in opening or reopening an estate is who has priority for appointment. Priority for appointment as a personal representative can be established by nomination in a will or under CRS § 15-12-203. If there are a number of persons with equal priority, there are several options: (1) obtain renunciation and/or nomination forms from others with equal priority;[6] (2) proceed with a formal petition for appointment of a person without exclusive priority, with the setting of a non-appearance hearing; or

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(3) obtain formal appointment of a special administrator for the sole purpose of transferring the underlying mineral interests.[7]

Formal Versus Informal

Generally, an estate can be opened informally, without prior notice and a hearing.[8] However, if there might be disagreement among the devisees and/or heirs or if there are substantial questions concerning issues, such as the validity of a will, the devolution of an intestate estate, or the identity and whereabouts of devisees or heirs, it might be better to formally open the estate. Informal proceedings are administrative in nature and require no prior notice to interested persons.[9] However, under CRS § 15-12-705, a personal representative is required to provide notice to heirs and devisees after the informal proceeding has been initiated.

Formal proceedings, on the other hand, are judicial in nature and are properly initiated by a petition to the court, and require prior notice to all interested persons and a hearing.[10] However, the paperwork required by both proceedings is very similar, and thus the cost is not necessarily that much more to proceed formally. Formal proceedings result in the added benefit of an order from the court that cannot be challenged once the time for appeal has expired.[11]

The fiduciary should be advised of the required formalities of administration and the responsibilities connected with appointment—that is, notice, inventory, accounting, and tax returns—and should make an informed decision, if any of these procedural requirements are going to be waived. Indemnification from distributees (heirs and devisees) releasing the personal representative from liabilities may be appropriate in such a case.

Reopening an Estate

If an estate has already been opened and closed in Colorado, the practitioner can petition the court to reopen the estate.[12] If the original personal representative is no longer able to act, an explanation will need to be made to the court, and any successor with priority for appointment will have to sign the petition.[13] None of the other formalities of administration needs to be followed and the closing is simplified.

Deed

The personal representative or special administrator can sign a deed distributing or selling the mineral interests, along with recording the Letters of Appointment. It is important to advise them to use a Personal Representative's Deed (a bargain and sale deed), rather than a warranty deed, to limit the warranty. A deed based on an informal appointment is as effective as a deed based on a formal appointment.[14] Some title companies require Letters Testamentary to have been certified within sixty days before to the deed, but this is not a statutory or title standard requirement.

Colorado Real Estate Title Standards, promulgated by the CBA Real Estate Section, should be consulted regarding the requirements for conveying a decedent's interests in real estate.[15] Standard 11.1.8 deals with the recording of certified copies of Letters of Appointment, along with a deed.[16] Standard 11.1.7 deals with the vesting of merchantable title in distributees versus purchasers.[17] The operation of a documentary fee stamp as to such title is set forth by statute.[18]

Under Title Standard 7.1.1, where a decedent held record interest as a joint tenant in real property, a certificate of death and a supplementary affidavit from a third party must be recorded.[19] The supplementary affidavit must include the legal description of the real property and a statement that the decedent held the interest in joint tenancy at the time of death.[20]

Oil and Gas Leases

If the decedent's mineral interests have not been distributed to beneficiaries, one option is to lease the interest. Because a personal representative has the statutory authority to lease real property of the estate,[21] the personal representative may enter into an oil and gas lease, as long as there are no restrictions on the personal representative's power to lease in the Letters of Appointment. The personal representative is not required to obtain the consent of the beneficiaries if he or she has the authority to enter into the lease. However, the personal representative should have any beneficiaries ratify the lease.

If the mineral interest is leased by the personal representative, any subsequent distribution of the mineral interest to a beneficiary is subject to the personal representative's lease. If the personal representative has the authority to enter into the lease and a beneficiary later objects to its terms, it is unlikely that the court will set aside the lease.[22] However, if at all possible, it is best for the interest to be distributed and to have the lease be with the distributees. Because oil and gas companies usually want to lease the interests as soon as possible, this may not be feasible.

Ancillary Proceedings

If an estate is still open in another state and the foreign court will issue Letters Testamentary, it may be easiest to proceed with an ancillary administration, rather than either informally or formally opening a new estate. To do so, the foreign personal representative will need to sign a Domiciliary Foreign Personal Representative's Sworn Statement (JDF 929) and file it with the court in the county where the interests are located, along with certified, exemplified, or authenticated copies of the foreign court's order and Letters.[23] Some counties may also require a certified, exemplified, or authenticated copy of the decedent's will. The court will issue a Certificate of Ancillary Filing (JDF 930), which will be recorded along with the deed and certified documents from the foreign court.[24] However, if the foreign estate administration has been closed, informally opening a new estate in the Colorado county where the interests are located is usually the best course.

Court Orders and Determinations of Heirship

The use of CRS §§ 38-30-153 and -154 (in conjunction with § 15-12-901) potentially allows for a will that has been probated to be recorded in the county where the mineral interests are located without the appointment of a fiduciary and a deed.[25] However, a certified copy of the will and an order probating the will should be recorded. Under § 15-12-901, a practitioner can get a court order, which allows him or her to have a document of record specifying who gets the interests, which might not be apparent from the will itself—for example, if a named devisee did not survive or other conditions are not satisfied. This procedure should be considered when a personal representative deed is not readily obtainable.

If there are deceased devisees or multiple generations through which the interest passed, a determination of heirship alternatively could be used to provide a recordable order.[26] An interested per-

son can file a Petition for the Determination of Heirs or Devisees or Both, And of Interests in Property after one year or more has passed since the decedent's death.[27] Under § 15-12-1302(3), the petition "may include more than one decedent if related by successive interests in the property."[28]

The statute was previously amended to extend its use to probated (but not unprobated) wills, not just to intestate situations. A subcommittee of the CBA Trust and Estate Section is currently considering a statutory change to expedite multiple probates in one proceeding and special notice to unknown or unascertainable interested parties in such circumstances. It is unclear whether the statute allows wills to be probated as part of this proceeding.

Declaratory Judgments

Finally, in the alternative, an action for declaratory judgment may be brought to ascertain any class of devisees or heirs. The action also may be brought to determine any question arising in the administration of the estate and might be offered to satisfy the requirements of a producer.[29]

Quiet Title

If no one is able or willing to open an estate, an action to quiet title might be the best (and only) option to establish ownership of the interests.[30] Because of its substantially greater cost, it should be used only if all else fails.

Unique Issues

Because a decedent's mineral interests may have been unknown or forgotten at the time of a decedent's death and many years may have passed since that death, with intervening deaths, unique situations may arise when trying to convey the interests. Examples include multiple decedents in the chain of title, a decedent's death prior to the enactment of the Colorado Probate Code, and probating lost instruments.

Multiple Decedents in the Chain of Title

If the interest passes through multiple decedents' estates, it may be possible to open an estate for only the initial decedent (in whose name the interests are titled), with a deed to the ultimate heirs and devisees who would take through the multiple estate administrations, rather than opening an estate and having deeds for every decedent in the chain of title. However, this practice should be used sparingly. If a middle generation has leased the interests, an oil and gas company will not recognize the final heirs or devisees because their lease was skipped. Additionally, the personal representative could be held responsible for correcting this mistake based on the warranties in the lease and the contractual obligations of the lease by the now deceased lessor. The obligations passed to the estate of the lessor, and skipping that generation may create more problems. It can be done, but it might be best for the personal representative's deed to trace the interest through every generation to satisfy a lessee.

When an attorney relies on the personal representative to provide information regarding the family tree or deceased devisees, for example, to establish chain of title, it is important to have that information in writing (it could be included in a fee agreement). Also, the client must be advised of the risks of such a shortcut and of the need to get sufficient indemnification from the ultimate distributees.

When Date of Death of a Person in the Chain of Title is Unknown

Pursuant to CRS § 15-10-107(1)(e), if an individual has been absent for a continuous period of five years, during which he or she has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, the decedent is presumed to be dead.[31] This statute may be used in circumstances where the original owner disappeared years ago, and the family is certain he or she is deceased but there is no death certificate or estate proceeding to establish the proper chain of title. Because of uncer-

tainty regarding the time of death, the appropriate heirs or devisees may be impossible to determine. In that case, a conservatorship for the missing person may be necessary and appropriate.[32]

Death Before Enactment of the Colorado Probate Code

A deed may not be required if the date of death was before July 1, 1974 and the estate was opened under pre-Colorado Probate Code laws, but other requirements will come into play. If a decedent was the record owner of a mineral interest and died before enactment of the Colorado Probate Code, the procedure to follow depends on which documents were recorded.

If a decedent died testate before July 1, 1974 and an estate was opened under the old laws, to pass title from the estate to the devisees of the mineral interest under the will, the following documents could be recorded:

1) certified copy of the will;
2) certified copy of the order, if available, admitting the will into probate;
3) certified copy of the Decree of Final Settlement;
4) certified copy of the Letters Testamentary; and
5) release of Colorado inheritance tax lien.[33]

If, instead, the estate wanted to sell the mineral interests to a third party, the documents that should be recorded to pass title to the third party include:

(i) certified copy of the Letter Testamentary, (ii) personal representative deed reciting the date of death, the date of the Will, the date the Will was admitted into probate and Colorado, and a quotation of the power allowing the personal representative to sell real property contained in the Will and, (iii) release of Colorado inheritance tax lien.[34]

If these documents are not of record or available, the procedures outlined above for appointment of a personal representative or determination of heirship under current law can be used.

If the above documents are not recorded, the defect might be cured by statute. An apparent owner can adversely possess real property after seven successive years of actual residency, occupancy, or possession if he or she claims ownership under an official or judicial conveyance or order.[35] Additionally, under § 38-41-108, a person in actual possession under color of title who also pays taxes on the lands for seven successive years will become the legal owner.[36] These curative statutes apply only to mineral interest ownership if the person possessed the surface estate and the minerals were not severed.[37]

Lost Wills

In situations where an original will cannot be found, special provisions allow the probate of a lost instrument.[38] The petitioner must overcome the presumption that the lost will was not revoked.[39] Once the petitioner overcomes such a presumption, possibly by an explanation of how the will was more likely to be lost than revoked, a copy of the will may be admitted or the contents of the original will must otherwise be proven.[40] Other than these two requirements, the procedure to be followed for probating a lost will is the same as the procedure if the will were physically presented.[41]

Private Agreement Among Successors

If the heirs and devisees agree to split the interests in a different manner than provided for in the will or intestacy statute, it is possible to have a private agreement among successors to protect the personal representative.[42] It may be subject to court approval (with notice to interested parties who are not parties to the agreement under CRS § 15-12-1101).

Benefits of Using an LLC or Trust

Devisees and/or heirs might want to create a limited liability company (LLC), which specifically provides for their interest to pass to their issue by representation without probate. This would avoid future probating of the interests at each generation (and further fractionalization of ownership) and keep the interests in the family (rather than having them pass to a spouse of an heir or devisee who might remarry or who has children by a prior marriage). There are legal accounting and tax reporting responsibilities and potential liabilities for the designated manager (and its successors) of an LLC. Availability and selection of a reliable manager is critical to such an arrangement. Additionally, it is important to note that some states do not allow an LLC to own certain agricultural land unless statutory requirements are met or an exception applies.[43]

Use of a trust might also be possible, with title in the name of the trust, not the trustees. The fiduciary duties of a trustee and the greater tax complexities of a trust might make this approach less suitable.

Loss of Rights Due to Tax Sale

Mineral rights can be lost if the interest is separately taxed and goes to tax sale.[44] Some counties separately assess severed mineral interests (for example, Dolores County), making them subject to loss through tax sales, and some (for example, Weld County) do not. It is possible in any county for the owner of surface rights to have mineral interests separately assessed, making it then possible for them to be acquired by a tax sale.[45]

Fee Agreements and Third-Party Payers

Often, the producer or a buyer of the mineral interests will want to have an estate opened to deed the interests and will be willing to pay the expenses. It is important to spell out the terms of the representation and payment of fees with the personal representative in a fee agreement, as well as in a payer agreement. The payer needs to acknowledge that the relationship with the personal representative is confidential, and that the client needs to agree to the payment arrangement.

Title Insurance Considerations

When land is conveyed, all the minerals beneath the surface owned by the grantor are conveyed as well, unless they are specifically reserved from the lands being conveyed. When the mineral estate has not been severed from the surface, the owner's title insurance policy may insure title to the minerals and the surface, as long as there are no specific exceptions. In certain counties, some companies refuse to offer coverage of any minerals, whether severed or not. If the denial of coverage is evidenced by a typed exception in Schedule B—Section 2, it would be noticed and one would react accordingly. However, if the denial is printed in the commitment as part of Schedule A, it can easily go unnoticed. A title insurance company may not be willing to issue a policy of title insurance to insure the holder of a mineral interest because the search of mineral rights is extremely difficult.

Assignments or conveyances of these severed or leased interests may not be recorded, so it is impossible to ascertain the current ownership for purposes of insuring the interest from the real estate records—that is, the clerk and recorder's office. However, if the minerals have not been severed, a title insurance policy might be obtained to insure that the record owner of the surface is also the owner of the minerals (under basic real estate law principles).[46] If there has been a severance or lease of the minerals and these are not excluded from the coverage, then the insured owner may have a title policy claim if the holder of the mineral interests asserts any rights adverse to the insured. A title insurance company may offer affirmative coverage by way of endorsements over the exercise of these mineral interests to the owner of surface rights.

In cases where mineral owners cannot obtain title insurance, for a mineral interest owner to determine the chain of title, there are essentially two options. The owner can hire a landman to search the real property records and prepare an ownership report. A reputable landman will have working knowledge of real property laws with regard to conveyances and can identify issues in the chain of title (there will almost certainly be some). The landman will not warrant his or her work, so there is not an "insurance" component to this approach.

Alternatively, the owner can hire an attorney to prepare a mineral title opinion. Although this is a more expensive option, it arguably provides greater certainty and imprimatur because a person who is trained in real property conveyancing issues is reviewing the documents in the chain of title. In some instances, this option would potentially give the mineral interest owner rights to sue for malpractice. However, the benefits of malpractice insurance, if the attorney has such coverage, may be illusory, because in any event a good attorney will deliver a title opinion subject to qualifications that will protect his or her firm, absent clear error. However, it should be noted that neither option determines who is entitled to the deceased record title owner's interest.

Conclusion

Every situation involving mineral interests in the name of a decedent must be analyzed independently as to the best—and least costly—approach to be taken under the circumstances. The objective of the persons ultimately entitled to ownership must be considered, and the chain of title needs to be determined.

Notes

1. CRS § 38-35-113.
2. *See* Palomar, *Patton and Palomar on Land Titles* 115 (3d ed., Thomson West, 2003).
3. Elaine Carleton, Esq., who provided many useful suggestions to this article and whose contributions are very much appreciated, suggested that the following might be added to an attorney's opinion regarding use of the affidavit:

> The examiner notes that an Affidavit of Heirship does not transfer title to real property, and may not properly identify all of the legal heirs of the decedent. Pursuant to CRS § 15-12-101 and in the absence of testamentary disposition, real property automatically devolves to those heirs entitled to receive such property by virtue of the laws of intestate succession. However, in the absence of a court order or personal representative's deed regarding the interest, such heirs hold legal title, which, while fully alienable on the death of the decedent, is not record or marketable title. *See, e.g, Collins v. Scott*, 943 P.2d 20, 22 (Colo.App. 1996). Consequently, it is possible that unidentified heirs of the decedent could exist and assert a future probate claim regarding all or a portion of this mineral interest. Further, because the mineral interest of Joe Smith was not under any oil and gas lease at his death, if such a future probate claim and proceeding is successful, it would render all or part of your leasehold in this mineral interest invalid.

4. CRS § 34-60-118.5.
5. CRS § 15-12-1201.
6. *See* Johns, ed., *The Green Book* 5-200 (CBA-CLE, 2013) (JDF 912).
7. CRS §§ 15-12-614 to -618.
8. CRS § 15-12-306.
9. CRS § 15-12-302.
10. CRS § 15-12-403.
11. CRS § 15-12-412.
12. *See The Green Book, supra* note 6 at 5-276 (JDF 990, Petition to Reopen Estate Pursuant to CRS § 15-12-1008).
13. CRS § 15-12-301.
14. *See The Green Book, supra* note 6 at 5-281 and 5-282 (Personal Representative's Deed (Sale) Form and Personal Representative's Deed (Distribution) Form).
15. *See id.* at 7-39 (Title XI. Decedent's Estates).
16. *See id*. at 7-41.
17. *See id.*
18. *See* CRS § 15-12-714(2) and the need for a notation of the state documentary fee to establish that a transaction was made for value.
19. *See The Green Book, supra* note 6 at 7-28 (Standard No. 7.1.1).
20. CRS § 38-31-102.
21. CRS § 15-1-804(g)(II).
22. *See* CRS § 15-12-714, which protects people who in good faith deal with a personal representative for value when the personal representative properly exercised his or her power.
23. CRS § 15-13-204.
24. *See The Green Book, supra* note 6 at 7-42 (Standard No. 11.1.9; this form conforms to the statutory requirements).
25. CRS §§ 38-30-153 and -154.
26. CRS §§ 15-12-1301 *et seq*. Note that one year has to pass after the decedent's death before this option becomes available.
27. *See The Green Book, supra* note 6 at 5-251 (JDF 948, Petition for the Determination of Heirs or Devisees or Both, And of Interests in Property).
28. CRS § 15-12-1302(3).
29. CRS § 13-51-108; Wade, *Wade-Parks Colorado Law of Wills, Trusts, and Fiduciary Administration* § 12.11 (6th ed., CBA-CLE, 2013).
30. CRCP 105.
31. CRS § 15-10-107(1)(e).
32. CRS § 15-14-401(1)(b)(I).
33. Perry and Clark, "Death of a Record Title Owner: Solving Estate Related Title Problems in Colorado" 5 (June 2014), www.wsmtlaw.com/cms-assets/documents/170787-613228.00276172.pdf.
34. *Id.* at 4.
35. CRS § 38-41-106; Perry and Clark, *supra* note 33 at 5.
36. CRS § 38-41-108.
37. Perry and Clark, *supra* note 33 at 5.
38. CRS § 15-12-402(2) and (3).
39. *Id.*
40. *Id.*
41. Wade, *supra* note 29 at § 6.2.
42. CRS § 15-12-912.
43. The list of states includes Iowa, Kansas, Minnesota, Missouri, North Dakota, and South Dakota. *See, e.g.,* CELF, "Anti-Corporate Farming Laws in the Heartland" (1997), www.celdf.org/anti-corporate-farming-laws-in-the-heartland.
44. *See* Carleton and Matthews, "Everything You Wanted to Know About Oil & Gas Interests (But Were Afraid to Ask)" 12 (2012), legis.sd.gov/interim/2012/documents/OGS6-12-12MineralInterest-SeveredAbandoned.pdf.
45. CRS § 39-1-104.5.
46. CRS § 10-111-123. ■