

### Question 7 – February 2019 – Selected Answer 1

A. Yes, Gwen can claim the mineral lease was not effective. At issue is whether Gwen, holder of the executive right, can claim that the mineral lease is not effective because she never "delivered" a gift deed to him.

Under Texas Property law, to convey interests in real property, the transferor generally must convey a deed. For the deed to be effective, it must be "delivered." In Texas, a deed need not be physically delivered; rather, the grantor must merely intend to make a present transfer to the grantee. Under Texas oil and gas law, the surface and mineral estate are severable and alienable; however, the mineral estate will remain the dominant estate despite any division. The owner of the mineral estate holds various rights in the subsurface estate, which include the executive right to negotiate and enter oil and gas leases.

Here, Dan bequeath a 1/8 royalty interest and "all executive rights" in Blackacre to Gwen, and "all other interests" to Ben. Later, Gwen purported to make a gift of her executive rights in Blackacre to Ben for his birthday as a gift, intending to have her attorney prepare a gift deed documenting the transfer; however, such a document was never made. Gwen's intention merely amounts to an intent to make an oral gift for which a writing was not transferred. Consequently, Gwen never conveyed the executive rights to Ben because a deed was never delivered. Thus, Gwen still holds all the executive rights in Blackacre.

Because Gwen still owns all the executive rights in Blackacre, the Mineral Lease is not effective.

B. Kim can argue waiver and pursue an injunction to prevent Big Oil from conducting drilling operations. At issue is what rights, if any, can Kim assert to preclude Big Oil from conducting drilling operations on Blackacre.

In Texas, the mineral estate is the dominant estate. An oil and gas lease is a legal agreement between the lessor of the mineral estate (the owner) and a lessee seeking to develop the subsurface minerals in the estate. Under a lease, the lessor grants a fee simple determinable to the lessee for a specific duration provided in the primary term of the oil and gas lease, and extended by the secondary term. Upon entering of an oil and gas lease, the lessee becomes holder of the mineral estate interest and thus is allowed to use as much of the surface estate as is reasonably necessary to develop the mineral thereunder; however, the lessee is subject to the accommodation doctrine. Under the accommodation doctrine, if there is a pre-existing use of the surface estate, the lessee must not substantially interfere with such surface activities and, if available, use alternative means available to use conduct its subsurface operations.

Here, prior to his death, Dan entered a three-year lease agreement with Kim (the Surface Lease), granting Kim "exclusive possession of Blackacre's surface estate, including use for the exploration for and production of oil, gas, or other minerals." The lease agreement was subsequently recorded in the property records of Henderson County. Thus, Big Oil is on constructive notice of the lease agreement. Moreover, the issue of whether the mineral lease was effective remains; based on the facts provided, Big Oil likely does not have an effective oil and gas lease on Blackacre since Gwen appears to still hold all the executive rights. Based on these

facts, Kim can sue to enjoin Big Oil on the ground that Big Oil cannot legal enter the surface estate.

Kim can sue to enjoin Big Oil and even argue waiver based on the mineral lease.

C. Gwen must satisfy the requirements for offers to buy/seller a mineral interest under Texas law; she will likely prevail on the claim for damages. At issue is what must Gwen satisfy to bring a suit against Big Oil and will she likely prevail.

The owner of the mineral interest enjoys certain rights such as the right to negotiate and enter oil and gas leases, the right to develop the mineral thereunder, as well as the right to receive payment for royalty for developing the mineral estate. A third-party may send an offer to purchase an individual's mineral interest; however, certain statutory requirements must be met. The purchaser of the mineral interest must send a writing containing conspicuous language indicating that by executing the provided document, the mineral interest owner is selling to the purchaser her mineral interest. Failure to provide this information provides grounds for the interest owner to sue for damages. If successful, the mineral interest own can recovery the greater of \$100 or the difference of the purchase price and the fair market value of the mineral interest.

Here, Gwen can sue Big Oil for damages because Big Oil failed to include any conspicuous language on the envelope or cover letter accompanying the \$1,000 check for the mineral interest. Gwen was unaware of what she was signing and that by signing she was selling her mineral interest. Accordingly, she can recover the greater of \$100 or the difference between \$1,000 and the fair market value of her mineral interest. Gwen will likely succeed.

Gwen can recover from Big Oil.

### **Question 7 – February 2019 – Selected Answer 2**

A. Yes, Gwen can clam that the mineral lease was not effective.

At issue is whether a lease conveyed by Ben was valid.

Under Texas law, a mineral interest owner owns the executive right to lease and convey the mineral interest, right to develop, produce, and explore the land; and an economic right, which includes bonus, royalty payments, and delay rentals. An executive owner is the only person that can convey an interest in the land, the right has a bundle of sticks. A lease of oil and gas is an interest in law and must satisfy the statute of frauds. It must be in writing, signed by lessor and lessee, must state a description of the interest in the land, date of termination. The lease contract does not need to be recorded in order to be valid, but if it is, it serves as notice for subsequent buyers and will appear in the owner's chain of title. A mineral lease conveys a fee simple determinable in the lessor and a right of reversion in the grantor. A lease also creates a working interest in the lessor to develop, produce, and explore the mineral tract as a prudent operator. The lessor retains the mineral rights.

Here, Ben signed the oil and gas lease but Gwen did not sign. Gwen is the mineral interest owner and is the only one that has the executive right to convey, lease, or encumber the mineral estate. Gwen inherited by will from Dan a 1/8 royalty interest in Blackacre and "all executive rights to execute oil and gas leases" for Blackacre. In the same will, Dan devised to Ben, "all other interests in Blackacre not bequeathed to Gwen". Ben may be a royalty interest owner or may hold a nonparticipatory interest holder as a result of Dan's bequeath to him, but he did not receive the executive right. While Gwen promised to gift Ben her executive rights on Blackacre, the promise is not enforceable because the statute of frauds requires a writing for conveyances of interests in land. Gwen intended to ask her attorney to draft a gift deed but she "forgot to do so". There is nothing in the facts that will allow Ben to get around the statute of frauds. Because Gwen never executed gift deed, Ben never had the right to enter into a lease with Big Oil. Therefore, the lease is not valid.

B. Kim may assert the prior use doctrine and require Big Oil to accommodate her surface estate use.

A landowner may sever the mineral and surface estates by conveying either the surface estate or the mineral estate to a grantee. The mineral estate is the dominant estate. The mineral interest owner may use the surface estate as reasonably necessary to be able to develop, explore and produce oil and gas. Under the accommodation doctrine, the surface estate must permit the mineral estate to enter the surface. However, when there is a prior use in the surface estate, the mineral interest owner must use the surface estate in a manner that interferes less with the use of the surface estate.

Here, Dan leased the surface estate of Blackacre to Kim for a period of three years. The lease is valid because it is in writing. The lease granted Kim "exclusive possession of Blackacre's surface". Kim may argue that Dan waived any right to use the Blackacre surface of any purpose during the term, including use for the exploration for and production of oil, gas, or other minerals, thus, Dan's devise in the will to Gwen was not valid. Kim may also argue that Big Oil had record notice of the lease, since her lease was recorded in the official public records in the county. Kim may also argue that Big Oil cannot conduct any drilling activities until the end of her lease. However, that argument will not succeed as the mineral estate is dominant over the surface. Since she will not succeed on this argument, Kim may require Big Oil to accommodate to her prior use of the surface estate. Under this doctrine, Big Oil must accommodate Kim's prior use if there is a reasonably alternative method that interferes less with Kim's use of the surface allowing Big Oil to conduct its drilling operations without incurring economic hardship and the alternative method is available on the tract.

C. Gwen must send a written pre-suit notice to Big Oil. It is very likely that Gwen will prevail in the suit. She may rescind the contract, and recover actual damages.

At issue is whether the purchase offer of a royalty interest met the necessary requirements to have a valid sale. Under Texas law, when an offeror wants to purchase a royalty interest it must send a cover letter indicating the purpose of the letter, include in the letter head that it is an offer to purchase a royalty interest, and that the document enclosed is a conveying instrument (deed). The deed must include a description of the land, the names of the buyer and seller, it must state

in conspicuous language (14 point size) that it is purporting to convey a royalty interest in oil, gas, and other minerals. Failure to follow this requirements may result in a rescion and liability for monetary damages. The grantor will have a cause of action for failure to disclose conspicuously. The grantor is required to send a written pre-suit notice informing the buyer that he intends to file a lawsuit for his failure to disclose, at least 30 days before filing the lawsuit. Damages include rescision, actual damages, costs, expenses, and attorney's fees.

Here, Big Oil sent an offer to purchase Gwen's royalty interest in Blackacre and mailed her a check for \$1,000 along with a cover letter asking her to sign the "enclosed document". The cover letter was deficient as it did not include a descriptive heading and the conveying language was in small print instead of being conspicuous as required. Since Gwen is a royalty interest owner she assumed that it was a payment of royalties and cashed the check. Gwen will not be precluded from asserting a claim against Big Oil simply because she cashed the check. Big Oil failed to disclose as required what the document enclosed purported to convey. Thus, Gwen is entitled to rescind the contract/conveyance and she may sue Big Oil for damages. Since Gwen doesn't want to rescind the contract, she may sue Big Oil but she must send a pre-suit notice stating that she intends to sue and recover for Big Oil's failure to disclose. Gwen may require Big Oil to pay the fair value of the 1/8 royalty interest, and she will not have to return the \$1,000 check. She can also recover actual damages, costs, and attorney's fees. Because of the failure to disclose, it is very likely that she will prevail in the suit.

### **Question 7 – February 2019 – Selected Answer 3**

A. Gwen can claim Mineral Lease was not effective because she never conveyed the executive right to lease.

Under Texas law, the mineral interest owner has the executive right to enter into oil and gas leases for the land. A nonparticipating royalty interest owner does not have a right to enter into oil and gas leases. An interest in oil and gas is an interest in real property, and must be in writing, describe the interest conveyed, contain conveyance language, name the grantee and be signed by the grantor.

Here, in April 2017, Gwen was bequethed a 1/8 royalty interest and all the executive rights. Ben received all other interests. Thus, Ben did not have the executive right to enter into a lease. Gwen's purported gift of the executive right was not in writing, and thus cannot be enforced by Ben. Thus, Ben did not have the right to enter into Mineral Lease on June 2018.

Therefore Gwen can claim Mineral Lease was not effective because she never conveyed the executive right to lease.

B. Kim may assert that the Mineral Interest was subject to her existing lease, or that Big Oil must accomodate her existing use, but both claims will likely fail.

Under Texas law, the mineral interest is the dominant estate and the surface interest is subservient. The mineral interest owner has the exclusive right to use the surface for exploration and production of minerals. These estates may be severed and alienated like other property

interests. An owner of an interest in real property cannot convey or bequeath more than they actual own. A

Here, Dan owned Blackacre and entered into a lease for the surface. Dan waived his right to use the surface for exploration and production of oil and gas. This did not sever the estates. In April 2017, the mineral estate passed to Gwen, subject to the existing Surface Lease. Gwen, as the mineral interest owner, had the exeuctive right to enter into the oil and gas lease. Kim may assert that Dan could not convey the right to use the surface, since he already waived the right; or that the lease is "subject to" her Surface Lease. However, the mineral estate is dominant, and the right to use the surface passes with the mineral estate.

Under Texas law, the lessee in an oil and gas lease has the exclusive right to use the surface for exploration and production of oil and gas. The lessor must make reasonable accomodations to the surface owner if: the surface has an existing use, there are reasonable alternatives available for exploration and production that would not interfere with the use, and those alternatvies exist on the tract of land itself.

Here, Kim has an existing use of storing equipment on the surface. If there are reasonable alternatives for Big Oil to drill for oil and gas, Big Oil must accomodate that existing use. Reasonableness is determined by all the circumstances, and takes into account the need for the lessee to make a profit. However, if there are no reasonable alternatives available on the land, the lessee will have the right to use the surface for exploration and production.

C. Gwen must show that Big Oil did not comply with the statutory requirements, and will likely prevail and recover damages.

Under Texas law, if a purchaser of a real property interest sends an offer by mail with a check enclosed, the offeror must include, in at least 14-point font and bold or conspicuous, a statement that the check is for the sale of an interest in real property. If this is not done, the seller may sue for damages in the amount of the difference in the offer accepted and the fair market value, or \$100, whichever is greater.

Here, Big Oil attempted to purchase a royalty interest by mail when it mailed an offer and an enclosed \$1,000 check. Big Oil did not meet the statutory requirements because the cover letter did not indicate that it was for a sale of a real property interest, it merely said "enclosed document." Also, there was no descriptive heading and the purported conveyance language was typed in small print. The purpose of these statutory requirements are to prevent lessees from taking advantage of unsophisticated lessors who may not read or understand what the legal significance of accepting the check and signing is.

Therefore, since Big Oil did not comply with the statute for purchasing real property by mail, Gwen may seek damages in the difference between the amount received and the fair market value, whichever is greater.