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## **“Comparing Pennsylvania and Texas Law on Ownership and Marital Rights: Common Law v. Community Property - Impact on Oil and Gas Leasing”**

Lilly Tade Van Maele

Rebecca Seidl

Kelly Shapiro

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# “COMPARING PENNSYLVANIA AND TEXAS LAW ON OWNERSHIP AND MARITAL RIGHTS: COMMON LAW V. COMMUNITY PROPERTY – IMPACT ON OIL AND GAS LEASING”

*Co-authored by Lilly Tade Van Maele, Rebecca Seidl, and Kelly Shapiro of Burleson Cooke L.L.P.*

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## I. INTRODUCTION

Located in the eastern United States is a layer of marine sedimentary rock known as the Marcellus Shale Formation (commonly referred to as the Marcellus Shale).<sup>1</sup> Underlying much of the Appalachian Basin, the Marcellus Shale extends from West Virginia to southwestern New York State<sup>2</sup> and is projected to hold trillions of cubic feet of natural gas.<sup>3</sup> Aside from the considerable volume of its forecasted resources, the Marcellus Shale’s proximity to highly popu-

1. Pa. Dep’t of Env’tl. Prot., *Marcellus Shale Fact Sheet*, PA. DEP’T OF STATE, <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-77964/0100-FS-DEP4217.pdf> (last visited Apr. 20, 2011).

2. *Marcellus Shale - Appalachian Basin Natural Gas Play*, GEOLOGY.COM, <http://geology.com/articles/marcellus-shale.shtml> (last visited Apr. 20, 2011).

3. U.S. DEP’T OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 21 (2009), available at [http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale\\_gas\\_primer\\_2009.pdf](http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf); Mary Esch, *Estimated Gas Yield from Marcellus Shale Goes Up*, ESTHERVILLE DAILY NEWS, Nov. 4, 2008, <http://www.esthervilledailynews.com/page/content.detail/id/63977.html?isap=1&nav=5016>.

lated areas along the eastern seaboard is uniquely advantageous to its economic potential.<sup>4</sup>

Long considered prohibitively expensive to access,<sup>5</sup> conventional wells drilled in the Marcellus Shale drew gas but not in significantly marketable quantities.<sup>6</sup> Through improved horizontal drilling and hydraulic fracturing techniques derived from those originally used in the Barnett Shale in Texas,<sup>7</sup> the Marcellus Shale has emerged economically viable.<sup>8</sup> Over the past two decades, the development of the Barnett Shale reservoir has significantly influenced the industry's understanding of large shale-reservoirs.<sup>9</sup> Equipped with lessons learned from the Barnett Shale, exploration and production companies now extract commercial quantities of natural gas from unconventional shale plays across the United States, including the Marcellus Shale.<sup>10</sup>

As a result of the emerging profitability of the Marcellus Shale, many Texas exploration and production companies have transitioned their work to Pennsylvania. Their experience in Texas shale formations, such as the Barnett, provides invaluable skills in procuring natural gas liquids from unconventional plays. Texas-based Range Resources Corp. of Fort Worth has established itself as a significant player in Pennsylvania. Acknowledging the potential for production, Range Resources Chairman and CEO John Pinkerton believes that "because of the size and breadth of this play, you have to be here every day."<sup>11</sup>

As Texas exploration and production companies transition into Pennsylvania, industry professionals must recognize the differing legal landscape of Pennsylvania common law. It is within this context that this article highlights the major distinctions between the marital property systems employed by Pennsylvania and Texas. Failure to understand these legal variances could result in numerous title problems relating to spousal ownership. Properly classifying the nature of the subject property is paramount because property ownership ultimately determines both the proper lessor of an oil, gas, and mineral lease and the manner in which royalties are paid.

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4. GEOLOGY.COM, *supra* note 2.

5. Pa. Dep't of Env'tl. Prot., *supra* note 1.

6. GEOLOGY.COM, *supra* note 2.

7. John A. Harper, *The Marcellus Shale - An Old "New" Gas Reservoir in Pennsylvania*, 38 PA. GEOLOGY 1, 9 (2008).

8. Esch, *supra* note 3; U.S. DEP'T OF ENERGY, *supra* note 3.

9. U.S. DEP'T OF ENERGY, *supra* note 3, at 18.

10. *Id.* at 21.

11. Casey Junkins, *Jobs, Revenue and Risks: Sides Picked in Gas Drilling Battle*, THE INTELLIGENCER: WHEELING NEWS-REGISTER, Nov. 7, 2010, <http://www.theintelligencer.net/page/content.detail/id/548639/Jobs—Revenue-and-Risks—Sides-P—.html>.

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The two states' similarities and differences are outlined in the following three sub-topics: marital property systems, spousal protections, and intestate succession. Each sub-topic begins with a discussion and analysis of Texas law, followed by a discussion and analysis of Pennsylvania law, and concludes with practical considerations.

## II. MARITAL PROPERTY SYSTEMS

In the United States, community property and common law constitute the two categories of marital property systems.<sup>12</sup> The community property system is based upon a partnership theory in that both spouses contribute equally to the marriage.<sup>13</sup> Each spouse owns an undivided one-half interest in the income that either spouse earns during marriage.<sup>14</sup> In contrast, under common law, each spouse's separate earnings are owned individually and are not shared with the other spouse.<sup>15</sup> Common ownership does not result merely as a consequence of the marriage in common law jurisdictions.<sup>16</sup>

### A. Texas

Community property in Texas dates back to the state's beginnings as a Spanish province and existed long before Texas gained its independence from Mexico.<sup>17</sup> Only eight other states employ a community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington, and Wisconsin.<sup>18</sup>

The Texas Constitution is the primary authority on classifying property.<sup>19</sup> In *Arnold v. Leonard*, the Supreme Court of Texas explained that the legislature is prohibited from altering the classifications of separate and community property as set forth in the Texas Constitution.<sup>20</sup> Notably, though, the Texas Constitution does not expressly define community property.<sup>21</sup> Rather, the Texas Constitution identifies certain property as separate property and implies that all other property not characterized as such is community property.<sup>22</sup> Article 16, section 15 of the Texas Constitution defines separate property as "all

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12. Aloysius A. Leopold, "Loss of Earning Capacity" Benefits in the Community Property Jurisdiction — How Do You Figure?, 30 ST. MARY'S L.J. 367, 369 (1999).

13. *Id.* at 374.

14. *Gen. Ins. Co. of Am. v. Casper*, 426 S.W.2d 606, 609 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

15. GERRY W. BEYER, *WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS* § 1.3.2 (3d ed. 2005).

16. Leopold, *supra* note 12, at 374.

17. FRED A. LANG & ALOYSIUS A. LEOPOLD, *TEXAS PRACTICE: LAND TITLES AND TITLE EXAMINATION* §§ 1.1, 1.29, 2.1 (3d ed. 2005).

18. RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY*, § 53.01(3) (1997).

19. *See* TEX. CONST. art. XVI, § 15.

20. *Arnold v. Leonard*, 273 S.W. 799, 801–02 (Tex. 1925).

21. *See* TEX. CONST. art. XVI, § 15.

22. *See id.*

property, both real or personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent.”<sup>23</sup> This implied exclusion approach creates a presumption in favor of community property.<sup>24</sup>

The constitutional presumption of community property is reaffirmed in the Texas Family Code.<sup>25</sup> The Family Code defines community property as all property acquired during marriage, other than separate property.<sup>26</sup> The Texas Family Code also expands the scope of separate property by including the recovery for one spouse’s personal injuries.<sup>27</sup> According to section 3.001 of the Texas Family Code, separate property now consists of: “(1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.”<sup>28</sup> In *Graham v. Franco*, the Texas Supreme Court upheld this statutory addition to the Texas Family Code concluding that it did not alter the meaning of separate property as set forth in the Texas Constitution.<sup>29</sup>

In 1859, the Texas Supreme Court recognized that “the principle which lies at the foundation of the whole system of community property is that whatever is acquired by the joint efforts of the husband and wife, shall be their common property.”<sup>30</sup> While Texas courts have long embraced the principles of community property, they have minimized the presumption in favor of community property.<sup>31</sup> This presumption can be rebutted by clear and convincing evidence.<sup>32</sup> For example, property acquired during the marriage may defeat the community property presumption if a spouse can demonstrate by clear and convincing evidence that the property was purchased entirely by separate funds. Similarly, the status of property acquired by either spouse prior to marriage cannot be subsequently altered, even though a portion of the purchase price is paid for with community funds.<sup>33</sup>

23. *See id.*

24. Leopold, *supra* note 12, at 378.

25. TEX. FAM. CODE ANN. § 3.003 (West 2009) (“(a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. (b) The degree of proof necessary to establish that property is separate property is clear and convincing.”).

26. *Id.* § 3.002.

27. *See id.* § 3.001(3).

28. *Id.* § 3.001; *See Graham v. Franco*, 488 S.W.2d 390, 391 (Tex. 1972).

29. *Graham*, 488 S.W.2d at 395 (explaining that by “adopting the provisions of section 15 of Article 16 of our constitution, the people did not intend to change the common law or the Spanish law under which Texas operated”).

30. *Stephens v. Stephens*, 292 S.W. 290, 293 (Tex. Civ. App.—Amarillo 1927, writ dismissed w.o.j.) (citing *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25, 28 (1859)).

31. Leopold, *supra* note 12, at 379.

32. *See Tex. Fam. Code Ann.* § 3.003(b).

33. *Odstrcil v. Odstrcil*, 384 S.W.2d 403, 406 (Tex. Civ. App.—Houston 1964, writ dismissed).

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Evolving case law highlights another method of classification based on the time of acquisition.<sup>34</sup> According to the inception of title doctrine, a property's characterization is fixed as separate or community property at the moment it is acquired.<sup>35</sup> Title vests at the first instance a party has a right of claim to the property.<sup>36</sup> However, the property's original character can be subsequently altered by a post-marital agreement between the spouses.<sup>37</sup> Furthermore, a conveyance of community property between husband and wife vests title in the recipient spouse's separate estate.<sup>38</sup>

### B. *Pennsylvania*

Pennsylvania belongs to the majority of states who have adopted the common law system and does not recognize the concept of community property. English-based common law views the husband and wife as an indivisible unit.<sup>39</sup> From this concept of unity evolved the estate known as tenancy by the entirety.<sup>40</sup>

A tenancy by the entirety is a form of co-ownership in real and personal property available only to a married couple and requires the joinder of five unities: time, title, interest, possession, and marriage.<sup>41</sup> Pennsylvania Supreme Court Justice Musmanno explains a tenancy by the entirety as follows:

A husband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade, and fruit as much as the other.<sup>42</sup>

The early concept of unity provided that husband and wife could not acquire property in any way other than as one entirety.<sup>43</sup> Any intent contrary to taking by the entirety was viewed as immaterial.<sup>44</sup> In 1913, the Supreme Court of Pennsylvania softened its approach, however, by recognizing a grantor's intent to create separate interests, so long as said intent was expressly stated.<sup>45</sup> Such an express provision would allow a husband and wife to each take individual, undi-

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34. See *Graham*, 488 S.W.2d at 395.

35. *Smith v. Buss*, 144 S.W.2d 529, 532 (Tex. 1940).

36. *Hallum v. Hallum*, No. 01-09-00095-CV, 2010 WL 4910232 (Tex. App.—Houston [1st Dist.] Dec. 2, 2010, no pet.) (mem. op.).

37. TEX. CONST. art. XVI, § 15.

38. See *Lewis v. Simon*, 710 S.W. 554, 555 (Tex. 1889); *Baker v. Baker*, 55 Tex. 577, 580 (1881); *Story v. Marshall*, 24 Tex. 305, 308 (1859); *Tison v. Gass*, 46 Tex. Civ. App. 163, 169, 102 S.W. 751, 754 (Galveston 1907, writ ref'd).

39. 41 C.J.S. *Husband and Wife* § 19 (2006).

40. *Beihl v. Martin*, 84 A. 953, 954 (Pa. 1912).

41. BLACK'S LAW DICTIONARY 1506 (8th ed. 2004).

42. *Sterrett v. Sterrett*, 166 A.2d 1, 2 (Pa. 1960).

43. *Beihl*, 84 A. at 954.

44. *Id.*

45. See *Blease v. Anderson*, 88 A. 365, 365–67 (Pa. 1913).

vided interests in the property.<sup>46</sup> Still, a conveyance to husband and wife creates a tenancy by the entirety absent a clear intent to convey individual interests to each.<sup>47</sup> Therefore, the grantees' marital status determines their right to take title to the property as tenants by the entirety.<sup>48</sup> Hence, a conveyance to an unmarried couple will not create a tenancy by the entirety.<sup>49</sup>

One spouse alone cannot unilaterally convey the property held by the entirety in an attempt to destroy the entirety estate.<sup>50</sup> During the marriage, a tenancy by the entirety may be severed by a joint conveyance of the estate executed by both parties or by mutual agreement between husband and wife.<sup>51</sup> Divorce will also sever a tenancy by the entirety.<sup>52</sup> Upon divorce, tenants by the entirety become tenants in common with each holding separate and distinct equal one-half shares of the property.<sup>53</sup> Either of them may bring an action against the other to have the property sold and the proceeds divided between them.<sup>54</sup> Either party may also convey to the other his or her undivided interest in the property without the joinder of the other tenant.<sup>55</sup> The remainder of the marital property is subject to an equitable distribution to both husband and wife,<sup>56</sup> however, if the property is not marital property then the court may direct its partition.<sup>57</sup>

As discussed above, the common law system recognizes the union between husband and wife created by the marital relationship. Despite this recognition, under the common law, property acquired by one spouse alone remains his or her own separate property, regardless of whether the property was acquired during the marriage.<sup>58</sup> Earnings are characterized as the separate property of the earning spouse,<sup>59</sup> and any property subsequently purchased with these earnings retains its characterization as separate.<sup>60</sup> Each spouse may freely convey his or her own separate property without the joinder of the other spouse.<sup>61</sup>

Although spouses may not share in the ownership of separate property acquired during the marriage, Pennsylvania common law classi-

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46. *See id.* at 366–67.

47. *In re Estate of Holmes*, 200 A.2d 745, 747 (Pa. 1964).

48. *Id.*

49. *Masgai v. Masgai*, 333 A.2d 861, 863 (Pa. 1975).

50. *Gasner v. Pierce*, 134 A. 494, 495 (Pa. 1926).

51. *Beihl v. Martin*, 84 A. 953, 956 (Pa. 1912).

52. *In re Estate of Maljovec*, 602 A.2d 1317, 1320 (Pa. Super. Ct. 1991).

53. 23 PA. CONS. STAT. ANN. § 3507(a) (West 2010).

54. *Id.*

55. *Id.* § 3508.

56. *See Keen v. Keen*, 461 A.2d 846, 848 (Pa. Super. Ct. 1983).

57. *Estep v. Estep*, 474 A.2d 302, 307 (Pa. Super. Ct. 1984), *rev'd*, 500 A.2d 418, 420 (Pa. 1985).

58. *See In re Fitzgibbon's Estate*, 116 A. 289, 291 (Pa. 1922).

59. *Beyer*, *supra* note 15.

60. *See Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 234 (Tex. Civ. App.—El Paso 1954, writ *ref'd n.r.e.*).

61. *Id.*

fies property as marital and non-marital for purposes of equitable distribution upon divorce.<sup>62</sup> Title 23, Chapter 35 of the Pennsylvania Consolidated Statutes generally defines marital property as all property acquired by either party during the marriage, as well as the increase in value of any property acquired prior to marriage.<sup>63</sup> Title 23, Chapter 35 also lists several exceptions to marital property including property acquired prior to marriage or by gift, devise, or descent.<sup>64</sup>

There is a presumption that property acquired during the marriage is classified as marital property, regardless of whether title is held individually or by both parties.<sup>65</sup> A person or property owner can overcome this presumption by evidence that the property was acquired prior to marriage; by gift, bequest, devise, or descent; or as otherwise enumerated in Title 23, Chapter 35 of the Pennsylvania Consolidated Statutes.<sup>66</sup> Taking all economic factors into account, the court makes an equitable and just division of all marital property between the parties to a divorce action.<sup>67</sup>

### C. *Practical Considerations*

Under Texas law, the marital property characterization significantly impacts the identification of the proper executing parties to an oil, gas, and mineral lease. Hence, landmen and title examiners should familiarize themselves with the definition of separate property as set forth in Article 16, section 15 of the Texas Constitution. Recall that property not falling within the separate property definition is presumptively community property.

The Texas Family Code guides the management of separate and community property.<sup>68</sup> Each spouse maintains "sole management, control, and disposition" of his or her separate property.<sup>69</sup> Therefore, only the spouse owning the separate property needs to execute the oil, gas, and mineral lease.

However, community property may be subject to either the sole management of one spouse or the joint management of both spouses. section 3.102 of the Texas Family Code provides "during marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single," and lists examples of such property.<sup>70</sup> Property is presumed to be the sole management of one spouse if it is held in that spouse's name.<sup>71</sup>

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62. *Drake v. Drake*, 725 A.2d 717, 722 (Pa. 1999).

63. *Id.*

64. *Id.*

65. *Id.*

66. 23 PA. CONS. STAT. ANN. § 3501(a)-(b) (West 2010).

67. *Id.* § 3502(a).

68. TEX. FAM. CODE ANN. §§ 3.101-.102 (West 2009).

69. *Id.* § 3.101.

70. *Id.* § 3.102(a).

71. *Id.* § 3.104(a).



That being said, property held in the name of only one spouse is not necessarily determinative of its character.<sup>72</sup> All other community property that does not fall within section 3.102 of the Texas Family Code is subject to the joint management of both spouses and any conveyance requires the joinder of both spouses.<sup>73</sup> Often a landman or title examiner encounters difficulty in determining whether property is sole-managed or community-managed, and should require the joinder of both spouses to an oil, gas, and mineral lease as a matter of prudence.<sup>74</sup>

In Pennsylvania, the subsequent marriage of the spouses does not alter the status of property acquired prior to marriage.<sup>75</sup> Marriage at the time of conveyance is necessary for the creation of a tenancy by the entirety.<sup>76</sup> This rule may be overcome by a later deed executed by and between the spouses during their marriage to establish their desire to hold title as tenants by the entirety.<sup>77</sup>

Unlike the concept of sole-managed property in Texas, Pennsylvania law does not recognize a general presumption that one spouse alone has the authority to convey property held by the entirety.<sup>78</sup> Neither spouse may adversely affect the estate independently and without consideration of the other spouse.<sup>79</sup> In some cases, a conveyance by one spouse may benefit the entirety, but a non-consenting spouse may choose to repudiate this action.<sup>80</sup>

During the fall of 1947, Pennsylvania briefly adopted the concept of community property by enacting the Community Property Law of 1947 (Act No. 550), effective September 1, 1947. This new law provided “all property acquired by either the husband or wife during marriage and after the effective date of the act, except that which is separate property of either, is to be deemed community or common property of the husband and wife, and each shall be vested with an undivided one-half interest therein.”<sup>81</sup> Shortly thereafter, on November 26, 1947, the Supreme Court of Pennsylvania in *Wilcox v. Penn Mutual Life Insurance Co.*, unanimously held the Community Property Law wholly invalid.<sup>82</sup> Although the Community Property Law was repealed, title issues between September 1, 1947, and November

72. Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 278 (1997).

73. TEX. FAM. CODE ANN. § 3.102(c) (West 2009).

74. Paul G. Yale, *To Waive or Not to Waive: Analyzing Oil and Gas Title Opinion Requirements*, LANDMAN MAG., Dec. 2009, at 23, 34.

75. *Stuckey v. Keefe's Ex'rs*, 26 Pa. 397, 403 (1856).

76. *Frederick v. Southwick*, 67 A.2d 802, 805 (Pa. Super. Ct. 1949).

77. *Stavish v. Stavish*, 14 Pa. D. & C.3d 367, 370 (Ct. Com. Pl. 1980).

78. *Polka v. May*, 118 A.2d 154, 156 (Pa. 1955).

79. *Schweitzer v. Evans*, 63 A.2d 39, 41 (Pa. 1949).

80. *Id.*

81. *Wilcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 523 (Pa. 1947).

82. *Id.* at 531.

26, 1947, must be considered within the context of community property.

### III. SPOUSAL PROTECTIONS

Both Texas and Pennsylvania offer spousal protections that safeguard the property rights of each spouse. In Texas, the homestead designation safeguards the property as well as the ownership rights of the spouses in and to the subject property. Common law states, including Pennsylvania, recognize a form of spousal protection known as the elective share, which allows the surviving spouse the option to take a fraction of a deceased spouse's estate.<sup>83</sup>

#### A. *Texas*

Homestead, like community property, is provided for in the Texas Constitution as a fundamental tenet of Texas property law.<sup>84</sup> Primarily created as a protection against creditors, the homestead provision also protects the rights of spouses.<sup>85</sup> Regardless of a tract's characterization as community or separate property, neither spouse can convey homestead property without the other's explicit consent.<sup>86</sup> Homestead laws are gender-neutral, and extend to both single and married individuals.<sup>87</sup> Physical occupancy of the tract or overt actions of preparation with the intention to reside on the tract in the future are necessary to establish a tract's homestead character.<sup>88</sup>

The Texas Constitution defines a rural homestead as a tract of land of not more than two hundred acres and not located in a town or city; a homestead in a town or city is limited to a single lot or contiguous lots of not more than ten acres.<sup>89</sup> Article 16, section 50 of the Texas Constitution requires the consent of each owner, and his or her spouse, prior to the sale or encumbrance of homestead property.<sup>90</sup> Subject to certain exceptions, neither spouse may convey the homestead property without the other's joinder no matter whether it is characterized as the community property of both spouses or separate property of one spouse.<sup>91</sup> These exceptions are listed in sections 5.003 and 5.101–.102 of the Texas Family Code.<sup>92</sup>

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83. See 20 PA. CONS. STAT. ANN. §§ 2201–11 (West 2005).

84. See TEX. CONST. art. XVI, § 51.

85. James W. Paulsen, *Introduction: The Texas Home Equity Controversy in Context*, 26 ST. MARY'S L.J. 307, 310–311 (1995).

86. TEX. CONST. art. XVI, § 50(b).

87. Mary Lou Cassidy, *Yours, Mine or Ours — Who Bought the Farm?*, in 18TH ANNUAL ADVANCED OIL, GAS AND MINERAL LAW COURSE, Ch. 14, at 4 (2000) (on file with author).

88. *Gilmore v. Dennison*, 115 S.W. 2d 902, 902 (Tex. 1938).

89. TEX. CONST. art. XVI, § 51.

90. *Id.* § 50(b).

91. TEX. FAM. CODE ANN. § 5.001 (West 2009).

92. See *id.* §§ 5.003, .101–.102.

A tract's homestead character extends to its unsevered mineral estate.<sup>93</sup> Since oil and gas leases convey an interest in real property, these leases fall within the general rule that both spouses must join in the conveyance of homestead property.<sup>94</sup> Conversely, if the surface and mineral estates are severed, the surface estate's homestead designation does not extend to the severed mineral estate.<sup>95</sup> Therefore, an oil, gas, and mineral lease covering a severed mineral estate does not require the joinder of both spouses if the mineral estate is the separate property of one spouse.

The failure to secure the signatures of both spouses on homestead property does not void the oil and gas lease, but rather, renders it inoperative.<sup>96</sup> Until an oil and gas lease is obtained and executed by both spouses, the homestead property remains wholly unleased.<sup>97</sup> The Texas Title Standards presume that a tract of land that includes surface ownership is homestead and, prior to relying on a conveyance by one spouse alone, the examiner should require a definite showing that the subject land is not homestead property.<sup>98</sup>

### B. *Pennsylvania*

Pennsylvania does not have homestead property concepts akin to those of Texas and other true homestead states. The word "homestead" is used in Pennsylvania to describe a partial *ad valorem* tax benefit available for certain residential properties upon particular terms and conditions.<sup>99</sup> Although Pennsylvania does not offer the protection of homestead, spouses' rights are safeguarded by the aforementioned elective share.<sup>100</sup>

An elective share provides the surviving spouse an interest in the decedent's assets in which the decedent "retained important rights of ownership at death."<sup>101</sup> For example, the surviving spouse could elect to take against property held jointly between the decedent and a third party.<sup>102</sup> This spousal election does not include property that has

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93. *Gulf Prod. Co. v. Cont'l Oil Co.*, 132 S.W.2d 553, 562 (Tex. 1939).

94. *Id.* at 565.

95. TEX. PROP. CODE ANN. T. 2, app., Title Examination Standards § 14.90 cmt. (West 2011).

96. *Id.*

97. *Griffin v. Bell*, 202 S.W. 1034, 1037 (Tex. Civ. App.—Texarkana 1918, writ ref'd).

98. TEX. PROP. CODE ANN. T. 2, app., Title Examination Standards § 14.90 caution (West 2011).

99. Russell L. Schetroma, *A Summary of Selected Provisions of Pennsylvania Oil and Gas Law for the Landman* (2008) (unpublished research compilation) (on file with author).

100. 20 PA. CONS. STAT. ANN. §§ 2201–11 (West 2005).

101. *In re Estate of Kotz*, 406 A.2d 524, 530 (Pa. 1979) (citing *In re Estate of Schwartz*, 295 A.2d 600, 602 (Pa. 1972)).

102. 20 PA. CONS. STAT. ANN. § 2203.

been wholly or jointly conveyed away and in which no interest is retained by the spouse.<sup>103</sup>

Chapter 21 of Title 20 of the Pennsylvania Consolidated Statutes lists several scenarios in which the surviving spouse has an elective share of an undivided one-third (1/3) interest in the decedent's property and/or estate.<sup>104</sup> Included in this list is the right to an elective share in property passing by will or intestacy.<sup>105</sup> The surviving spouse has six months after the date of the decedent's death or probate, whichever is later, to file a written notice of his or her intent to take, or not to take, the elective share.<sup>106</sup>

### C. *Practical Considerations*

In Texas, a lease taken from a married lessor who owns both the surface and mineral estates should be investigated for possible homestead status.<sup>107</sup> A review of the public records is an unsound method of establishing a tract's homestead character because the public records rarely contain conclusive evidence of a tract's homestead character.<sup>108</sup> For instance, a lessee is on notice of a tract's possible homestead status if it is occupied by the owner as his or her home.<sup>109</sup> An affidavit from the tract's owner that designates other property as his or her homestead and states that the subject tract is not his or her homestead is conclusive and should be required.<sup>110</sup> Unless there is definitive evidence that the property is not their homestead, both spouses should execute an oil and gas lease.

Under Pennsylvania law, each spouse may freely convey his or her own separate property without the consent or joinder of the non-owning spouse; however, a conveyance of separate property by one spouse may later be subject to an elective share by their surviving spouse. Accordingly, lessees should obtain spousal joinders in which the non-owning spouse waives all of his or her interest in the property.

## IV. INTESTATE SUCCESSION

### A. *Texas*

If a record title owner dies without leaving a will, he or she is said to have died intestate and property passes by intestate succession as governed by the Texas intestacy statutes.<sup>111</sup> Because community and sep-

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103. *In re Estate of Behan*, 160 A.2d 209, 214 (Pa. 1960).

104. 20 PA. CONS. STAT. ANN. § 2203(a).

105. *Id.* § 2203(a)(1).

106. *Id.* § 2210.

107. Cassidy, *supra* note 87, at 2.

108. TEX. PROP. CODE ANN. T. 2, app., Title Examination Standards § 14.90 caution (West 2011).

109. *Texas Land & Loan Co. v. Blalock*, 13 S.W. 12, 13 (Tex. 1890).

110. TEX. CONST. ANN. Art. XVI, § 50(d).

111. *See* TEX. PROB. CODE ANN. §§ 38, 45 (West 2010).

arate property are treated differently under the Texas intestacy statutes, a threshold determination must be made as to whether the decedent's subject property is characterized as community or separate.

### 1. Prior to September 1, 1993

A title examiner in Texas must take particular notice of the decedent's date of death, as several changes to the intestacy laws went into effect on September 1, 1993. Prior to September 1, 1993, if a decedent who owned separate real property was married with children at the time of death, then two-thirds of the decedent's separate property passed in equal shares to his or her children and their descendants.<sup>112</sup> The remaining one-third of the decedent's separate property vested in the surviving spouse as a life estate, with the remainder to the children and their descendants.<sup>113</sup> For community property, however, a decedent's undivided one-half community property interest passed in equal shares to the decedent's children and their descendants.

To illustrate the nature of intestate succession as it applies to community property prior to September 1, 1993, consider the following hypothetical:

Harry and Wanda live in Texas. After getting married, they purchase a ranch outside of Austin. Eventually, Harry and Wanda decide to expand their family and have three children, Albert, Barry, and Cindy. Based on the Inception of Title Doctrine, the ranch is classified as Harry and Wanda's community property; as such, Harry and Wanda each owned an undivided one-half interest in the ranch. If Harry died without a will prior to September 1, 1993, his interest in the ranch, being an undivided one-half community property interest, would pass in equal shares to his three children, Albert, Barry, and Cindy. By operation of law, each child would own an undivided one-third of Harry's one-half interest in the ranch.

### 2. Effective September 1, 1993

The legislative changes to the laws on intestate succession did not affect a decedent's separate property estate. For community property, however, if a decedent is married with children at the time of death, the decedent's community property interest vests entirely in the surviving spouse, so long as all surviving children are issue of the decedent and the decedent's surviving spouse. If the decedent had children from outside of the marriage on the decedent's date of death, the decedent's community property interest vests in all his children and their descendants.<sup>114</sup>

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112. *Id.* § 38(b)(1).

113. *Id.*

114. *Id.* § 45(b).

Consider again the illustration from above. If Harry dies intestate on or after September 1, 1993, all of his community property interest in the ranch vests in his surviving wife, Wanda. Albert, Barry, and Cindy would not inherit any interest in the ranch.

## B. *Pennsylvania*

### 1. Property Held by the Entirety Estate

As noted above, under Pennsylvania law, a husband and wife are considered one person and a tenancy by the entirety cannot exist without this marital relationship.<sup>115</sup> Upon the death of one spouse, the estate as a whole is not altered, but continues to be held by the surviving spouse.<sup>116</sup> However, the surviving spouse ceases to hold title to the property as a tenant in the entirety and the surviving spouse becomes the sole owner of the complete estate.<sup>117</sup>

The Supreme Court of Pennsylvania declared this right of survivorship "has been the settled law for centuries" and "is founded upon the nature of the marriage."<sup>118</sup> Survivorship in the entire estate is a key feature of tenancy by the entirety. Consequently, one spouse, by his or her death, may not disrupt the surviving spouse's right of survivorship in the entirety estate.<sup>119</sup>

As expressed in *Diver v. Diver*, upon the death of a spouse, the property held by the entirety estate does not descend to the decedent's heirs.<sup>120</sup> However, if a tenancy by the entirety was terminated *prior* to the death of either spouse, then upon their deaths, each spouse's interest passed to their respective estates.<sup>121</sup> Upon the simultaneous death of a husband and wife, one-half of the entirety estate passes to the wife's heirs, and the other one-half of the entirety estate passes to the husband's heirs.<sup>122</sup>

This right of survivorship distinguishes Texas and Pennsylvania intestacy laws. Recall that under Texas law, both community property and separate property are subject to intestate succession. But, since a tenancy by the entirety vests the entire estate in the surviving spouse, the entirety estate is not subject to the laws of intestate succession.

### 2. All Other Property Not Part of the Entirety Estate

Chapter 21 of Title 20 of the Pennsylvania Consolidated Statutes governs intestate succession in Pennsylvania. All property that does

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115. *Clingerman v. Sadowski*, 519 A.2d 378, 380–81 (Pa. 1986).

116. *Driver v. Driver*, 56 Pa. 106, 109 (1867).

117. *In re Estate of Holmes*, 200 A.2d 745, 747 (Pa. 1964).

118. *Id.* (citing *Rogers v. Grider*, 31 Ky. (1 Dana) 242 (1833)).

119. *Shapiro v. Shapiro*, 224 A.2d 164, 173 (Pa. 1966).

120. *Driver*, 56 Pa. at 109.

121. *Clingerman v. Sadowski*, 519 A.2d 378, 384 (Pa. 1986).

122. 20 PA. CONS. STAT. ANN. § 8503 (West 2005).

not pass by will is subject to the laws of intestacy.<sup>123</sup> Title to the decedent's property vests in his or her surviving heirs at the moment of his or her death.<sup>124</sup>

Per Chapter 21, if the intestate decedent is not survived by children or parents, then the entire estate of the intestate decedent passes to the surviving spouse.<sup>125</sup> Where the decedent is survived, however, by a spouse *and* the decedent's children or the decedent's parents, the decedent's estate is divided amongst the surviving spouse and the decedent's children or parents.

In a case when the decedent is survived by his or her spouse *and* their issue, the first \$30,000 plus one-half of the decedent's remaining estate passes to the surviving spouse.<sup>126</sup> Where the decedent is survived by issue who are not also issue of the surviving spouse, the surviving spouse inherits only one-half of the decedent's remaining estate.<sup>127</sup> Finally, if a decedent is survived by no issue, but is survived by a spouse and parent(s) of the decedent, the surviving spouse inherits the first \$30,000, plus one-half of the decedent's remaining estate.<sup>128</sup>

Should any part of the intestate decedent's estate not pass to the surviving spouse, then it shall pass to the following individuals in the following order:

- (1) Issue of the decedent;
- (2) Decedent's parents if no issue survives the decedent;
- (3) Decedent's siblings if no issue or parents survive the decedent;
- (4) Decedent's grandparents if no issue, parents or siblings survive the decedent;
- (5) Decedent's aunts, uncles and their children and grandchildren if no issue, parents, siblings, or grandparents survive the decedent; and
- (6) If none of the previous individuals survive, then the decedent's estate passes to the Commonwealth of Pennsylvania.<sup>129</sup>

Upon the death of a spouse, legal title to that spouse's property passes to the heirs of the decedent by operation of law and does not require a conveyance by deed or court action.<sup>130</sup> Nonetheless, the decedent's property may be subject to a court order and authorized actions by a properly appointed personal representative of the intestate

123. *In re Estate of Luongo*, 823 A.2d 942, 956 (Pa. Super. Ct. 2003).

124. *See Fullerton v. Fullerton*, 89 Pa. D. & C. 607, 608 (Ct. Com. Pl. 1953).

125. 20 PA. CONS. STAT. ANN. § 2102(1) (West 2005); *In re Estate of Kirk*, 535 A.2d 669, 670 n.2 (Pa. Super. Ct. 1988).

126. 20 PA. CONS. STAT. ANN. § 2102(3).

127. *Id.* § 2102(4).

128. *Id.* § 2102(2).

129. *Id.* § 2103.

130. *See Fullerton v. Fullerton*, 89 Pa. D. & C. 607, 608 (Ct. Com. Pl. 1953).

estate.<sup>131</sup> Within two years after the decedent's death, the court may appoint a personal representative, and the heirs of the decedent remain subject to the actions of the personal representative.<sup>132</sup> When this course of action is pursued, letters of administration are issued to the personal representative by the Register of Wills.<sup>133</sup>

### C. *Practical Considerations*

In Texas, an important practical consideration when examining instances of intestate succession and its impact on oil, gas, and mineral leasing is who must execute an oil, gas, and mineral lease. If the record title owner dies intestate, or if the owner dies testate but the will was not probated, then the examiner must, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will and require that all of them join in any conveyance of the property of the decedent. Such requirement also extends to the execution of oil, gas, and mineral leases.

In order to ascertain the identity of the heirs of the decedent, an examiner may rely upon an Affidavit of Heirship with respect to the family history and identities of the heirs at law at the time of death.<sup>134</sup> Affidavits of Heirship are recorded in the real property records of the county in which the decedent owned real property.<sup>135</sup> Preferably, an Affidavit of Heirship is averred to by non-interested parties; however, it is not required. An Affidavit of Heirship must be sworn to by the affiant, and contain a proper jurat, a clause identifying when, where, and before whom the affidavit was sworn. It should also contain the following necessary information: the names and residences of the decedent's heirs; the relationship of each heir to the decedent; the decedent's marital history, including the names and addresses of all spouses and children, whether born or adopted; the date of death and heirs of any predeceased spouse or child; and a general description of the real and personal property belonging to the estate.<sup>136</sup> A subsequent conveyance or an oil, gas, and mineral lease must be from all interested heirs named in the Affidavit of Heirship. Without the joinder of such heirs, their undivided interest in the subject land remains unleased.

In Pennsylvania, the rights of the heirs remain subject to the rights of any personal representatives appointed within two years from the date of death. Therefore, it is not prudent to take a lease from the

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131. *Brown v. Bailey*, 84 Pa. D. & C. 269, 274 (Ct. Com. Pl. 1952).

132. Russell L. Schetroma, *A Summary of Selected Provisions of Pennsylvania Oil and Gas Law for the Landman* (2008) (unpublished research compilation) (on file with author).

133. 20 PA. CONS. STAT. ANN. § 3155 (West Supp. 2010).

134. TEX. PROP. CODE ANN. T. 2, app., Title Examination Standards § 11.70 (West Supp. 2011).

135. *Id.* § 52 (West 2011).

136. *Id.* § 52A.



heirs within two years of the date of death, absent a joinder in that deed by a properly appointed personal representative.<sup>137</sup> When conveying real property, the heirs should reconcile any gaps in the chain of record title between the decedent and the grantee by reciting in the deed the manner in which the title descended. In Pennsylvania, Affidavits of Heirship, executed by as many known heirs as may be found, should be used to reconcile any gaps in the chain of title.

## V. CONCLUSION

At the end of 2010, the Marcellus Shale continued to increase its natural gas production, and industry sources predict this trend will continue in 2011.<sup>138</sup> According to Bill Holland, Associate Editor of *Gas Daily*, “The drilling is going to be getting even bigger in the Marcellus Shale in 2011.”<sup>139</sup>

Located about 1,500 miles southwest of Pennsylvania, deep in the heart of Texas, lies an equally impressive shale play, the Eagle Ford shale formation. Previously overshadowed by other areas of domestic production, the Eagle Ford is thought to be one of the biggest oil and gas formations in the United States.<sup>140</sup> Chairman and CEO of Houston’s EOG Resources, Mark G. Papa forecasted that, “the Eagle Ford would probably be the hottest single area in all the lower forty-eight states in 2011.”<sup>141</sup>

Given the status of both shale plays, land managers, title attorneys, and exploration and production companies will undoubtedly find themselves crossing state lines. As identified in this article, property systems in Pennsylvania and Texas vary significantly; therefore, industry professionals should familiarize themselves with the laws of each state. The topics discussed in this article are intended to highlight major considerations regarding marital property rights as they relate to Texas and Pennsylvania law but are not intended to be an exhaustive source on the subject. Materials such as the Texas Title Standards and the American Association of Petroleum Landman’s Comparison of Laws on Leasing, Exploration, and Production, are also helpful guides in understanding the two legal systems beyond the scope of this article.

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137. Russell L. Schetroma, *A Summary of Selected Provisions of Pennsylvania Oil and Gas Law for the Landman* (2008) (unpublished research compilation) (on file with author).

138. Joe Napsha, *Marcellus Wells, Output Up in Third Quarter*, *PITTSBURGH TRIB. REV.*, Oct. 19, 2010, [http://www.pittsburghlive.com/x/pittsburghtrib/business/s\\_704974.html](http://www.pittsburghlive.com/x/pittsburghtrib/business/s_704974.html).

139. *Id.*

140. Brett Clanton, *South Texas Shale Attracting Interest and Billions of Dollars*, *FUELFIX*, Jan. 3, 2011, <http://fuelfix.com/blog/2011/01/03/s-texas-shale-attracting-interest-and-billions-of-dollars/>.

141. *Id.*