THE PENNSYLVANIA BAR ASSOCIATION

Quarterly

PENNSYLVANIA BAR ASSOCIATION

Your Other Partner

January 2013 • VOLUME LXXXIV, NO. 1

Recognizing New Issues Arising Out Of The Marcellus Shale Development—Avoiding Pitfalls—A Primer For Diligent Oil And Gas Title Attorneys

By MICHAEL K. VENNUM, ESQ. AND GRANT H. HACKLEY, ESQ.[1]
Washington County
Members of the Pennsylvania Bar

TABLE OF CONTENTS

ABSTRACT

Because of the fast-paced exploration and heavily competitive production of the natural gas shale plays occurring throughout Pennsylvania, several law firms and attorneys licensed in the Commonwealth have expanded their practices to include the review of oil and gas title abstracts. While some practitioners have years of experience dealing with oil, gas and coal estates, a vast majority of lawyers are at the infancy of their title careers, learning the practice and crafting their opinions in order to explain, to mostly out-of-state landmen and division order title analysts, subjects such as the Dunham Rule,[2] royalty apportionment,[3] intestacy succession[4] and the particulars of Pennsylvania's recording statute.[5] However, the diligent title attorney is aware of other Pennsylvania-specific issues that may affect the client's oil and gas leasehold interests. This article highlights four topics of which attorneys should be aware when reviewing abstracts and preparing their title opinions: (1) Pennsylvania's modified common law concept of stranger to title; (2) Pennsylvania's brief experimentation with community property; (3) the validity (or invalidity) of oil and gas leases executed during the administration of an estate; and (4) title washing.

1. Michael K. Vennum, Esq. is a partner at the Canonsburg law office of Burleson LLP. He represents energy exploration and production companies in land use, title and transactional matters. Grant H. Hackley, Esq., is an associate with Burleson LLP, focusing his practice on oil and gas title examination and general business matters.
2. *Dunham* v. *Kirkpatrick*, 101 Pa. 36 (1882).
3. *Swint* v. *McCalmont Oil Co.*, 39 A. 1021 (Pa. 1898).
4. 20 Pa. Cons. Stat. §§2101-14 (2012).
5. 21 Pa. Stat. Ann. §405 (West 2012).

RESERVATION TO A STRANGER TO TITLE

Under common law, a grantor cannot convey an interest to real estate in favor of a stranger to the land's title via a reservation contained in a deed.[6] Pennsylvania has adopted a modified form of the common law focusing upon the grantor's intent.[7] In *In re Condemnation by Cnty. of Allegheny of Certain Coal, Oil, Gas, Limestone, Mineral Props.*, the ownership of oil, gas and mineral rights underlying land located in Findlay Township, Allegheny County, Pennsylvania, was questioned during an eminent domain proceeding. The determination of vested ownership focused upon a reservation contained in a 1942 deed between Cosgrove-Meehan Coal Company of Pennsylvania ("Cosgrove PA") and James Morrow, Jr. ("Morrow"), whereby Cosgrove PA conveyed land to Morrow *excepting and reserving* to Cosgrove-Meehan Coal Corporation ("Cosgrove Coal")[8] all of the coal, gas, oil, limestone and other minerals. The court was asked to determine whether the exception and reservation to Cosgrove Coal, being a stranger to title, was void.

The Diligent Attorney is Aware of Pennsylvania-Specific Issues Affecting Oil and Gas Leasehold Interests.

Initially, the court accepted the common law rule that "generally a reservation/exception of rights in a stranger to a deed is ineffective to transfer any interests to the stranger."[9] However, noting that the primary objective "in construing a deed is to ascertain and effectuate the intention of the parties," the court reasoned that the parties' intention in the 1942 deed was unambiguous: "The intent was that James Morrow, Jr. not receive the right to mine coal."[10] Thus, the court held that, despite the ineffective reservation to a stranger in title, Cosgrove PA did not intend to transfer the oil, gas and mineral rights to Morrow and thereby effectively reserved those rights to itself upon issuance of the 1942 deed. As persuasive authority for its holding, the court cited the North Dakota Supreme Court's decision of *Malloy* v. *Boettcher*.[11]

In *Malloy*, spouses executed a deed conveying to their daughter an interest in land individually owned by the husband and reserving a life estate to both the husband and wife. Upon the death of the husband, his daughter filed a quiet title action asserting that she was the sole owner of the applicable land. Her mother countered, claiming that the mother possessed a life estate pursuant to the deed's reservation clause. The court recognized the common law to be that "a reservation or exception in a deed of conveyance cannot operate as a conveyance to a party who is a stranger to the title or deed."[12] However, the court then "abandoned" the common law rule,

---

6. Eugene Kuntz, A Treatise on the Law of Oil and Gas 414-16 (The W.H. Anderson Co., 1st ed. 1904); Eugene Kuntz, A Treatise on the Law of Oil and Gas 162-64 (Matthew Bender, Rev. Ed. 2011). *See generally* Howard H. Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla. L. Rev. 127 (1953).

7. *In re* Condemnation by Cnty. of Allegheny of Certain Coal, Oil, Gas, Limestone, Mineral Props., 719 A.2d 1 (Pa. Cmwlth. Ct. 1998). *See also In re*: Howard, 422 B.R. 593 (Bankr. W.D. Pa. 2010) (recognizing that "as a general matter, a grantor who is a 'stranger' to title cannot gain an interest in the reserved and/or excepted property where none previously existed.").

8. The Commonwealth Court emphasized that Cosgrove Coal was a separate legal entity from Cosgrove PA and was not a party to the 1942 deed. *In re Condemnation by Cnty. of Allegheny*, 719 A.2d at 4.

9. *Id.* at 3. In its acceptance of the common law rule, the court cited *Meadows* v. *Belknap*, 483 S.E.2d 826 (W.Va. 1997) (holding that, despite a reservation to a stranger being void, a grantor can reserve to a third party [in this instance, his wife] a life estate in real property if the instrument conveying the land is clear and unambiguous as to the reservation) and *Rye* v. *Baumann*, 329 S.W. 2d 161 (Ark. 1959) (holding, in part, that a reservation in favor of a stranger is void or inoperative).

10. *In re Condemnation by Cnty. of Allegheny*, 719 A.2d at 4.

11. *Malloy* v. *Boettcher*, 334 N.W.2d 8 (N.D. 1983).

12. *Id.* at 8 (citing *Stetson* v. *Nelson*, 118 N.W.2d 685, 688 (N.D. 1962)).

stating that a reservation can convey a property interest to a stranger to title where it is determined that the conveyance was the grantor's intent. The court held that the husband intended to reserve a life estate to both himself *and* his wife and, as such, the wife was granted a life estate in the land via the reservation clause.[13]

Although the Commonwealth Court used *Malloy* as persuasive authority in setting forth the principle that the grantor's intent determines whether a reservation to a stranger may ultimately be reserved to the grantor, no Pennsylvania appellate court decision exists as to whether a stranger to title, such as a spouse, can receive a life estate, or other interest, in property.[14] The Beaver County Court of Common Pleas broached the subject in its decision of *Alexa* v. *Alexa*,[15] when, in *dicta*, the court cited to various jurisdictions outside of Pennsylvania in reasoning that a life estate in a wife was created when she joined her husband as a grantor in a deed to convey the husband's separately owned property with a reservation to each of them as grantors as long as the wife was relinquishing her inchoate rights by joining in the applicable deed.[16] However, *Alexa* has limited, if any, precedential value.

Therefore, in Pennsylvania, a conveyance to a stranger to title requires the discernment of the grantor's intent when interpreting a reservation/exception clause. When such intent is evident, the clause *may* consequently reserve that interest in the grantor. However, whether an interest can be ultimately conveyed to a stranger to the title, including a spouse, will likely require a court decree issued based upon a declaratory judgment action.

PENNSYLVANIA'S COMMUNITY PROPERTY LAW EXPERIMENT

In Pennsylvania, married couples typically hold real property (and, if applicable, oil and gas royalty interests) as tenants by the entirety if they acquire such property jointly after marriage.[17] Consequently, the spouses own the property collectively, and neither spouse can convey it independently.[18] The concept was memorialized as early as 1843 in the Pennsylvania Supreme Court's decision of *Johnson* v. *Hart*.[19] To avoid such an estate, spouses must affirmatively designate that the property is to be held in some capacity other than as entireties. The two primary advantages of a tenancy by the entirety are: (1) when one spouse dies, the other spouse becomes the sole owner of the property[20] and (2) generally, a creditor cannot acquire an enforce-

13. Three of the concurring justices in Mallow claimed that, by law, a wife is not a stranger to title. *Malloy*, 334 N.W.2d at 10-11 (Vandewalle, J., concurring); *Id.* at 11 (Pederson, J., concurring); and, *Id.* at 11-12 (Sand, J., concurring). The Commonwealth Court's holding in *In re Condemnation by Cnty. of Allegheny* did not distinguish between spousal and non-familial third party interests.

14. *In re*: Howard, 422 B.R. 593, 600 (Bankr. W.D. Pa. 2010).

15. *Alexa* v. *Alexa*, 23 Pa. D. & C.3d 164 (Beaver Cnty. Ct. Com. Pl. 1982).

16. The court, in *Alexa*, stated that courts in several other states have held "that the rights which the spouse acquires through marriage are sufficient to make her no longer a stranger to the title." *Id.* at 168. The court cited the following cases: *Saunders* v. *Saunders*, 26 N.E.2d 126 (Ill. 1940); *Bd. of Missions of Methodist Episcopal Church, S.* v. *Mayo*, 81 F.2d 449 (6th Cir. 1936) (applying Kentucky law); *Engel* v. *Ladewig*, 116 N.W. 550 (Mich. 1908); and, *Glasgow* v. *Glasgow*, 70 S.E.2d 432 (S.C. 1952).

17. *Clingerman* v. *Sadowski*, 519 A.2d 378 (Pa. 1986). *See also Gilliland* v. *Gilliland*, 751 A.2d 1169 (Pa. Super. Ct. 2000), *appeal denied*, 761 A.2d 550 (Pa. 2000); McAuly Estate, 49 Pa.D.&C.2d 407 (Allegheny Cnty. Ct. Com. Pl. 1970). *See generally* Ladner, Pa. Real Estate Law §8.04 (5th Ed. 2006 & Supp. 2011).

18. A tenancy by the entirety can be severed only in certain circumstances: (1) death of one of the spouses; (2) joint conveyance; (3) divorce; or, (4) mutual agreement, either expressed or implied. *Clingerman*, 519 A.2d at 381. *See also* 23 Pa. Cons. Stat. §3507 (2012) (regarding division of entireties property between divorced persons). Prior to 1949, however, a divorce did not terminate a tenancy by the entirety. *See* Ladners, *supra* note 17, §8.04(g).

19. *Johnson* v. *Hart*, 6 Watts & Serg. 319 (Pa. 1843). *See Stuckey* v. *Keefe's Ex'rs*, 26 Pa. 397, 399 (1856) (holding that the concept of entireties has been settled law for centuries).

20. *Clingerman*, 519 A.2d at 381.

able lien on the entireties real estate through a judgment that is entered against only one of the spouses.[21]

The entireties concept differs from that of a community property jurisdiction wherein marital interests of spouses, being acquisitions arising from the earnings of either spouse during marriage, constitute community property, but property of one spouse owned or claimed before marriage or that is acquired afterward by gift, devise or descent is considered separate property.[22] Community property may be subject to either the sole management of one spouse or the joint management of both spouses.[23]

Interestingly, in the fall of 1947, and only for a very brief period of time, Pennsylvania statutorily became a community property state. In an effort to combat rising federal tax rates resulting from the Great Depression and World War II, Pennsylvania joined several other states in taking advantage of a federal tax loophole by changing its marital property regime.[24] Because spouses in community property states are deemed to have earned one half of each other's income, the filing of one half of the marital income on two separate returns resulted in a lower overall tax rate, which provided an advantage in community property states.[25] A married couple with only one wage earner would be taxed at a lower rate than if they were residents of a common law state.[26] This favorable tax treatment was eventually diminished by the Revenue Act of 1948,[27] but not before Pennsylvania enacted its Community Property Law of 1947 (the "Community Property Law").[28]

The Community Property Law became effective on September 1, 1947, and provided that

> [a]ll property acquired by either the husband or wife during marriage and after the effective date of this act, except that which is the separate property of either ... shall be deemed the community or common property of the husband and wife, and each shall be vested with an undivided one-half interest therein, and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary be satisfactorily proved.[29]

Section 5 of the Community Property Law provided a caveat for the disposing and encumbering of real estate in that "[a]ll real estate, whether the separate property of the husband or wife, or the community or common property of both, shall not be

---

21. *In re*: O'Lexa, 476 F.3d 177 (3d Cir. 2007). *See Amadon* v. *Amadon*, 59 A.2d 135 (Pa. 1948). *See also In re*: Hope, 77 B.R. 470, 472 (Bankr. E.D. Pa. 1987) (reiterating that "[a]t most, a creditor of either spouse may obtain a presently unenforceable lien upon the spouse's expectancy of survivorship—a lien that becomes enforceable only when the other spouse dies."). *But see U.S.* v. *Craft*, 535 U.S. 274 (2002) (holding that a husband's federal tax lien attaches to property held by the entirety).

22. *E.g.*, Tex. Fam. Code Ann. §3.002 (West 2012). *See, e.g., Padilla* v. *Roller*, 608 P.2d 1116 (N.M. 1980) (holding that oil, gas and mineral leases are real property and, if arising from community property, one spouse cannot convey such leases without the consent of the other spouse).

23. *See, e.g.*, Tex. Fam. Code Ann. §3.101.

24. *See generally* Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939-1947*, 27 Law & Hist. Rev. 585 (2009) (pp. 613-20 cover Pennsylvania's Community Property Law).

25. *See* Katherine D. Black et al., *Community Property for Non-Community Property States*, 24 Quinnipiac Prob. L.J. 260, 260-61 (2011).

26. Jennifer E. Sturiale, *The Passage of Community Property Laws, 1939-1947: Was "More than Money" Involved?*, 11 Mich. J. Gender & L. 213, 214-15 (2005).

27. Revenue Act of 1948, Pub. L. No. 471, ch. 168, §§301-05, 62 Stat. 110, 114-16 (codified as amended in scattered sections of 26 U.S.C.) (amending I.R.C. 12(c) (1939)). *See also* McMahon, *supra* note 24, at 621-22.

28. 1947 Pa. Laws 1423, *invalidated by Willcox* v. *Penn Mut. Life Ins. Co.*, 55 A.2d 521 (Pa. 1947). The court found the Community Property Law to be so "uncertain and contradictory in its terms ... as to be ... inoperative and incapable of execution." *Willcox*, 55 A.2d at 528.

29. 1947 Pa. Laws at 1424. Section 4 of the Community Property Law provided the husband with the management and control over all community property that was not otherwise conferred upon the wife by provisions of the Community Property Law. *Id.*

sold, encumbered or otherwise disposed of, except in the manner provided by law prior to the effective date of this act."[30] However, Section 9 of the Community Property Law permitted a spouse to convey community property "in esse," which operated

> to divest the property therein described of every claim or demand as community property to the extent herein provided, and shall vest the same in the grantee as the separate property of the grantee: Provided, however, That the deeds, conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift or encumbrance.[31]

Furthermore, upon divorce, the Community Property Law vested undivided one-half interests to the community property in the former husband and wife as tenants in common.[32]

Pennsylvania's community property experiment was brief. On November 26, 1947, less than three months after the Community Property Law became effective, the Pennsylvania Supreme Court held the law to be unconstitutional and "wholly invalid."[33] Although the Pennsylvania Supreme Court invalidated the Community Property Law, certain conveyances and acquisitions of both real estate and personal property (such as royalty interests)[34] that occurred during the period that the law was initially considered to be effective should be deliberated under the context of community property law.[35]

VALIDITY OF PERSONAL REPRESENTATIVE EXECUTED OIL AND GAS LEASES

Many title abstracts for properties located in the Marcellus Shale and Utica Shale regions of Pennsylvania will include recently executed oil and gas leases that are within their primary terms. A few of those leases may have been executed by a personal representative or heirs of a decedent's estate. The diligent title attorney will pay particular attention to the structure of those instruments because Pennsylvania's Probate, Estates and Fiduciaries Code (the "Probate Code") places general restrictions on the personal representative's (and an heir's individual) ability to lease the decedent's real estate and oil and gas interests.

Section 3352 of the Probate Code states that "[e]xcept as otherwise provided by the will, if any, the personal representative may lease any real or personal property which he is entitled to possess."[36] Title to a decedent's real estate presumably vests at the time of death to the heirs or devisees, and title to personal property passes to the personal representatives, if any, upon the decedent's death.[37] Further, Section 3354 of the Probate Code directs that "[a] power in the [will] to . . . lease . . . property not given to any person by name or description shall be deemed to have been given to the personal representative and may be exercised without court approval."[38] Never-

30. *Id.*
31. *Id.* at 1425.
32. *Id.* at 1425-26.
33. Willcox, 55 A.2d at 531.
34. In Pennsylvania, a natural gas royalty is considered personal property. *London* v. *Kingsley*, 81 A.2d 870, 875 (Pa. 1951); *Wettengel* v. *Gormley*, 39 A. 57, 58 (Pa. 1898); *Miller* v. *Dierken*, 33 A.2d 804, 807 (Pa. Super. Ct. 1943); *Burke* v. *Kerr*, 15 A.2d 685, 686 (Pa. Super. Ct. 1940). *See* 33 Pa. L. Encyc., *Mining, Oil & Gas* §84 (2010) ("A right to receive oil and gas rents or royalties is generally a chose in action.").
35. *See* Lilly Tade Van Maele et al., *Comparing Pennsylvania and Texas Law on Ownership and Marital Rights: Common Law v. Community Property—Impact on Oil and Gas Leasing*, 18 Tex. Wesleyan L. Rev. 113 (2011).
36. 20 Pa. Cons. Stat. §3352.
37. 20 Pa. Cons. Stat. §301.
38. 20 Pa. Cons. Stat. §3354.

theless, despite these presumptions of when title to a decedent's interests passes, the "full legal title of a decedent is *both* in the devisee and in the personal representative."[39]

If it is determined that the personal representative may lease a decedent's property, then the lease's term is limited. Pursuant to the Probate Code, an executor of a testator's estate may execute an oil and gas lease only if the testator's last will and testament authorizes the executor to do so.[40] Otherwise, if the last will and testament does not expressly provide the executor with the power to lease, then the executor must obtain approval from the Orphans' Court in order to bind the estate to a lease. Similarly, the administrator of an intestate estate must obtain Orphans' Court approval to bind the estate to an oil and gas lease. The Probate Code does provide a caveat to the required Orphans' Court approval in that such approval is unnecessary if the lease term is less than one year from the date of the decedent's death or if the lease is terminable by the personal representative at any later time on thirty days' notice.[41]

However, not all leases failing to meet the statutory requirements will be inoperable. In *In re: Estate of Bilger*,[42] the Pennsylvania Superior Court was asked to determine whether a sole heir of her son's estate, who joined the personal representative in executing a real estate lease for a term of ten years, could maintain a subsequent action to have the lease voided because it was not approved by the Orphans' Court as required by the Probate Code. The court noted that Section 3352 of the Probate Code is

> intended to permit the administrator to administer real estate owned by a decedent without undue delay so that the estate could be settled with reasonable celerity. It was also intended to create a stable procedure for disposition of the decedent's realty and certainty in the marketability of the title thereto.[43]

Consequently, the court held that, because legal title to the real estate passed to the decedent's heir, which she could thereafter deal with as her own, and that the administrator did not subsequently contend that the lease impaired his ability to administer the estate, the heir could not maintain that the lease should be voided due to its imperfect execution (in that the administrator of the estate acted without court approval). The court added that the heir, who co-signed the lease, accepted the benefits of that agreement for more than two years before challenging its validity.

Additionally, the diligent title attorney should be wary about an oil and gas lease executed solely by the heirs of a decedent because of the Pennsylvania Supreme Court's warning in *Quality Lumber & Millwork Co.* v. *Andrus* that those who enter into agreements with

> an heir or devisee, in the absence of the joinder in the transaction of the decedent's personal representative or a court decree awarding the interest of the decedent to such heir or devisee, assume the risk of later acts of the personal representative or a subsequent decree of the court.[44]

---

39. *Maier* v. *Henning*, 578 A.2d 1279, 1282 n. 5 (Pa. 1990) (holding that "a personal representative may only sell specifically devised estate property with the consent of the devisee, or where the proceeds from such sale would be needed to satisfy debts, taxes, and other expenses incurred in the administration of the estate, or if the will so provides.").

40. 20 Pa. Cons. Stat. §§3352-54.

41. "The lease may be for a term expiring not more than one year after the decedent's death unless it is terminable by the personal representative at any time on 30 days' notice, or unless a longer term is approved by the [Orphans' Court]." 20 Pa. Cons. Stat. §3325. The Orphans' Court can approve a term longer than one year and waive the thirty days' termination obligations. *Id.*

42. *In re* Estate of Bilger, 590 A.2d 366 (Pa. Super. Ct. 1991).

43. *Id.* (citing *Quality Lumber & Millwork Co.* v. *Andrus*, 200 A.2d 754 (Pa. 1964)).

44. *Quality Lumber*, 200 A.2d at 759. *See also Hupp.* v. *Union Coal & Coke Co.*, 131 A. 364 (Pa. 1925) (validating a coal deed executed by all of the decedent's heirs and his executors).

In *Quality Lumber*, the court affirmed the invalidation of a mortgage executed only by the decedent's heir while the estate was still being administered. Conversely, in *DiLoretto* v. *Marsidell, Inc.*,[45] the court confirmed the priority of an oil and gas lease that was executed by a devisee prior to the issuance of testamentary letters and based on the following facts: Adolphus Goodrich ("Goodrich"), the sole devisee of his wife's estate, granted an oil and gas lease to Albert DiLoretto (the "DiLoretto Lease") when the applicable will had not yet been probated and letters were not yet issued. Four years later, the will was probated, letters were issued and the estate was settled. The Orphans' Court authorized Goodrich, as the estate's personal representative,[46] to sell the land covered by the DiLoretto Lease to Sidney Stone ("Stone"). Thereafter, Stone leased the oil and gas rights to Marsidell, Inc. (the "Marsidell Lease"). Both DiLoretto and Marsidell, Inc. claimed rights to the oil and gas and, thus, sought a declaratory judgment as to the priority of the leaseholds. The Pennsylvania Supreme Court held that because DiLoretto, in good faith and for value, acquired the DiLoretto Lease from the sole devisee of the decedent, and the interest was obtained more than one year after the decedent's death and at a time when no letters of testamentary had been issued, DiLoretto was protected from a divestiture under the Probate Code.[47] As such, the DiLoretto Lease was given priority over the Marsidell Lease.

Thus, the diligent title attorney, when encountering a contemporary oil and gas lease related to a decedent's estate interest should determine (1) if all necessary parties have executed the lease, including all heirs or devisees and the personal representative, and (2) if the personal representative executed the lease, then whether the lease is for a term expiring not more than one year after the decedent's death, includes a clause stating that the lease is terminable by the personal representative upon thirty days' notice or evidences Orphans' Court approval authorizing the personal representative to bind the estate to a lease for a longer term. If such conditions are not met, then the diligent title attorney will advise the client that the subject lease is probably invalid and, as a protective measure, if the client intends to operate under the subject lease, then the client should obtain either: (1) a new lease executed by the personal representative as well as all heirs or devisees and approved by the Orphans' Court, or (2) a ratification of the subject lease from the necessary previously missing parties and possibly the Orphans' Court.[48] This is not to say that all leases require execution by heirs and personal representatives and Orphans' Court approval. However, these protective recommendations are intended to limit subsequent challenges and, thus, court costs.

TITLE "WASHING" AND UNSEATED LANDS

Finally, the diligent title attorney must be aware of the possibility of title washing in the chain of title, which functions to erase early reservations of oil, gas and minerals underlying formerly undeveloped land.

Historically, Pennsylvania courts have treated real estate distinctly for tax purposes depending upon whether it was "seated" or "unseated."[49] The distinction lies

45. *DiLoretto* v. *Marsidell, Inc.*, 200 A.2d 890 (Pa. 1964).

46. Goodrich was both the sole devisee of the subject land and the estate's personal representative.

47. The court's holding was based on Sections 547 and 615 of Pennsylvania's Fiduciaries Act of April 18, 1949, P.L. 512, as amended, 20 Pa. Cons. Stat. §§320.547 and 320.615 (current versions at 20 Pa. Cons. Stat. §§3372 and 3385 (2012)).

48. Prior to the Fiduciaries Act of 1917, a personal representative had nothing to do with a decedent's real estate except as directed or empowered by the testator. Section 542 of the Fiduciaries Act of 1949 completed the liberation of real estate from its former limitations by authorizing the personal representative to lease it for an appropriate term.

49. *Rosenburger* v. *Schull*, 7 Watts 390 (Pa. 1838); *Hutchinson* v. *Kline*, 49 A. 312 (Pa. 1901).

in whether the applicable land had been improved in some manner. Land was considered to be seated when the tax assessor "finds upon it such permanent improvements as indicate a personal responsibility for the taxes."[50] If the tax assessor found no improvements upon the land, he would denote the land as being unseated.[51] Conversely, if the assessor found sufficient improvements upon the land to demonstrate a personal responsibility for the land to be assessed, he denoted the land as being seated. The distinction determined the manner of tax collection: "the question is but how the taxes shall be collected: if seated, then from some person; but if unseated, from the land itself."[52]

This distinction comes into play in the title arena when examining severances of oil, gas and mineral estates from the surface of *unseated* land. The holder of unseated land held a duty to provide a description of the land to the commissioners of the county in which such land was located.[53] Upon severance of the oil, gas or minerals from the surface, the subsurface owner held a further obligation to notify the assessor of the severance for the purpose of separate assessment of the subsurface estate.[54] Nevertheless, some landowners failed to provide the required notifications. Thus, an assessor visually examining those lands had no immediate basis, without a review of the chain of title, to determine whether a subsurface severance had occurred. As a result, in the event unseated land became subject to sale for delinquent taxes, failure to notify the assessor of the severance resulted in the previously severed subsurface estate passing to the grantee of the surface under the applicable tax deed, unless, of course, the oil, gas and minerals were specifically excluded from the tax deed.[55] This result contrasts, importantly, with that of a tax deed conveying seated land. When the oil, gas and minerals underlying seated land had previously been severed, a grantee under a tax deed acquired no interest in oil, gas and minerals, unless the tax deed so specifically provided.[56]

It follows that a surface owner of unseated but severed land could obtain possession of the subsurface estate via the relatively uncomplicated mechanism of intentional failure to pay taxes. The surface owner of land with a prior severance of oil, gas or minerals, with the intent to recombine the various estates with the surface, allowed taxes on that land to become delinquent, and then utilized a "straw" purchaser at the tax sale to purchase the lands from the county treasurer. Typically, the straw purchaser further failed to record the treasurer's deed for a period of two years, a time period conveniently coinciding with the expiration of the statutory tax redemption period. This "title washing" merged the subsurface estate into the surface estate and divested the subsurface owners of their prior reservation. This contrivance was given the imprimatur of the courts, which seemed to implicitly justify their holding based on the failure to alert the assessor and the failure to pay taxes.[57]

This scenario played out in the context of large amounts of acreage consolidated by leather and lumber interests in northern and central Pennsylvania. In the late 1800s, Pennsylvania had an enormous leather tanning industry, which purchased vast amounts of acreage for the purpose of obtaining hemlock bark, an exceptional

---

50. *Hutchinson*, 49 A. at 313.
51. *Id.*
52. *Stoetzel* v. *Jackson*, 105 Pa. 562, 567 (1884).
53. *Williston* v. *Colkett*, 9 Pa. 38 (1848).
54. *Hutchinson*, 49 A. 313. *But see also Day* v. *Johnson*, 31 Pa.D.&C.3d 556 (Warren Cnty. Ct. Com. Pl. 1983) (holding that the speculative nature of the value of minerals, oil and gas, if any [i.e., the taxable estate] underlying the land raises a question as to the value of the estate to be taxed and therefore no tax delinquency under which a tax sale could occur should arise until production occurred and the estate could be properly valued.)
55. *Hutchinson*.
56. *Luther* v. *Game Commission*, 113 A.2d 314 (Pa. 1955) (distinguishing Hutchinson).
57. *See, e.g., Proctor* v. *Sagamore Big Game Club*, 166 F.Supp. 465 (W.D. Pa. 1958).

source of tannins used in the tanning process. Once the bark had been removed, the resulting timber was useful in the lumber industry, which also held tremendous influence and some overlap with the tanning industry. As the "Leather Trust" built up its holdings, it began to transfer these interests through *mesne* conveyances and transactions to its affiliated entities (often, ultimately, becoming vested to the Central Pennsylvania Lumber Company). Along the way, the various entities in the Leather Trust are believe to have engaged in numerous title washes, allowing interests to pass through tax sales and straw purchasers and back to an affiliated entity.

A reasonably diligent title attorney would most likely be alerted to title washing based on the names of recognizable parties in the chain of title, including various leather and lumber interests or their associated principals, including Central Pennsylvania Lumber Company, Elk Tanning Company, Union Tanning Company, Keta Realty Company, Astra Oil & Gas Company, Thomas Proctor and G.W. Childs. As previously noted, most title washing conveyances occurred in central and northern Pennsylvania. Thus, a tax deed dating from the late 1890s to the 1930s in Elk County, for example, should arouse the first suspicions of an alert title attorney to the possibility of title washing.

The diligent title attorney suspecting the possibility of a title wash should perform a grantee search, starting with the present owner and chaining the applicable title backwards in time. Additionally, the attorney should be aware that a tax deed almost never includes the name of the prior owner to unseated lands it conveys, because the taxes are assessed against the land and not as to a person. If this is the case, the diligent title attorney must go back to the initial land warrants to compare names and warrant or lot numbers and to trace the mineral interests forward from the warrant to the reservation *and* backward from the present claimant to the tax sale. Additionally, the diligent title attorney will direct the title abstractor to look in the unseated land books, which were maintained by all counties except Allegheny and Philadelphia, to confirm the historical status of the land for taxing purposes. Further, the attorney will direct the abstractor to review the county treasurer's deed books and redemption books to determine whether the particular subject land has ever been the subject of a tax sale and/or redemption. Lastly, the diligent title attorney should inquire whether the oil, gas and minerals were separately assessed at the time of the tax sale, in which case the title washing would be unsuccessful.[58]

CONCLUSION

In summation, Pennsylvania's real estate laws encompass several, oftentimes overlooked, eccentricities that diligent title attorneys should be aware when reviewing oil and gas opinions for their energy production clients because of the laws' possible implications on the vested ownership of oil and gas rights. Such laws include the matters covered by this article: (1) the modified common law rule related to reservations to a stranger to title and how those reservations may not necessarily be void if the parties' intent is unambiguously discernible, (2) Pennsylvania's brief (albeit judicially voided) experimentation with community property law from September 1, 1947, through November 26, 1947, (3) the validity of oil and gas leases executed by a decedent's personal representative without Orphans' Court approval or by the estate's heirs or devisees and (4) the concept of title washing as applied to historical unseated lands, which reunites severed oil and gas interests with the surface estate.

58. Separate assessment of the subsurface estate was abolished prospectively by *Independent Oil & Gas Ass'n of Pa.* v. *Fayette Cnty. Bd. Of Assessment Appeals*, 814 A.2d 180 (Pa. 2002).