"DEFENSIBLE TITLE" WHEN EXAMINING OIL AND GAS INTERESTS: AN OVERVIEW OF THE LAW IN OKLAHOMA

AND

OKLAHOMA SEVERED MINERALS AFFIDAVIT OF HEIRSHIP

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"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after Rocket Oil and Gas Co. v. Donabar", 82 The Oklahoma Bar Journal 622 (March 12, 2011);
"Well Site Safety Zone Act: New Life for Act", 80 OBJ 1061 (May 9. 2009).

A. INTRODUCTION

According to Kuntz: "With respect to ordinary land transactions, it is well established that, in the absence of a specific provision on the subject, it is implied in every executory contract for the sale of land that the vendor must provide merchantable or marketable title. The same is true in the instance of contracts for the execution or assignment of an oil and gas lease. The vendor need not have such title at the time the contract is entered into, provided that he is able to perform at the proper time and place, or before trial."[1] The below discussion assumes that the parties have agreed to provide and to accept Defensible Title, rather than perfect, merchantable, or marketable title, and herein there is an attempt to explain, how the term, Defensible Title, is to be used in evaluating the adequacy of title to oil and gas properties being conveyed by a seller to a buyer. Principally, the focus is on the underlying title for oil and gas leases being sold and assigned by the lessee to a buyer.

The approach taken in this article is: (1) to discuss whether there is authority -- from statutes, case law, and treatises -- in the oil and gas industry, either inside or outside Oklahoma, defining the term "Defensible Title", standing alone, when determining whether title is adequate to enforce a sale between knowledgeable parties in the oil and gas industry, (2), because such definitive legal guidance does not appear to exist, to discuss what guidance the authorities do give us in at least a general sense, and (3) to explore what language can be found in typical asset purchase and sale agreements, which provide a definition for at least that particular transaction.

In addition, for one's further study, a list of suggested related articles and other authorities on this subject is provided.

[1] Eugene Kuntz, *A Treatise on the Law of Oil and Gas,* Anderson Publication Company, 1989, §19.11 *Marketable title and abstracts of title.*

It should be noted that the assumption made herein is that the vendee rather than the vendor bears the risk associated with establishing the absence of Defensible Title. The determination as to who shall be the bearer of such risk is set by the terms of the purchase and sale agreement ("PSA") utilized by the parties. Therefore, there may be instances where the PSA places the burden on the vendor.

B. WHAT DEFENSIBLE TITLE IS

A search of the court cases and statutes in Oklahoma failed to reveal any express definition of "Defensible Title" provided. Nationally, the search for a specific definition for "Defensible Title" was also fruitless.

As a recent professional article declared: *"There is no legally or commonly accepted meaning for 'defensible title', so it must be defined in each asset purchase agreement."*[2]

Defensible title has generally been defined as: *"…[S]omething less than marketable; it is imperfect on the record but is possible to defend."*[3] So, it is generally understood: "Defensible Title" is a lower standard than "perfect or marketable title."

This lack of specific objective guidance concerning "defensible title" creates the requirement that one must look to any agreement of the parties (i.e., the PSA between the seller and buyer) for guidance.

C. WHAT DEFENSIBLE TITLE IS NOT

It is generally understood that "perfect title" and "marketable title" are higher standards than "Defensible Title". To help understand how they are different, it is beneficial to view Defensible Title as that which "perfect title" and "marketable title" are not.

[2] Allen D. Cummings, Randy Browne *Meeting of the Minds on Title Defects*, 48 Rocky Mtn. Min. L. Inst. 27, 27.07 (2002).

[3] *See* Thomas P. Schroedter, *Oil and Gas Title Examination and Title Curative: Marketable v. Defensible Title*, COMPREHENSIVE LAND PRACTICES, AN AAPL PUBLICATION at III-48 (1st ed. 1984), note 5.

"If the term 'free from defects' means free from all flaws or defects, both of record and in fact, we are speaking of the perfect title, and long ago Lord Chancellor Hardwick stated that 'it is impossible in the nature of things that there should be a mathematical certainty of a good title.'"[4]

In other words, practically speaking, there is no such thing as a truly "perfect" title. In addition, "merchantable title" and "marketable title" are usually used interchangeably, and such terms will be treated in the articles as covering the same quality of title.[5]

Under Oklahoma's Production Revenue Standards Act[6] the Title Examination Standards adopted by the Oklahoma Bar Association ("Standards") are the official gauge used to determine whether a producer will have to pay 6% or 12% interest on proceeds from sales of production not timely tendered to a royalty owner. If title is "marketable" under such Standards, then the higher rate of interest must be paid. In other words, the producer is penalized when the title is really marketable, but proceeds are held up. 52 O.S. § 570.10.D. provides:

> *D. 1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.*
>
> *2. a. Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.*

[4] *Standards of Mineral Title Examination—Marketable Title vs. Defensible Title*, G.D. Ashabranner, 9 Mineral Law Institute 95 (Rocky Mountain Mineral Law Institute, 1964).
[5] The Oklahoma Supreme Court views the terms "merchantable title" and "marketable title" as synonyms. *See* Knowles v. Freeman, 649 P.2d 532, 535 (Okla. 1982), 1982 OK 89**.** ¶16
[6] 52 O.S. §§ 570.1 to 570.15.

> *b. Where marketability has remained uncured for a period of one hundred twenty (120) days from the date payment is due under this section, any person claiming to own the right to receive proceeds which have not been paid because of unmarketable title may require the holder of such proceeds to interplead the proceeds and all accrued interest into court for a determination of the persons legally entitled thereto. Upon payment into court the holder of such proceeds shall be relieved of any further liability for the proper payment of such proceeds and interest thereon.*

(underlining added)[7]

In Oklahoma, the Standards define marketable title as: "[Title] free from apparent defects, grave doubts and litigious uncertainty, [consisting] of both legal and equitable title fairly deducible of record."[8] Marketable title has also been defined as title that is saleable (i.e., that which a purchaser can be required to accept) as opposed to being perfect.[9]

The Standards are not only made applicable to oil and gas matters by such Statute, but, in general, are deemed by the Oklahoma Supreme Court as being "persuasive", which makes them the equivalent of an opinion from the Oklahoma Court of Civil Appeals.[10]

If a PSA required "marketable title", then, according to Oklahoma case law:

> "'A purchaser under such a contract is not required to resort to evidence dehors [outside] the record. It is not sufficient that the title is good in fact; that is, capable of being made good by the production of affidavits or other oral testimony. It must be good of record…the court said: 'The title may be good; but one to whom an abstract showing a good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract. The vendee in such a case is not required to accept or rely upon parole evidence of title, or information dehors the record, or the word of the vendor.' It was therefore held that the purchaser was not obliged to accept the title, which was bad of record, although capable of being made good by evidence showing adverse possession for the statutory period of time… 'A title is not marketable where it depends necessarily upon matter in pais [without legal proceedings], which is in

[7] *See also* Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990), 1989 OK 168, ¶9 ("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.").
[8] 16 O.S. App. § 1.1.
[9] *See* Thomas P. Schroedter, *Oil and Gas Title Examination and Title Curative: Marketable v. Defensible Title*, COMPREHENSIVE LAND PRACTICES, AN AAPL PUBLICATION at III-48 (1st ed. 1984).
[10] *See* **Knowles v. Freeman**, *supra* note 5 (The title examination standards are persuasive in authority); *see also* OK AG Opin. 79-230.

itself a doubtful fact, and never can be determined or established, except by bringing every party into court.…"[11]

Hence, assuming a PSA only requires a defensible title the title being provided by a seller does **not** have to be:

1. Perfect, without even minor defects;
2. Marketable;
3. Of record;
4. Free from the need to rely on parole evidence;
5. Free from the need to rely on affidavits; and
6. Free from the need for litigation to prove the title is valid.

D. SAMPLE PSA DEFINITIONS

Like other contracts crafted by parties wise in the ways of the industry involved, oil and gas buyers and sellers use certain standard language.

The followed excerpted language includes some samples from asset purchase agreements defining the quality of title expected to be provided by sellers to buyers, when the parties are looking for "defensible title."

(1) First Version of "Defensible Title"

"(a) As to each of the Wells, that title or operating rights of Seller which:

(1) entitles Seller to receive from each well not less than the interests shown on Exhibit "A," and

(2) obligates seller to bear a percentage of the costs and expenses relating to the maintenance and development of, and operations relating to, each well not greater than the working interest shown on Exhibit "B."

[11] Campbell v. Harsh, 122 P. 127, 129 (Okla. 1912), 1912 OK 165, ¶10 (summarizing numerous authorities, citations omitted, ancient terms explained).

(b) That title of Seller to the assets at closing is free and clear of liens and encumbrances (except Permitted Encumbrances)."

(2) Second Version of "Defensible Title"

(same as version (1) above, followed by)

"fairly deducible of record and/or provable title evidenced by documentation that although not constituting perfect , merchantable, or marketable title, can be successfully defended if challenged."

(3) Third Version of "Defensible Title"

(same as version (1) above, preceded by)

"title which sellers can successfully defend against a claim to the contrary made by a third party, based upon industry standards in the acquisition of oil and gas properties, and in the exercise of reasonable judgment and in good faith…".

(4) Fourth Version of "Defensible Title"

(same as version (1) above, preceded by)

"a record or beneficial title that…"

(5) Fifth Version of "Defensible Title"

(same as version (1) above, preceded by)

"clean, unencumbered, uncontested, record title to an interest in the Sellers that is (i) evidenced by instruments filed of record in accordance with the conveyance and recording laws of the applicable jurisdiction…"

(6) Sixth Version of "Defensible Title"

(same as version (1) above, preceded by)

"such interest of record…"

"is free from reasonable doubt, so that a willing and reasonably prudent buyer…would be willing to accept the title."

If the definition requires "record title" (examples 5 and 6 above), then such definition becomes synonymous with "marketable title," which according to Standard 1.1 (as quoted above) requires "both legal and equitable title fairly deducible of record."

Otherwise, in the absence of a request for title being "of record," the definition will only require a title which can be "made good," because it is "provable."

E. WHAT IS THE SELLER'S BURDEN TO ESTABLISH THE "PROVABLE TITLE"

If the Seller is tasked with providing defensible title, where it means "provable title," then the buyer is in the position of challenging the title as if it were the plaintiff in a lawsuit (e.g., by a lessor against a lessee, seeking to cancel or terminate an oil and gas lease.)

Consequently, each separate title would have to be reviewed under the applicable statutes and case law to determine whether a lessor could successfully reclaim such title. As noted in another professional article: "*The concept of a defensible title is one which, if challenged, has sufficient merit under the relevant court decisions to be successfully defended...*"[12]

Consequently, it is clear, where the terms of the PSA require "defensible title" and not "record title" (i.e., it defines "defensible title" as "provable," or "record or provable," or "record or beneficial"), then, where the buyer specifically describes a condition allegedly making the subject title less than "defensible title", the title to each property will be subject to a reasonable scrutiny. Such due diligence will presumably include (1) a search for all discoverable facts, (2) the identification of the applicable law, and (3), most importantly, an evaluation as to what

[12] *See e.g.* Robert G. Pruitt, Jr. *Mining Claim Titles for Investors and Lenders*, 33 Rocky Mtn. Min. L. Inst. 9, 9.08 fn. 71 (1988).

would be the likely result of a challenge in the form of litigation by a hypothetical lessor, who is attempting to defeat the lessee's claim.

Under the terms of such PSA, defensible title is necessarily viewed through the lens of litigation. Defensible title is, again by definition, NOT free from litigious uncertainty. By the very definition set forth in such PSA, defensible title is that which "can be successfully defended if challenged." Litigious uncertainty [i.e., a court challenge] is, by definition, expected.

Courts have used the term "burden of proof" to refer to two distinct concepts: burden of persuasion and burden of production.[13] The burden of persuasion refers to a plaintiff's (or counter-plaintiff's) ultimate burden of persuading the court to accept its position. Thus, "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose."[14] The burden of production refers to "a party's obligation to come forward with evidence to support its claim." Id. Once a plaintiff meets its burden of production, the burden of producing evidence then shifts to the other party, although the burden of persuasion generally does not change.[15]As a hypothetical plaintiff, the buyer has (1) the burden of persuasion to prove each element or issue of the cause of action (which is non-shifting),[16] and (2) the burden of production to provide evidence at each stage to offset the evidence most recently provided by the hypothetical defendant. [17] The plaintiff starts out with both the burden of persuasion and the burden of production.[18]

In other words, the buyer, as plaintiff, could shift only the burden of production for a particular issue by making a *prima facie* case as to that issue. However, if the buyer does not

[13] *See* Harder v. F.C. Clinton, 948 P.2d 298, 303 n 13, 1997 OK 137, n 13 (Okla. 1997).
[14] Id. at 303 n 13 (quoting Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 271-72 (1994)).
[15] *See* Harder, 948 P.2d at 303.
[16]*See* Id.
[17] *See* Id.
[18] *See generally* 29 AM. JUR. 2D *Evidence* § 174 (2009); *see also* Ferguson v. Lambert, 225 P.2d 354, 356 (Okla. 1950), 1950 OK 307, ¶8???

make its *prima facie* case, the buyer does not shift the burden of production, and a ruling in the seller's favor is the result.

Remember, however, as the plaintiff, **the buyer always has the burden of persuasion**, which must be satisfied in a civil matter (such as a suit to resolve title issues) by the preponderance of the evidence standard.[19]

In the example above, whereby the buyer is a hypothetical plaintiff in a suit to terminate a lease, the buyer must disclose facts and law, which, when applied to each issue, will result in the claimed leasehold interests being adjudged unenforceable against the lessee.

Explained another way, in such a transaction, the burden of production and the burden of persuasion is on the buyer, and they require the buyer to present both evidence and law which establish that the seller fails to have defensible title. Until the buyer meets such burdens, the seller has no obligation to present anything.

By way of example, if the buyer claims a certain number of mineral acres were not owned by the lessor of a lease because the lessor is the putative heir of a decedent, and neither a pre-death assignment nor a probate exists conveying the mineral acres from the decedent to the lessor, the buyer must (1) document facts showing: (a) the decedent owned the mineral acres of record, (b) the decedent died (testate or intestate) (c) no valid assignment of the acreage exists of record, (d) the lessor, who was not the decedent, signed the lease; and (2) set forth the Oklahoma law applicable to such facts holding that a probate of the decedent's estate would cure the defect by transferring the mineral acres to the lessor. The seller would then (and only then) be required to come in and set up its defenses, for example: (1) there was a signed but unrecorded mineral deed covering the mineral acres in question from the decedent to the lessor executed prior to the

[19] In civil cases, the plaintiff generally must prove his case by a preponderance of the evidence. *See* Christian v. Gray, 65 P.3d 591, 611 (Okla. 2003); *see also* McKellips v.Saint Francis Hosp, 741 P.2d 467, 471 (Okla. 1987) .

decedent's death, or (2) provide an affidavit of heirship showing the decedent had only two heirs, one of which is the lessor, and provide an unrecorded quitclaim deed from the other heir to the lessor, or (3) obtain affidavits stating what the affiants would testify to if the matter were litigated, as to the existence of a will of the decedent, valid under Oklahoma law, leaving all assets of the decedent to the lessor. Such evidence and law provided by the seller would then indicate the title, though not perfect, of record or marketable, is provable, and, therefore, is **defensible**.

F. CONCLUSION

Defensible title, if defined in the PSA as non-record or "beneficial" or "provable title," then it can be less than perfect or marketable title and does not need to be provable of record. Instead, assuming there is a challenge (as in a lawsuit), such title needs to simply be provable by recorded and/or non-recorded documentation, including affidavits of heirship, unrecorded conveyances, joint interest billings, forced pooling affidavits, and other practical proof which is shown to be usually relied on in the industry.

Consequently, the buyer, as the hypothetical plaintiff, has the burden of persuasion and the burden of production to show that the seller's title is not defensible, for each title defect through the production of facts to meet the standards of the law relevant to each issue. If and when the buyer meets such burdens, the seller is then responsible for defending its title, through the production of facts (such as affidavits and extra-record matters) to counter the buyer's evidence.

G. SUGGESTED READINGS

1. Allen D. Cummings, Randy Browne *Meeting of the Minds on Title Defects,* 48 Rocky Mtn. Min. L. Inst. 27, (2002).

2. Thomas P. Schroedter, *Oil and Gas Title Examination and Title Curative: Marketable v. Defensible Title,* COMPREHENSIVE LAND PRACTICES, AN AAPL PUBLICATION at III-48 (1st ed. 1984).

3. G.D. Ashabranner, *Standards of Mineral Title Examination—Marketable Title vs. Defensible Title,* 9 Mineral Law Institute 95 (Rocky Mountain Mineral Law Institute, 1964).

4. Robert G. Pruitt, Jr. *Mining Claim Titles for Investors and Lenders,* 33 Rocky Mtn. Min. L. Inst. 9 (1988).

5. Benjamin F. Hackett, *Whistling Past the Graveyard to the Tune of Defensible Title,* Mineral Lawyers Society of Oklahoma City, October 20, 2005.

6. Kraettli Q. Epperson, *Marketable Title: What is it? And Why Should Mineral Title Examiners Care?,* The 2007 Rocky Mountain Mineral Law Foundation Institute, Westminster, Colorado, September 13, 2007.

7. Eugene Kuntz, *A Treatise on the Law of Oil and Gas,* Anderson Publication Company, 1989.

III. OKLAHOM SEVERED MINERALS AFFIDAVIT OF HEIRSHIP

A. STATUTE: 16 O.S. Section 67

Oklahoma Statutes Citationized
Title 16. Conveyances
Chapter 1 - General Provisions
Section 67 - Acquiring a Severed Mineral Interest from Decedent - Establishing Marketable Title
Cite as: 16 O.S. § 67, __ __

A. After the date of death of a person who was an owner of a severed mineral interest in real estate, a person who claims such interest, immediately or remotely, through an affidavit of death and heirship recorded pursuant to Sections 82 and 83 of this title, shall acquire a valid and marketable title to such interest as against any person claiming adversely to such recorded affidavit on the conditions set forth in subsection C of this section.

B. Any purchaser for value acquiring a severed mineral interest in real estate from a person who claims such interest, immediately or remotely, through a recorded affidavit of death and heirship or a recital of death and heirship in a recorded title transaction, as that term is defined in Section 78 of Title 16 of the Oklahoma Statutes, shall acquire a valid and marketable title to such interest as against any person claiming adversely to such recorded affidavit or recital on the conditions set forth in subsection C of this section.

C. In order to establish marketable title pursuant to this section:

1. The affidavit or recital must state that the decedent died without a will, or if the decedent had a will, that the will was never probated in Oklahoma and a copy of the will is attached to the affidavit or recital, or if the will was probated that the severed mineral interest was omitted from the final decree of the decedent and a copy of the will and final decree is attached to the affidavit or recital;

2. The affidavit or recital must list the names of the decedent's heirs and their relationship to the decedent;

3. The affidavit or recital must state that the maker is related to the decedent or otherwise has personal knowledge of the facts stated therein;

4. The affidavit or the title transaction that contains the recital must have been recorded for at least ten (10) years in the office of the county clerk in the county in which the real property is located; and

5. During the ten-year period following the recording of the affidavit or the title transaction that contains the recital, no instrument inconsistent with the heirship alleged in the affidavit or recital was filed in the office of the county clerk in the county in which the real property is located.

This section shall apply to affidavits recorded before November 1, 1999, as well as to those recorded thereafter, except that, with respect to those recorded before such date, the ten-year period specified above shall not expire until one (1) year after November 1, 1999. This section shall not apply as against any person in possession of the land, by occupancy or by occupancy of a tenant, at the time such purchaser acquires an interest in such land.

Historical Data

Added by Laws 1999, HB 1817, c. 84, § 2, eff. November 1, 1999; Amended by Laws 2010, HB 1319, c. 223, § 1, emerg. eff. May 10, 2010 (superseded document available).

B. TITLE EXAMINATION STANDARD: No. 3.2 (adopted November 15, 2013)

The Committee recommends an amendment to Standard No. 3.2 to establish guidelines for the use of Affidavits to establish marketable title to severed mineral interests.

3.2 AFFIDAVITS AND RECITALS

A. Recorded affidavits and recitals should cover the matters set forth in 16 O.S. §§ 82 and 83. They cannot substitute for a conveyance or probate of a will.

B. Affidavits and recitals should state facts rather than conclusions and should reveal the basis of the maker's knowledge. The value of an affidavit or recital is not reduced if the maker is interested in the title.

C. Oklahoma statutes have authorized the use of affidavits to affect title to real property for several purposes. The specific statute should be consulted and the requirements of the statute should be followed carefully.

D. Special attention should be given to the provisions of 16 O.S. § 67 – *Acquiring Severed Mineral Interests from Decedent – Establishing Marketable Title*:

1. In part, 16 O.S. § 67 provides that a person who claims a severed mineral interest, through an affidavit of death and heirship recorded pursuant to 16 O.S. §§ 82 and 83, shall acquire a marketable title ten years after the recording of the affidavit by following the five specific steps set forth in part C of Section 67. The act applies only to severed minerals, not leasehold interests. Section 82 provides that such an affidavit creates a rebuttable presumption that the facts stated in the recorded affidavit are true as they relate to the severed minerals.

2. Although not specifically required by 16 O.S. § 67, it is recommended that the affidavit contain sufficient factual information to make a proper determination of heirship. Such information includes the date of death of the decedent, a copy of the death certificate,

marital history of the decedent, names and dates of death of all spouses, a listing of all children of the decedent including any adopted children, identity of the other parent of all children of the decedent, the date of death of any deceased children and the identity of the deceased child's spouse and issue, if any. During the ten year period of 16 O.S. § 67, if an affidavit fails to include factual information necessary to make a proper determination of heirship, the examiner should call for a new affidavit that contains the additional facts necessary for a proper determination of heirship. If a new or corrected affidavit is filed, the statutory ten-year period would run from the date of recordation of the new or corrected affidavit

3. Title 16 O.S. § 67 is unclear when an unprobated will is attached, whether title passes to the intestate heirs or to the devisees under the will. Oklahoma cases have held that until a will is admitted to probate, it is wholly ineffectual to pass title to real property, including any mineral or leasehold interest and a devisee has no rights to enforce under the will. [3] A foreign will that has not been probated in Oklahoma is ineffective to establish any interest or title in the persons claiming thereunder. If the decedent died with a will, strong consideration should be given to a probate of the estate.

4. If the decedent died intestate, strong consideration should be given to an administration of the estate or a judicial determination of death and heirship during the ten year period before the title becomes marketable by a properly prepared 16 O.S. §67 affidavit.

Comment 1: Affidavits affecting real property include: Affidavits to Terminate Joint Tenancy or Life Estates (58 O.S. § 912); Multi Subject Information Affidavit (16 O.S. §§ 82-83); Memorandum of Trust (60 O.S. § 175.6a).

Affidavits to Terminate Joint Tenancy or Life Estates under 58 O.S. § 912 may be recorded

with only a jurat or only an acknowledgment, or both. Since this provision is specific to §912, prudence dictates that an affidavit which is not prepared under 912 contain both a jurat and acknowledgment. See 16 O.S. § 26.

Comment 2: Before the affidavit or unprobated will has been of record for ten years, it is not uncommon for the title examiner to recommend to the party paying royalty owners to consider assuming the business risk of waiving the requirements of marketable title, which might include a probate administration, or judicial determination of death and heirship, and assume the business risk of relying upon the affidavit called for in Section 67.

Comment 3: *Yeldell v. Moore*, 1954 OK 260; 275 P.2d 281. Oklahoma cases discuss the "factum" of a will: whether the will is legally executed in statutory form; legal capacity of the testator; the absence of undue influence, fraud and duress, *Ferguson v. Paterson*, 191 F.2d 584 (10th Cir. 1951); *Matter of the Estate of Snead*, 1998 OK 8, 953 P2.d 1111; *Foote v. Carter*, 1960 OK 234, 357 P.2d 1000. In Oklahoma the district court determines the validity of a will, interprets the will and determines the heirs. A probate proceeding is necessary to determine if there are pretermitted heirs, allow for spousal elections, determine if there is any marital property, and confirm the absence of liens for taxes and debts.

Comment 4: *Smith v. Reneau*, 1941 OK 99; 2112 P.2d 160. The decree of the court administering the estate is conclusive as to the legatees, devisees and heirs of the decedent, *Wells v. Helms*, 105 F.2d 402 (10th Cir. 1939).

Comment 5: The use of (non-judicial) heirship affidavits under 16 O.S. § 67 may also be suspect in the context of restricted citizens (members) of the Five Civilized Tribes in light of the Act of June 14, 1918, 40 Stat. 606 (25 U.S.C. 375) and Section 3 of the Act of August 4, 1947, 61 Stat.731 which confers exclusive jurisdiction upon the courts of Oklahoma to judicially determine such heirship in accordance with the Oklahoma probate code.

IV. AUTHOR'S SELECTED OIL AND GAS ARTICLES

(See WWW.EPPERSONLAW.COM for all of my articles.)

OIL & GAS ISSUES

239. "**Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar***", 82 The Oklahoma Bar Journal 622 (March 12, 2011)

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