REFORMING DEEDS WHICH FAIL TO RESERVE MINERALS

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PRACTICE AREAS:

- **Mineral/Surface Title Matters: Curative, Litigation, Expert Consultant/Witness, and Opinions**
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SUCCESSFUL APPELLATE CASES AND SAMPLE ENGAGEMENTS:

- **Testifying Expert: Reformation of Deeds (Miller v. Nagel, Cert. Denied No. 115, 655)**
- **Amicus Brief: Enforcement of Ancient Probate (Bebout v. Ewell, 2017 OK 22)**
- **Expert Opinion: Reformation of Deeds (Scott v. Peters, 2016 OK 16)**
- **Arbitrator: Horizontal Damages to Vertical Wells**
- **Court-appointed Receiver for 5 Abstract Companies**
- **Secured AG Opinion: Safe Distance Between Residences and Well Sites (2009 OK AG 5)**
- **Arbitration Assistance: Defended Billion Dollar PSA Title Dispute**

SPECIAL ACTIVITIES:

- **OBA Title Examination Standards Committee (Chairperson: 1988-Present)**
- **Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982-Present)**
- **<u>Vernons 2d: Oklahoma Real Estate Forms and Practice</u>, (2000 - Present) General Editor and Contributing Author**

SELECTED PUBLICATIONS:

- ***"Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests", 80 OBJ 40 (January 2018)***
- ***"The Oklahoma Marketable Record Title Act (aka The Re-Recording Act): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies", 87 OBJ 27, (October 15, 2015)***
- ***"Marketable Record Title: A Deed Which Conveys Only The Grantor's 'Right, Title And Interest' Can Be A 'Root Of Title'", 85 OBJ 1104 (May 17, 2014)***

REFORMING DEEDS WHICH FAIL TO RESERVE MINERALS

What happens when a deed is signed, acknowledged, delivered, and filed in the local county land records, but it fails to include the proper language to carry out the intent of the grantor and grantee to reserve the minerals in the grantor?[1]

Good question. Three fairly recent Oklahoma Supreme Court cases (resulting from the same real estate transaction) answered that the passage of a sufficient number of years -- 2 years for negligence and 5 years for reformation -- caused the Statute of Limitations to apply so that the "deed cannot be undone", so to speak.[2]

But wait, when and why should an attorney even care about this question? An attorney can face this question either knowingly or unknowingly. If the disgruntled grantor (e.g., Smith) realizes his/her minerals have been conveyed away unintentionally (e.g., to Jones), and that the grantee (e.g., Jones) will not cooperate by re-conveying the minerals back, then the grantor might approach an attorney and ask whether the grantor can get the mineral interest back. Or, an attorney might examine a title where a prospective grantor/lessor (the same Smith or Jones), and a prospective grantee/lessee (e.g., White) asks the attorney what mineral interest is held by the prospective grantor/lessor. The title examiner will see only the record title including the erroneous deed (but not the prior unrecorded purchase agreement), and will presumably advise the parties that Jones owns such interest. If Jones is the proposed grantor/lessor, then White will pay for and supposedly acquire record title to the minerals. This title examiner will have unknowingly been influenced by this error, but, hopefully, will not face any liability.[3]

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[1] 16 O.S.§29, provides that: "Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words"; and 60 O.S.§64 provides: "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it."

[2] Carter v. Swinford, 2016 OK 100 (abstractor); Carter v. Swinford, 2016 OK 104 (attorney); Carter v. Swinford, 2016 OK 105 (grantee); also see: Scott v. Peters, 2016 OK 108, which follows the holding of the Carter cases.

[3] White should be protected as a bona fide purchaser for value without notice, and, hopefully, the examining attorney will be protected as well. See Knowles v. Freeman, 1982 OK 89, 649 P. 2d 532.

The trio of Carter cases involved a single real estate transaction where two sisters signed a real estate purchase contract which expressly provided that the grantors (i.e., the two sisters) would be reserving the minerals to themselves. The deed was prepared by the abstract company and reviewed by the sisters' attorney, and then the sisters signed and acknowledged and delivered it to the abstract company. The abstract company conducted the closing and had the deed filed of record. The deed was intended by both sides of the transaction to reserve the minerals in the grantors. The deed was initially prepared by the abstract company without the mineral reservation, and such error was caught by the sisters who told their attorney to add the reservation. The attorney claims he added the reservation, but the deed that was signed and filed did not include the mineral reservation.

Eleven years after the closing, and after the grantee died, when there were mineral leasing activities taking place on the sisters' lands, the sisters inquired about their mineral ownership. They were advised that they had deeded away such minerals, and, therefore, would not be participating in the leasehold benefits, including the receipt of leasing bonuses and royalties.

The sisters sued the grantee, their own attorney and the abstract company for this error asserting damages for negligence, and for reformation of the deed to return the minerals to the sisters.

Reformation is permitted, unless the applicable Statute of Limitations has run.[4] The sisters claimed there was a mutual mistake, and a review of the terms of the real estate purchase agreement supported this claim. The grantee could not rebut this assertion because he had died by the time the sisters made their claim. The grantee's title was in probate.

[4] 12 O.S.§95 (A) (12), cited at Carter, 2016 OK 100, ¶6

However, the defendants (abstractor, attorney and grantee) can and did assert the passage of the Statute of Limitations deadline. Such defense requires a determination of the date of the beginning of the running of such period.

The threshold and dispositive question in the Carter cases became: when does the Statute of Limitations begin to run? Is it from (1) the date of execution and delivery of the deed, or (2) the date of discovery of the error?

If the Statute of Limitations had already run -- it would have run, if it was based on the date of execution and delivery of the instrument -- then the grantor may attempt to delay the beginning of the running of the Statute of Limitations based on an argument that the running of the Statute is "tolled" until the error is discovered.[5]

In the Carter case (2016 OK 100), the Court noted:

> *The obvious purpose of applying the discovery rule in similar types of actions is because: 1) the negligence was not readily discoverable by a plaintiff utilizing ordinary due diligence; 2) the negligence was hidden from being readily discoverable by the plaintiff; or 3) the plaintiff was prevented from knowing of it, and it did not become apparent until problems arose and the negligence was uncovered without any apparent negligence on the part of the plaintiff. This cause [Carter] does not fall into those type of actions in which the discovery rule applies.*

In the Carter cases, the grantors sought to assert this "tolling" argument to establish that their claim was still alive.[6]

As could be expected, the two sides in these Carter cases argued that different beginning dates should be used:

[5] Carter, 2016 OK 100, ¶11
[6] Carter, 2016 OK 100, ¶9

1. The grantors claimed they did not receive a copy of the deed after the closing and did not discover the mistake until less than two years before they filed their lawsuits; and
2. The grantee, attorney and abstract company claimed that the date of the filing of the deed of record should be used because such filing in the public land records allowed the grantor to discover the defect in the deed immediately upon the completion of the closing and the recording of the deed.

The Oklahoma Supreme Court held, in the first of the three cases (2016 OK 100, (0)) (which ruling was followed in all three cases):

> *The plaintiffs/appellants, sisters, sold real property in Noble County, but allegedly intended to keep their mineral interests in the property. Some twelve years after the deeds were filed, the sisters realized that mineral interests were not reserved and they filed a lawsuit for professional negligence against the defendant/appellee, the abstract office. The defendant filed a motion for summary judgment arguing that the lawsuit was untimely, and the trial court agreed and granted summary judgment. We retained the cause to address the dispositive issue of whether the statute of limitations for an action brought by a grantor begins to accrue when a deed is filed with the county clerk. We hold that it does.*

Such argument was challenged by the grantors who asserted that the Recording Act language expressly limits its impact -- giving constructive notice of the filing of an instrument in the local county clerk land records -- solely to "subsequent purchasers" and not to <u>prior</u> purchasers.[7]

[7] 13 O.S.§16

The Oklahoma Supreme Court included in their analysis a list of cases which held that the recording of instruments constituted constructive notice to the grantor.[8] The Court also included citations to cases where it was held that the grantor being bound by the instrument because they signed it, and there were no extenuating circumstances, such as the grantor being illiterate, was intentionally defrauded, and/or did not have a chance to read the instrument before signing it.[9]

Such special extenuating circumstances were absent in Carter. The Oklahoma Supreme Court concluded in all three of the Carter cases that the Statute of Limitations was not tolled. Specifically, there were two specific reasons given: First, because the grantors did not claim they were prevented from reading the deed before they signed it, and, Second, they were not prevented from exercising reasonable due diligence to find the deed, and were thereby subject to the operation of the statutory concept known as constructive notice.

The trial court and the Oklahoma Supreme Court held that the applicable 2-year Statutes of Limitations for negligence by the attorney and by the abstract company had run[10] and the 5-year limitation for reformation against the grantees had also run.[11]

The Carter Court (2016 OK 100, ¶19) explains that this case promotes certainty of title:

> *Although limitation issues may involve mixed questions of law and fact, they are ordinarily reviewed in this Court as questions of law. There exists a statutory presumption that a recorded signed document relating to title to real estate is genuine and was properly executed. The record supports but a single*

[8] Carter, 2016 OK 100, ¶9; see: Pangaea Exploration Corp. v. Ryland, 2010 OK CIV APP 66, 239 P.3d 130; Horn v. Horn, 2007 OK CIV APP 114, 172 P.3d 228; Overholt v. Indep. School Dist. No. 2, Tulsa County, 1993 OK CIV APP 75, 852 P.2d 823 and Mattewson v. Hilton, 1958 OK 6, 321 P.2d 396.
[9] Carter, 2016 OK 100, ¶¶16 & 17; see: Globe v. Rutgers Fire Ins. Co. v. Roysden, 1953 OK 184, 258 P.2d 644.
[10] 12 O.S.§95(A)(3); cited at Carter, 2016 OK 100, ¶6
[11] 12 O.S.§95(A)(12); cited at Carter, 2016 OK 100, ¶6

conclusion, that the statute of limitations began to accrue when the deed was filed and that the discovery rule is inapplicable to this cause. If this were not the case, real property transactions across the state would be set aside at almost any time which could leave all real property transactions unsettled indefinitely. Accordingly, we hold that, as a matter of law, any action for negligence regarding the mistaken deeds began to accrue when the deeds were filed.

These three Carter cases provide direction to attorneys who are examining title or advising parties, both where the Statute of Limitations has passed and where it has not passed (based on the recording date of the deed); tempered by whether (1) there are known extenuating circumstances and (2) whether a subsequent BFP holds the challenged title.

This author disagrees (1) that the Recording Act gives constructive notice to anyone other than "subsequent grantees"; and (2) that a grantor has a duty to look for their own deed in the public land records.

The better argument is -- as presented by the court as a secondary rationale -- if you can read it and had a chance to do so, but did not, you are bound.

LIST OF THE LATEST 10 ARTICLES,
AUTHORED BY KRAETTLI Q. EPPERSON
(OMITTING DUPLICATES)
(last revised September 13, 2019)

317. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions, & Title Examination Standards Revisions for 2017-2018", Oklahoma Bar Association: Cleverdon Round Table Seminar, Oklahoma City, Oklahoma (May 30, 2019) and Tulsa, Oklahoma (May 31, 2019)

311. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions, & Title Examination Standards Revisions for 2016-2017"; Woodward County Bar Association, Boiling Springs State Park, Woodward, Oklahoma (September 18, 2019)

308. "'Marketable Title' vs. 'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law in Oklahoma", Joint Seminar Oklahoma City Association of Professional Landmen & American Association of Professional Landmen Field Landman, Oklahoma City, Oklahoma (April 19, 2018)

306. "Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests", 89 Oklahoma Bar Journal 40 (January 2018)

302. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2015-2016", Boiling Springs, Woodward County Bar Association: Boiling Springs State Park, Woodward, Oklahoma (September 19, 2017)

301. "Examination of an Abstract of Title in Oklahoma: A Procedural Outline," Oklahoma Bar Association Solo and Small Firm Conference, Durant, Oklahoma (June 24, 2017)

294. "The Oklahoma Marketable Record Title Act ('aka' The 'Re-Recording Act'): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies," 87 Oklahoma Bar Journal 27 (October 15, 2016)

291. "Interpreting Oil and Gas Conveyances: Some Examples"; Oil & Gas Land Titles for The Oklahoma Bar Journal, Tulsa, Oklahoma (May 13, 2016) and Oklahoma City, Oklahoma (September 30, 2016)

278. "Marketable Record Title: A Deed Which Conveys Only The Grantors: 'Right, Title and Interest' Can Be A 'Root Of Title'"; OLTA Title Gram (Summer 2014)

276. "Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can be A 'Root of Title'", 85 Oklahoma Bar Journal 1104 (May 17, 2014)