

**DEATH OF A RECORD TITLE OWNER:  
SOLVING ESTATE RELATED TITLE PROBLEMS IN COLORADO**

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When examining title to real property, breaks in the chain of title often occur because either the record title owner has passed away and there are no documents conveying his or her interest, or the recorded documents are insufficient to transfer marketable title. The purpose of this paper is two-fold. The first section briefly outlines the probate process and defines terms frequently used in the probate arena. The second section addresses some of the more common title defects created by the death of a record owner. This paper generally approaches these defects by first describing the issue, then listing what is generally required in a title opinion and, finally, the legal basis for the requirement.

First, a few definitions may be helpful. An “executor” is a person named in a Will to carry out the wishes of the decedent as expressed in the Will and to administer his or her estate under the law. An “administrator” is a person appointed by a court to settle the estate in accordance with the law when the decedent died without a Will. Under the Colorado Probate Code terminology, an executor and an administrator are all called the “personal representative”.

“Testate” means that a decedent died leaving a valid Will. A Will that is admitted into probate becomes a legally binding document that directs how an estate will be administered and names who will receive the estate’s assets once the administration is completed (called the “devisees” of the Will).

“Intestate” means that a decedent died without a Will. If someone dies without a Will, then an estate is administered in accordance with rules set forth in the Colorado statutes governing estates (this collection of statutes is referred to as the Colorado Probate Code). The Colorado Probate Code includes an intestacy

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provision that sets forth who will inherit the decedent's estate once the administration is completed. Those person entitled to inherit the decedent's estate under the intestacy statute are called the decedent's "heirs".

A "beneficiary" is a person, trust or entity that will inherit from an estate either as a devisee under the decedent's Will (testate estate) or as an heir to the decedent (intestate estate).

"Probate," in its narrow meaning, describes the process by which an instrument purporting to be a Will is legally determined to be the effective Last Will and Testament of the decedent. Probate, in its broader sense, describes the entire process by which a decedent's estate is collected, administered and distributed. This process is also referred to as administering an estate.

Regardless of whether the decedent died testate or intestate, when a person dies, a relative or friend of the decedent will file a petition in the District Court (in Denver County it is the Probate Court) for the County in which the decedent lived at the time of his or her death seeking appointment as the personal representative. If the decedent died testate, then the petitioner is usually the person named in the Will to serve as the personal representative. In this case, the petitioner will also ask the Court to admit the decedent's Will into probate. If the decedent died intestate, then the petitioner is usually the person who has priority to serve as personal representative of the estate as set forth in the Colorado Probate Code.

Once the personal representative is appointed by the Court (and the Will admitted into probate if the decedent died testate), the Court will issue Letters Testamentary (if testate) or Letters of Administration (if intestate) naming the petitioner as the personal representative of the estate. Upon the issuance of Letters in an unsupervised estate<sup>1</sup>, the personal representative now has the legal authority to (i) collect all of the decedent's assets, (ii) pay any creditors, the cost of administration and taxes, and (iii) distribute the estate's assets according to the decedent's Will (if testate) or according to the intestacy statutes (if intestate). In addition to the above, the personal representative also has broad statutory authority during the pendency of the estate to deal with the estate's assets in order to effectively administer the estate. This includes the power to sell, lease and encumber any oil and gas interests owed by the decedent.

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<sup>1</sup> Most estates in Colorado are administered without Court supervision and are called an unsupervised administration. If there is a conflict involving an estate, then the administration of the estate may be supervised by Court. In a supervised administration, the personal representative must obtain Court approval before taking most actions, including selling, leasing or distributing real property.

Once the personal representative has administered the estate and distributed the assets, the personal representative files a statement with the Court advising the Court that the estate can be closed. The personal representative's authority as granted by his or her Letters remains in effect for one year after this statement is filed with the Court in the event that an issue or asset is overlooked. After the expiration of this one-year period, the authority of the personal representative and his or her Letters automatically terminate.

Now that you are familiar with the probate process and its terminology, we will discuss common title defects created by the death of a record owner and options for curing the defect based upon the Colorado Probate Code and the relevant Colorado title standards.

### **1. Death prior to enactment of the Uniform Probate Code (July 1, 1974).**

Tom Smith is the record owner of a mineral interest in Weld County, Colorado. The Weld County real property records include probate documents for Tom Smith's estate but there are no personal representative deed and Letters of appointment. Is this sufficient to transfer title? It depends on whether Tom died before or after Colorado enacted the Uniform Probate Code (the "UPC) and on which documents from the administration of Tom's estate were recorded in the real property records.

Colorado adopted the Uniform Probate Code in the early 1970's making it effective for all estates in which the decedent died on or after July 1, 1974. The UPC, as revised over the years, remains the governing law in Colorado and is the basis for most requirements found in title opinion comments involving estates. However, it is worthwhile to understand the requirements for marketable title under the pre-UPC laws in the event that probate documents appear of record for decedent's who died prior to July 1, 1974. To that end, we have provided some examples illustrating what documents must be of record under the laws prior to Colorado's adoption of the UPC for decedents who were Colorado residents at the time of death. For decedent's who were residents of a state other than Colorado at death, attached to this paper is a list of the documents required under Colorado law prior to adoption of the UPC. Also, following the examples below is a discussion of curative statutes that may eliminate the title defect if one or more of the documents listed below is not of record.

Example 1 – testate; distribute to beneficiaries

Tom Smith died testate on August 15, 1965 a resident of Weld County, Colorado. An estate was opened in Weld County under the pre-UPC laws, Emily Smith was appointed as the personal representative and Tom's Will was admitted into probate. Tom's mineral interest was distributed to Tom's children, Emily Smith and Jonah Smith, who are the devisees under Tom's Will and the beneficiaries of the estate.

In order to pass title from Tom's estate to Emily and Jonah, the following documents should be recorded in the real property records: (i) certified copy of the Will naming Emily and Jonah as the devisees to the mineral interest, (ii) certified copy of the Order admitting the Will into probate, (iii) certified copy of the Decree of Final Settlement, (iv) certified copy of the Letters Testamentary and (v) release of Colorado inheritance tax lien.<sup>2</sup>

Example 2 – testate; sale to a third party

Same as Example 1 except that the estate owed \$100,000 in federal estate taxes. Emily acting as personal representative decides to sell the estate's mineral interest to Rudy Adams in order to raise money to pay the taxes instead of distributing the minerals to Emily and Jonah.

In order to pass title from Tom's estate to Rudy Adams, the following documents should be recorded in the real property records: (i) certified copy of the Letter Testamentary, (ii) personal representative deed reciting the date of death, the date of the Will, the date the Will was admitted into probate in Colorado and a quotation of the power allowing the personal representative to sell real property contained in the Will and, (iii) release of Colorado inheritance tax lien.

If the Will does not include a power to sell real property, then the following documents should be recorded in the real property records: (i) certified copy of the Letters Testamentary, (ii) personal representative deed with a certified copy of the Order of Sale and the Order Confirming Sale issued by the Weld County District Court, and (iii) release of Colorado inheritance tax lien.

Example 3 – intestate; distribute to beneficiaries

Tom Smith died intestate on August 15, 1965 a resident of Weld County, Colorado. An estate was opened in Weld County under the pre-UPC laws

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<sup>2</sup> Because a Colorado State tax lien is only valid for 15 years, it is no longer a title defect if the release of a Colorado inheritance tax lien is not of record.

and Emily Smith was appointed as the personal representative. The estate was distributed to Tom's heirs, Emily Smith and Jonah Smith, as determined by the Court in a determination of heirship proceeding initiated by Emily Smith as the personal representative.<sup>3</sup>

In order to pass title from Tom's estate to Emily and Jonah, the following documents should be recorded in the real property records: (i) certified copy of the Decree of Heirship, (ii) certified copy of the Decree of Final Settlement, (iii) certified copy of the Letters of Administration and (iv) release of Colorado inheritance tax lien.

Example 4 – intestate; sale to a third party

Same as Example 3 except that the estate owed \$100,000 in federal estate taxes. Emily acting as personal representative decides to sell the estate's mineral interest in Weld County to Rudy Adams in order to raise money to pay the taxes.

In order to pass title from Tom's estate to Rudy Adams, the following documents should be recorded in the real property records: (i) certified copy of the Letters of Administration, (ii) personal representative deed with a certified copy of the Order of Sale and the Order Confirming Sale issued by the Weld County District Court and (iii) release of Colorado inheritance tax lien.

If one or more of the documents listed above do not appear of record, then this irregularity made be excused by one of Colorado's curative statutes. Colorado has two statutes that allow an apparent owner of record to adversely possess real property after seven years of actual residence, occupancy or possession if that person is claiming ownership under an official or judicial conveyance or order (§ 38-41-106 Colo. Stat.) or under color of title and payment of taxes (§ 38-41-108 Colo. Stat.). It is important to remember, however, possession of the surface estate is not possession of the mineral estate if the minerals have been severed. To establish title to severed minerals by adverse possession, one must take actual physical possession of the minerals and exclude others from entering the property to drill for oil and gas.

In addition to the above, under Colorado Title Standard No. 11.1.4, a certified copy of the Letters of appointment does not need to be recorded under the

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<sup>3</sup> Under the current, post-UPC laws, a personal representative is no longer required to obtain a court determination of the decedent's heirs, although this option remains available to the personal representative if needed in a contested matter.

pre-UPC laws if there is of record a certified copy of a Colorado Court Order that confirms the sale of real property, names the personal representative and the capacity in which the personal representative is acting.

What if Tom Smith died prior to adoption of the UPC but there are no probate documents in the Weld County real property records? It depends on (i) whether an estate was opened and the documents were never recorded in the real property records, or (ii) if an estate was never opened.

If Tom's estate was opened in Colorado prior to enactment of the UPC, then you should obtain from the Clerk of the District Court for the County where the probate was opened certified copies of the documents required to be recorded under the pre-UPC laws and record those documents in the Weld County real property records.

If an estate was never opened, then practically speaking, the mineral interest will be transferred out of the estate either (i) by a personal representative deed in an estate opened today and administered under the current UPC laws or (ii) by a Court Order issued in a determination of heirship by special proceeding under the current laws.

## **2. No Letters of appointment recorded in the real property records.**

In the real property records is a personal representative deed but no Letters of appointment. Is this sufficient to pass title? No, it is not. A certified copy of the Letters of appointment must also be recorded in the real property records to evidence the personal representative's authority to transfer the property.

Letters Testamentary (if the decedent died testate) and Letters of Administration (died intestate) are issued by a court to give the appointee, i.e., the personal representative, the authority to take any actions that the decedent could have taken while he or she was alive. In other words, the Letters allow the personal representative to step into the shoes of the decedent. To provide evidence of this authority, the Colorado title standards require that the Letters of appointment appear in the real property records.

In addition to the requirement that the Letters should be of record, the following information must be confirmed from the face of the Letters:

1. The Letters were issued by a Colorado Court;

2. The grantor in the deed is the same person appointed as personal representative in the Letters;
3. The date the Letters are issued is before the date of the deed;
4. There are no restrictions to the personal representative's authority listed on the face of the Letters; and
5. The Letters are certified to be in effect on or after the date of the deed, or certified to be in effect no more than 60 days prior to the date of the deed. Although this 60-day requirement is not set by statute or by the Colorado title standards, it is considered by most third parties relying on a personal representative's Letters of appointment to be an acceptable length of time. The risk is that the authority of the personal representative terminated during this 60-day period of time. To eliminate this risk, the Letters would need to be certified to be in effect on or after the date of the deed.<sup>4</sup>

### **3. Personal representative appointed by another state.**

In the real property records is a personal representative deed conveying mineral interest and a certified copy of Letters issued by another state's court. Is this sufficient to convey the mineral interest? No because an ancillary probate must be opened in Colorado. The real property records should include, along with the deed, a certified copy of the *Certificate of Ancillary Filing – Decedent's Estate* signed by the Clerk of a Colorado District Court along with the personal representative's Letters issued by the other state's court (or what are called "foreign Letters").

There are two types of probate, one is commonly called an original or primary probate and the other is an ancillary probate. When someone dies, an estate is usually opened in the County in which the decedent lived at the time of his or her death. This is the original or primary probate. This state's court has jurisdiction over all personal property owned by the decedent wherever located and over real property<sup>5</sup> that the decedent owned in that state. For example, if Tom

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<sup>4</sup> Another way to look at this is to identify the window in which you know the personal representative has authority to act. The date that the Letters of appointment is issued by the Court is the start date of this window, and the date that the Clerk certifies the Letters to be effective is the end date of this window. Thus, if a personal representative executes an oil and gas lease or conveys a mineral interest within this window of time, then you can be certain that the lessor/grantor/assignor had the requisite authority as personal representative. If the window of time ends within 60-days prior to the date of the lease or conveyance, you can be fairly certain that the personal representative had authority because it is unlikely that the personal representative's authority terminated within that 60 days.

<sup>5</sup> In most states, overriding royalty interests and royalty interests are treated as real property.

Smith died in Harris County, Texas owning bank accounts in Texas and in Colorado, and owned mineral interest in Weld County, Colorado, Emily would open the original probate in Harris County, Texas. The probate court in Harris County would have jurisdiction over both of Tom's bank accounts since they are personal property, but would not have jurisdiction over his mineral interest in Colorado.

In order for Emily to have the authority to convey Tom's mineral interest located in Weld County, Colorado, Emily will need to open an ancillary probate in Colorado<sup>6</sup>. To do this, Emily would file with the Weld County District Court Clerk a certified copy of her Letters issued by the Texas Court certified to be in effect within the past 60 days and a *Domiciliary Foreign Personal Representative's Sworn Statement*. Once these are filed, the Court Clerk will sign a *Certificate of Ancillary Filing – Decedent's Estate* and attach the certified copy of Emily's foreign Letters. Emily will then execute a deed conveying Tom's mineral interest and record this deed along with a certified copy of the *Certificate of Ancillary Filing – Decedent's Estate* (with her foreign Letters attached) in the Weld County real property records.

What if the deed was recorded but no ancillary probate was opened yet. Can you open the ancillary after the fact and record the proper documents or does the personal representative need to execute a new deed? Although there is nothing in the Colorado Probate Code or title standards answering this question, because the personal representative did not have authority to execute the original deed, to eliminate any risk that the deed could be set aside by a court, it would be prudent to have the personal representative execute and record a new deed dated after the date the *Certificate of Ancillary Filing – Decedent's Estate* was signed by the Clerk of Court.

One point to remember is that an ancillary probate in Colorado can only be opened if the original probate is still open and active. If not, then the personal representative can either (i) re-open the original probate in the other state and open an ancillary probate in Colorado or (ii) open a second original probate in Colorado. A second original probate would result in the personal representative being issued new Letters by a Colorado court. In this case, the personal representative deed and a certified copy of the Letters issued by the Colorado court should be recorded in the real property records.

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<sup>6</sup> Original probates are usually opened in the County where the decedent resided and ancillary probates are usually opened in the County where the real property is located. If property is located in more than one County, only one ancillary probate will need to be opened in Colorado. Authority granted by one County in Colorado is valid as to all real property located in Colorado.



#### **4. Obtaining an oil and gas lease from a personal representative or a beneficiary.**

An estate is pending and the personal representative has not distributed the decedent's mineral interest. Should a lease be obtained from the personal representative or from the beneficiary of the estate? If the lease is granted by the personal representative, should the beneficiary ratify the lease? If the decedent's mineral interest has not been distributed to the beneficiaries, and as such, remains an asset of the estate, then an oil and gas lease should be obtained from the personal representative if the personal representative has the requisite authority. To ensure that the personal representative has the power to lease the estate's mineral interest, you should obtain a certified copy of the personal representative's Letters of appointment that are certified to be in effect within the prior 60 days to confirm that there are no restrictions listed on the face of the Letters that would prohibit the personal representative from entering into an oil and gas lease on behalf of the estate. Although not required, it is a good business practice to have the beneficiaries ratify the lease (either upon acquisition of the lease or following a distribution of the relevant mineral interest).

This question involves the interplay of two provisions in the Colorado Probate Code. Section 15-12-101 provides that title to a decedent's real and personal property devolves to the beneficiaries of the estate at the moment of death, subject to administration of the estate. Section 15-12-711 gives the personal representative the same power over the estate's assets as the decedent had, in trust, however, for the benefit of any creditors and the beneficiaries of the estate. Specifically, § 15-1-804(g)(II) of the Colorado Statutes authorizes the personal representative to lease real property "even for a term extending beyond the duration of the administration of the estate . . . and, in any such case, to include or exclude the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements" unless this power is limited as noted on the face of the Letters of appointment. The personal representative must exercise his or her powers as a fiduciary with a duty of prudence, loyalty and impartiality to the beneficiaries of the estate.

Based upon the above, if a mineral interest remains in the estate, then the personal representative has the authority to lease the minerals without the beneficiary's joinder or consent; provided that the Letters of appointment does not include language restricting this power. However, it is a good business practice to have the beneficiaries ratify any lease that the personal representative executed since the beneficiaries will have to abide by the lease terms.

### Example 1

Tom Smith dies in Weld County, Colorado owning a mineral interest in that County. Emily is appointed as personal representative of Tom's estate by the Weld County District Court Clerk and is issued Letters without any restrictions. Jonah is a beneficiary of Tom's estate. Rudy's Oil Company obtains an oil and gas lease from Emily as personal representative with a 1/8 royalty interest. Emily as personal representative subsequently distributes the mineral interest to Jonah.

Does Jonah receive this mineral interest subject to the lease? Yes; Jonah receives his portion of the mineral interest subject to the personal representative's lease because the mineral interest was an asset of the estate at the time the lease was executed and Emily's powers to do so were not restricted.

If Jonah does not like the 1/8 mineral interest, can he have a court set aside the lease? Generally, No. Section 15-12-714 of the Colorado Probate Code protects third parties who in good faith deal with a personal representative for value. Under this statute, a third party is protected as if the personal representative properly exercised his or her power, except that a third party is deemed to have notice of any restrictions listed on the Letters of appointment. It is worth noting, however, that Rudy's Oil Company must be a good faith purchaser for value. The mere fact that a purchaser is receiving a good deal by paying less value (in this example, a 1/8 royalty interest) than what property is worth does not prevent the purchaser from being a purchaser for value. If, however, the difference in value is great, then a court may view the substantial difference between value and purchase price as an indication that the purchaser knew or suspected that the transferor was breaching his or her fiduciary duty, and as such, the court could find that the purchaser was not a bona fide purchaser for value. *See Whatley v. Wood*, 404 P.2d 537 (Colo. 1965). This could result in a court denying the purchaser any protection under § 15-12-714 and setting aside the transaction.

If not, what is Jonah's recourse? Jonah's recourse is to bring suit against Emily for a breach of her fiduciary duty. If Rudy's Oil Company is protected as a third party purchaser for value, then the result of any such action should be a monetary judgment against Emily and not termination of the lease.

Should Rudy's Oil Company have Jonah ratify the lease? Although Emily has the authority to execute the oil and gas lease and Jonah will be bound by the lease and its terms upon distribution of the mineral interest to him as a beneficiary, it is good practice to have Jonah ratify the lease since he will have to abide by the lease terms for the life of the lease.

### Example 2

Same facts as above except that Rudy's Oil Company obtains an oil and gas lease from Jonah as the beneficiary of the estate with a 1/8 royalty interest. Jonah later regrets agreeing to a 1/8 royalty interest.

If Emily subsequently distributes the mineral interest to Jonah, is he bound by the lease? Yes. As discussed above, at the moment of Tom's death, Jonah owned a vested interest in the minerals subject to administration. Once the minerals are distributed to Jonah by Emily as the personal representative, then Jonah's ownership interest in the minerals is fully vested.<sup>7</sup> Even though Jonah's interest was not perfected until after the lease was signed, it seems highly unlikely that a court would allow Jonah to escape the terms of a lease that was signed by him.

If Emily determines that she needs to sell the mineral interest to Charley Peterson to raise money to pay federal estate taxes owed by the estate, does Charley acquire the mineral interest subject to the lease between Rudy's Oil Company and Jonah? Although no direct authority was found in the Colorado Probate Code, Colorado title standards or in case law, it seems most likely that Charley Peterson will own the mineral interest free of the oil and gas lease with Rudy's Oil Company. Section 15-12-910 of the Colorado Statutes provides protection for a purchaser (it could be argued that this would also apply to a lessee) from a beneficiary *who has received a deed of distribution from the personal representative*. Until an asset of an estate is formally distributed by the personal representative, it remains under the control of the personal representative who has the power to divest the beneficiary of his or her interest. If the personal representative sells an estate asset, in other words, divests the beneficiary of his or her interest, then the beneficiary's interest was never perfected and reduced to

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<sup>7</sup> It is worth noting that under § 15-12-909 of the Colorado Statutes a beneficiary must return property or the value of property that was improperly distributed to the beneficiary. However, third party purchasers for value are protected from an improper distribution under § 15-12-910. Under this section, if an improper distribution is made to a beneficiary and the beneficiary either sells or leases the mineral interest, then the buyer or lessee who pays value is protected. Instead, the beneficiary would be required to return the *value* of the improperly distributed property using other assets or return the minerals subject to the oil and gas lease.

possession. Basically, it is as if the beneficiary never had an interest in the property. Accordingly, it seems likely that a court would find that a beneficiary does not have the authority to sell or lease an estate asset *until* the asset is formally distributed to the beneficiary. An option in this fact scenario is to have Emily as the personal representative ratify, with words of let, the lease between Jonah and Rudy's Oil Company and record this ratification in the real property records prior to selling the minerals to Charley Peterson.

## **5. Proof of Death and Heirship *aka* Affidavit of Heirship**

The real property records reflect that Oscar Owner owns a mineral interest in Weld County, Colorado. In addition, the real property records contain an affidavit of heirship identifying Henry Heir as Owner's sole heir, but do not contain personal representative's deed to Heir. Is the affidavit of heirship sufficient to pass title to Heir? No, an affidavit of heirship does not convey title to real property. To convey marketable title to the heirs or devisees of a decedent, the decedent's estate must be probated.<sup>8</sup>

The heirs or devisees<sup>9</sup> of a decedent owning a real property interest sometimes attempt to avoid probate. This situation often occurs when the decedent owned an interest in severed minerals that were not producing at the time of the decedent's death. Instead, the heirs or devisees may attempt to establish title by an affidavit of heirship.<sup>10</sup> An affidavit of heirship is a sworn statement attesting to facts concerning a decedent's death, marital status and genealogy/family relations. The purpose is to establish heirship, pursuant to the intestacy laws, of persons who purport to have acquired title to real property through the decedent. Colorado law, however, provides no protection for relying upon an affidavit of heirship or presumption of accuracy unless the affidavit has been of record for twenty (20) years in the real property records of the county in which the real property is located.<sup>11</sup>

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<sup>8</sup> As an alternative to probate, Colorado law permits a determination of heirs or devisees proceeding under certain circumstances. *See* C.R.S. §§ 15-12-1301, *et seq.* Such proceeding is discussed briefly later in this Section.

<sup>9</sup> A will is not legally binding until it is admitted into probate. A will must be probated within three (3) years after the decedent's death, subject to exceptions. *See* C.R.S. § 15-12-108.

<sup>10</sup> Affidavits of heirship are also commonly recorded where a decedent died in a state other than Colorado and his/her estate was probated in such other state. *See* Section 3, above regarding ancillary proceedings.

<sup>11</sup> C.R.S. § 38-35-113 provides that affidavits containing statements relating to death, intestacy, heirship, relationship, age, sex, names and identity of persons that have been of record for twenty (20) years in the real property records of the county in which the real property is situated shall be

While an affidavit of heirship does not convey title to real property, it may provide useful information in identifying and locating a decedent's heirs or devisees.<sup>12</sup> When reviewing an affidavit of heirship, it is important to remember that the intestacy laws have changed over the years and that the laws in effect on the date of the decedent's death govern. If relied upon, however, an affidavit of heirship may create additional issues if it is incomplete or contains inaccurate information. For example, an oil company relies upon an affidavit of heirship to obtain a lease from the person identified therein as the sole heir. The oil company drills a producing well. Thereafter, it is determined that another heir was omitted (whether inadvertently or intentionally) from the affidavit of heirship. The omitted heir still owns his/her interest, which is unleased. The oil company would be liable to the omitted heir for the net profits attributable to the omitted heir's interest and, perhaps, late payment penalties. *See, e.g.*, C.R.S. § 34-60-118.5. The oil company is not protected against the rightful heirs or devisees.<sup>13</sup> Thus, relying on an affidavit of heirship is risky.

Nevertheless, oil companies sometimes make a business decision to rely on an affidavit of heirship. For example, an oil company may decide to rely on an affidavit of heirship for drilling purposes and require the purported heirs to institute probate proceedings to determine ownership only in the event of production. In addition, an oil company may make a business decision to rely on an affidavit of heirship when a small interest is involved and/or when the record title owner died a long time ago. The more time that has passed since the death of the record title owner, the more difficult it is to clear title. If an oil company is willing to assume the business risk of relying on an affidavit of heirship, it should obtain indemnifying division orders.

As an alternative to probate, Colorado law permits a determination of heirs and/or devisees proceeding ("determination of heirs proceeding") under certain circumstances. *See* C.R.S. §§ 15-12-1301, *et seq.* Similar to an affidavit of

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accepted as prima facie evidence of the facts stated in the affidavit insofar as those facts affect title to the real property. However, prima facie evidence is rebuttable.

<sup>12</sup> If an affidavit of heirship is sought, it should be obtained from an independent third party who has knowledge of the decedent and his/her heirs. The affidavit should provide specific information related to the decedent, including his/her date of death, whether he/she died testate or intestate and whether and where his/her estate has been probated, the identity of his/her spouse at the time of death (including the date of death, if applicable) and any prior spouse(s) (including the date of death, if applicable), the identity of all children (including the date of death, if applicable), the identity of both parents (including the date of death, if applicable), the identity of all siblings (including the date of death, if applicable) and the current contact information for each identified person.

<sup>13</sup> The oil company may be able to recoup the over-payments from the purported sole heir.

heirship, a determination of heirs proceeding is based upon information from a person with knowledge of the relevant facts. Such proceeding may be useful in situations where a considerable amount of time has passed since the decedent's death and the decedent still holds record title to real property interests either because a probate proceeding was never commenced or because certain assets were not distributed through probate.<sup>14</sup> The determination of heirs proceeding results in a court decree that "shall be conclusive as to the rights of heirs or devisees in the property described in the order. . . ." *Id.* at §§ 15-12-1306. A certified copy of the decree recorded in the real property records of the county in which the real property is located provides a reasonable degree of title certainty.

#### **6. Establishing the Termination of a Joint Tenancy or Life Estate (*i.e.*, Establishing Survivorship of a Joint Tenant or Remainderman)**

The real property records contain an affidavit attesting to the death of a joint tenant, but do not contain a death certificate for such joint tenant. Is the affidavit sufficient to establish survivorship? Yes, assuming the affidavit is sworn to by two or more persons, includes a statement that the death certificate cannot be procured and the reason it cannot be procured and contains all other information required by C.R.S. § 38-31-103. *See also* Colorado Title Standard No. 7.1.1.

This issue involves two provisions in the Colorado Revised Statutes. Section 38-31-102 applies if you have the death certificate. Section 38-31-102 provides that the death of a joint tenant or life tenant may be established by recording in the county in which the real property is located (1) a death certificate meeting the requirements of C.R.S. § 38-31-102 (*i.e.*, an official death certificate) and (2) a supplementary affidavit that includes (a) the legal description of the real property; (b) a statement that the decedent owned an interest in such real property at the time of death; and (c) a statement that the affiant owns no record interest in such real property.

Section 38-31-103, which applies if you do not have the death certificate, provides that the affidavit must contain additional information and be sworn to by two or more persons when a death certificate cannot be procured. Specifically, § 38-31-103 requires the recording, in the county in which the real property is located, of an affidavit sworn to by two or more persons that includes (1) a statement that the death certificate cannot be procured and the reason therefor; (2) the legal description of the real property; (3) the date and place of death of the

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<sup>14</sup> For example, where a personal representative's deed distributed an undivided 1/4 mineral interest in certain lands to a devisee, but the decedent actually owned an undivided 1/2 mineral interest in those lands.

decedent's death; (4) a statement that the decedent owned an interest in such real property at the time of death; and (5) a statement that the affiants own no record interest in such real property.

#### Example

Larry Landowner and Lydia Landowner, as joint tenants, acquired a real property interest in land in Larimer County, Colorado in 2000. Larry died on January 14, 2014. The real property records include a certified copy of Larry's death certificate. Lydia executes an affidavit in which she provides a legal description of the real property and states that Larry died on January 14, 2014 owning an interest in such real property. The affidavit is recorded in the real property records in Larimer County. Is the affidavit sufficient to establish survivorship and sole ownership of the real property interest in Lydia? No. Under C.R.S. § 38-31-102 and Colorado Title Standard No. 7.1.1, the affiant (*i.e.*, Lydia) cannot own an interest in such real property. An affidavit complying with Section 38-31-102 should be obtained from a person who does not own an interest in such real property and recorded in the real property records in Larimer County. However, the oil company may choose to accept the business risk that Lydia did not survive Larry and rely upon Lydia's affidavit. If so, the title examiner should recommend that the oil company obtain an executed division order with an indemnity clause from Lydia Landowner.

### **7. Deed Conveys Real Property to the Estate of a Decedent**

The real property records contain a deed that conveys real property to the estate of a decedent (*i.e.*, the deed does not convey the real property to the personal representative of the estate). Does the estate acquire title to such real property? No, an estate is not a legal entity and cannot hold title to real property. The grantee of a conveyance must be a real person or entity. *See* Colorado Title Standard No. 11.1.2. Any conveyance to a grantee that is fictitious, or otherwise does not exist, is ineffective. To cure this defect, a corrective deed in which the grantor conveys the real property to the personal representative of the estate should be obtained and recorded in the real property records of the county in which the real property is located.

#### Example

Dom Decedent dies a resident of Denver, Colorado. His will names Paul Representative to serve as the personal representative of his estate. The Denver probate court appoints Paul Representative as the personal representative of the estate of Dom Decedent, deceased. Gilbert Grantor

conveys a mineral interest in Mesa County, Colorado to the “estate of Dom Decedent.” This conveyance is ineffective because an estate is not a separate legal entity and cannot own real property. To be effective, the deed should convey the mineral interest to “Paul Representative, personal representative of the estate of Dom Decedent, deceased.” This conveyance would be effective because real property conveyed to the personal representative of an estate conveys the title as if the real property was owned by the decedent at the time of death.

## **8. Record Title to a Real Property Interest Held by Person who is Deceased**

The real property records reflect that Ophelia Owner owns record title to a mineral interest and contain a death certificate for Owner, but the estate has not been probated. Can an oil company institute probate proceedings on behalf of the decedent to clear title to real property interests? No, an oil company does not have standing to institute probate proceedings for a person who died owning a real property interest. The quiet title action is available to an oil company when the oil company cannot claim an interest through the decedent in such property.

As an alternative to instituting a quiet title action, the oil company may conduct an investigation to locate the decedent’s heirs or devisees. Once the oil company identifies the persons believed to be the heirs or devisees of the decedent, it should obtain protective leases from each such person.<sup>15</sup> The oil company may suspend proceeds under such leases as an incentive to induce such persons to probate the decedent’s estate and obtain and record a personal representative’s deed conveying all of the decedent’s interest to the appropriate heirs or devisees.<sup>16</sup> The oil company may hold proceeds under such leases in suspense until it is able to confirm the identity of decedent’s heirs or devisees with a reasonable degree of certainty.<sup>17</sup>

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<sup>15</sup> In such circumstances, it is helpful to the title examiner if the landman for the oil company identifies the lessor as an heir to the decedent. Otherwise, depending upon the number of unleased interests in a tract, it may be difficult or impossible for the title examiner to match unleased interests to persons who executed oil and gas leases, but appear to be strangers to title. For example, the lessor could be identified as “Larry Lessor, sole heir to Olivia Owner, deceased” or, if not sole heir, then as “Larry Lessor, heir to Olivia Owner, deceased”.

<sup>16</sup> Once the oil company obtains an oil and gas lease from an alleged heir or devisee of a decedent, then the oil company may institute a determination of heirs proceeding as a person claiming an interest derived from an alleged heir or devisee, if at least a year has passed since the decedent’s death. See C.R.S. §§ 15-12-1301, *et seq.*

<sup>17</sup> If any of the decedent’s heirs or devisees are deceased, then the identity of the heirs or devisees of such deceased heir or devisee should, likewise, be established by Colorado probate law or by a determination of heirship.



## 9. A Will Creates a Testamentary Trust

Olivia Owner is the record owner of a mineral interest in Garfield County, Colorado. The Garfield County real property records include probate documents for Olivia Owner's estate, including a copy of her will, which creates a valid testamentary trust consisting of the mineral interest for the benefit of her minor children. Is the creation of the testamentary trust sufficient to transfer title to the trustee? No, the mineral interest must be distributed to either the trustee or the trust<sup>18</sup> by a personal representative's deed or a court order. C.R.S. § 38-30-108.5 treats trusts as entities capable of holding title to real property and allows title to real property to be held in the name of the trust. As such, property held in trust can be titled either in the name of the trustee (*e.g.*, "Tom Trustee, Trustee") or in the name of the trust (*e.g.*, "The Owner Children Trust"). *See* C.R.S. § 38-30-108.5. If the trust takes title to trust property in its name, then, pursuant to C.R.S. § 38-30-172, the trustee should file, in the clerk and recorder's office in the county in which the real property is located, a "statement of authority" showing the existence of the trust and the trustee's authority to act on behalf of the trust. The statement of authority is essentially a public record evidencing who is authorized to act on behalf of the trust. Once the Trustee is identified, third parties may rely on actions of a trustee concerning trust property, without confirming that the trustee is complying with his/her fiduciary duty to the trust beneficiaries. *See* C.R.S. § 38-30-108.

A testamentary trust is a trust created by a will and is administered by a trustee for the benefit of one or more beneficiaries who are named in the will. Testamentary trusts are often created for children who are minors, have special needs or are young adults. The will provides for the expiration of the testamentary trust on a given date, such as when the child finishes college or turns 25 years old. By definition, a testamentary trust does not come into existence until the death of the person (*i.e.*, the testator) creating the will. Typically, a trustee is named in the will, but the probate court may appoint a trustee if one is not named or if the person named is unable or unwilling to serve. Testamentary trusts do not avoid probate. The personal representative probates the will and, as part of the probate process, creates the trust.

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<sup>18</sup> In most states, property in trust must be held in the name of the trustee, *e.g.*, "Tom Trustee, as trustee of the Owner Children's Trust under the will of Olivia Owner." However, C.R.S. § 38-30-108.5 allows a trust to take title to trust property in its name (*e.g.*, "Owner Children's Trust under the will of Olivia Owner").

### Example

Omar Owner, owner of Blackacre, died testate. The real property records contain (1) a copy of owner's will, which was admitted to probate and created a valid trust for the benefit of Owner's children and appointed Tom Trustee as trustee, and (2) an order distributing Blackacre to the trustee. Tom Trustee, as trustee, deeded Blackacre to Gary Grantee. Did Grantee acquire marketable title to Blackacre? Yes, Grantee is entitled to presume that Trustee complied with his fiduciary duties. See C.R.S. § 38-30-108.

## **10. Additional Issues/Documents You May Encounter when Reviewing a Probate File**

When reviewing a probate file, a title examiner may encounter situations where a decedent's estate is not distributed pursuant to the provisions of his/her will. As discussed below, sometimes a spouse or child is entitled to receive a share of the decedent's estate despite the provisions of the decedent's will. A title examiner should be aware of such issues and related documents and give credence to them when encountered.

### **a. A Spouse's Elective Share**

Colorado allows a surviving spouse an "elective share," which is the right of the surviving spouse to elect to receive a certain portion of his/her deceased spouse's "augmented estate" instead of what, if anything, the surviving spouse was left under the deceased spouse's will or living trust. The surviving spouse may claim an elective share even if he/she was specifically disinherited under the deceased spouse's will. The surviving spouse must file his/her election in court or deliver it to the personal representative within nine (9) months after the date of the decedent's death or six (6) months after the will is admitted into probate, whichever is later. See C.R.S. § 15-11-205.

### **b. Pretermitted Heirs (*i.e.*, Unintentional Disinheritance)**

Under certain conditions and subject to certain exceptions, a pretermitted spouse is entitled to an intestate share of the deceased spouse's estate where the deceased spouse executed a will prior to the marriage. See C.R.S. § 15-11-301. Similarly, under certain conditions and subject to certain exceptions, a pretermitted after-born or after-adopted child is entitled to a share of the deceased parent's estate where the deceased parent executed a will prior to the birth/adoption of the child. See C.R.S. § 15-11-302.

## ATTACHMENT TO PAPER

### Requirement under Colorado law prior to enactment of the Uniform Probate Code for Personal Representatives appointed by another state

#### Testate – Non-Resident – Beneficiary Takes

Where the deceased was not a resident of Colorado but owned property located in Colorado, ancillary proceedings were required to pass marketable title. In a testacy situation where the property is distributed to a beneficiary of the estate, the following three documents should be recorded in the real property records for the County in which the real property is located:

- (1) certified copy of the order of the Colorado court admitting the foreign Will to probate in Colorado;
- (2) certified copy of the foreign Will certified by the Colorado court; and
- (3) release of the Colorado inheritance tax lien.

#### Intestate – Non-Resident – Beneficiary Takes

If the deceased died intestate and the property is distributed to a beneficiary of the estate, the following documents from the ancillary proceeding in Colorado should be recorded:

- (1) certified copy of foreign Letters of appointment;
- (2) certified copy of the Colorado court order admitting the foreign court order of settlement and final discharge; and
- (3) release of the Colorado inheritance tax lien.

#### Testate – Non-Resident – Sale to Third Party

If the property is not distributed to the estate's beneficiaries under a foreign Will, but instead, the personal representative sold the Colorado property to a third party under a power of sale contained in the Will, the following should be of record:

- (1) certified copy of the foreign Will;

- (2) certified copy of the Colorado court order admitting the foreign Will to probate;
- (3) certified copy of the foreign Letters of appointment;
- (4) release of the Colorado inheritance tax lien; and
- (5) personal representative's deed reciting the power of sale.

If the sale by the executor is without a power contained in the will, there should be recorded, in addition, a certified copy of the Colorado court order confirming the sale.

#### Intestate – Non-Resident – Sale to Third Party

If the deceased was not a resident of Colorado and died intestate, but owned property in Colorado which the personal representative sold to a third party, the following documents should be of record:

- (1) certified copy of the foreign Letters of appointment;
- (2) personal representative's deed reciting the order confirming sale issued by the Colorado court;
- (3) certified copy of the Colorado court order confirming the sale; and
- (4) release of the Colorado inheritance tax lien.