Texas Marital Property Law Applied to Oil, Gas, Water, Wind, & Solar Rights

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Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2018); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Honors Received:

Texas Center for the Judiciary, *Exemplary Non-Judicial Faculty Award* (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2019)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2019)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2021); Appellate Law (2007-2021)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

Magazines:

A New Day: Same Sex Marriages: Emerging Gender Identity Issues; IN CHAMBERS Fall 2015; Texas Center for the Judiciary, p 10.

Error Preservation for Evidentiary Rulings; THE ADVOCATE Fall 2016; State Bar of Texas, p 19.

Follow the Money, TEXAS BAR JOURNAL December 2016; pp. 808-809.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Troubling Issues of

Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018); Attacking and Defending Trusts in Divorce (2019)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012); Sanctions in Texas Courts: Trial and Appeal (2018)

SBOT's New Frontiers in Marital Property Law: Estate Planning Devises in Divorce–Attacking, Defending and Using Trusts, Estates, Family Partnerships and Other Estate Planning Devices (1996); Bill of Review (2000); Marital Property Issues: Tracing Reimbursement, and Claims for Economic Contribution (2002); Busting Trusts Upon Divorce (2003); Distinguishing Enterprise Goodwill from Personal Goodwill (2006); Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); Different Ways to Trace Separate Property (2008); Reassessing Some of Our Approaches to Family Law Cases (2009); 21st Century Discovery and Evidence: Electronically Stored Information (2010); A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); Compensation, Return on Capital and Return of Capital (2012); Distributions from Business Entities: Six Possible Approaches to Characterization (2015); New Frontiers in Tracing Separate Property (2017); Gifts and Trusts, and How to Attack Them (2018); Selected Characterization Issues (2019)

Texas Center for the Judiciary: Marital Property Issues: Tracing, Reimbursement, and Claims for Economic Contribution (2002); Family Law Updates (2004); Important Topics in Family Law (2007); Family Law Update (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements (2014); Same-Sex Marriage and Gender Identity Issues (2015); Same-Sex Marriage and Gender Identity Issues (2016); Dividing the Estate Upon Divorce (2017); 20 Rules for Characterizing Marital Property in Texas (2017); Current Issues Related to Child Custody (2019); Family Law Case Update (2019); Current Issues Relating to Parental Presumptions and Third Party Standing (2020)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Fiduciary Litigation Course, Family Law and Fiduciary Duty (2013); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); 10th Annual Fiduciary Litigation Course, Selective Fiduciary Issues in Family Law, (2015); SBOT Child Protection Law Section, Evidence & Experts, (2019); Kentucky Society of CPAs, Rethinking Our Approaches to Determining Divisible Goodwill Upon Divorce, (2020); 15th Annual Fiduciary Litigation Course, The Clash of Business Fiduciary Duties With Other Duties (2020); SBOT Child Protection Law Section, Making and Defending a Daubert Challenge of a Mental Health or Drug Expert, (2021); Texas Supreme Court: History and Current Practice, Development of Legal Specialization in Texas, (2021); Texas Supreme Court: History and Current Practice, History of the Texas Supreme Court Through Rebellion, Reconstruction, & Restoration (1860-1876), (2021); Texas Supreme Court: History and Current Practice, Texas Supreme Court Chief Justices Calvert, Greenhill, & Pope, with Special Section on Judicial Selection, (2021)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

Texas Marital Property Law Applied to Oil, Gas, Water, Wind, & Solar Rights

by

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I. INTRODUCTION. There is no comprehensive material on Texas marital property rights in oil and gas, and no literature in Texas or anywhere else in the nation on handling water, wind, and solar rights in a divorce. Surprisingly, the Texas case law precedent regarding the marital property character of mineral interests and oil and gas production is old and sparse. In this Article, the law relating to oil and gas and water rights is compared, and possible applications of the same principles to wind and solar rights is explored, along with alternatives.

II. SURFACE ESTATE VS. MINERAL INTEREST. The Supreme Court wrote in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 831-832 (Tex. 2012): "In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land.... The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land."

Thomas M. Murray, in *Conflicting Uses of the Surface Estate*, ch. 17, p. 2 (State Bar of Texas 30th Annual Advanced Real Estate Drafting 2019) ("Murray"), wrote:

> A fee owner of real property owns...the surface of the land, and everything attached to the surface, as well as interests above and below the surface. A property owner has the ability to sever, convey and transfer different and separate interests in the realty. This ownership extends to every type of valuable right and interest on the land, and includes real and personal property.

See Bagby v. Bredthauer, 627 S.W.2d 190, 194 (Tex. App.--Austin 1981, no writ) ("it is well established [that] it is possible for the owner of land to sever the surface and mineral estates, creating a separate corporeal estate in the minerals. The grantor of land may, for example, reserve to himself the entire mineral estate. He may also reserve a distinct and severable part of the mineral estate, including an interest we have denominated a 'royalty interest'").

A. SURFACE ESTATE. In his article Murray described the surface estate in this way:

> Under a strict construction, the "surface estate" is not "land" or some physical "thing", but rather, the "surface estate" is the "legal unit of ownership in the physical land". However, in construing what constitutes a "surface estate" courts have equated it with the physical earth over which the owner exercises dominion and control. The surface estate extends to the "surface" overlying a leased mineral interest, which includes ownership of "geological structures beneath the surface." Further, the surface owner, and not the mineral owner, owns all of the "non-mineral molecules" in the land. Thus, even though there is a conveyance of the mineral estate effectuating a severance of the minerals, the conveyance of the mineral estate does not create a conveyance of

the entirety of the subsurface. [Footnotes omitted.]

Murray at p. 3.

> [W]hile it has been held by the Texas Supreme Court that "building stone belongs to the surface estate as a matter of law," in *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*, 62 S.W.3d 844 (Tex. App.--Austin 2001, no pet.), the court held that the landowner could convey a granite deposit as a severable estate, which would then have the right of reasonable use of the surface to extract the granite. The principle might be applied to landowners selling the right to extract "frac sand" to use in fracing. Murray, p. 11.

The owner of the surface estate has the right to "capture" the ground water under the surface of the land.

B. MINERAL ESTATE. The mineral estate is originally part of the fee simple ownership of the land. However, in Texas the mineral estate can be severed and reserved or severed and assigned separately from the surface estate.

1. Deeds vs. Leases. There are two ways to convey an interest in the mineral estate: a deed and a mineral lease.

a. Mineral Deeds. Unsevered mineral rights are included in a transfer of a fee simple interest in land. However, the grantor can "reserve" some or all of the mineral rights when he conveys the land. Those unconveyed minerals are "severed" from the rest of the rights in the land. Mineral rights can also be severed by conveying away some or all of the minerals while retaining the other rights to the land. Severed minerals are conveyed by mineral deeds. Mineral deeds are standardized to a great degree, but there are enough drafting defects in mineral deeds to keep up a steady stream of cases going to the trial courts, and the courts of appeals, and even the Texas Supreme Court for interpretation and application.

b. Mineral Leases. To allow exploration for and production of oil and gas, the owner signs a mineral lease. A mineral lease is a conveyance of a "fee simple determinable" that gives the lessee an ownership interest in the mineral estate under particular land, subject to reservations and conditions. *See Luckel v. White*, 819 SW 2d 459, 464 (Tex. 1991). In exchange, typically, the owner is paid a bonus for signing the lease, and is promised a royalty which consists of part of the oil and gas produced from the property. The royalty is almost always paid in cash. Most mineral leases provide that if production does not begin within a certain period of time, or if production starts but is then stopped, ownership of the minerals reverts back to the lessor. "The 'possibility of reverter' is the real property term of art for what the grantor owns as a future interest in a determinable fee grant; it is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs." *Luckel v. White*, 819 S.W.2d at 464.

2. From the Land Owner's Perspective. In *Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016), the Court said:"[t]he mineral estate is comprised of five severable rights: '1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals, and 5) the right to receive royalty payments.' *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995).

a. The Right to Develop. The right to develop minerals includes the right to explore, drill, produce, transport, store and market the minerals. <https://www.txoga.org/mineral-owner-rights>. Normally the right to develop is assigned by the owner of the mineral interest to a company that explores and drills for oil and gas.

b. The Right to Lease. The right to lease a mineral interest is called the "executive right." When the ownership of the mineral interest is divided into parts, the executive right to lease all of the mineral interest can belong to just one person or entity. The holder of the executive right over the mineral interest of other owners owes a fiduciary duty to the other owners to obtain the same benefits for them that he obtains for himself. *Hysaw* 483 S.W.3d at 9. Where there are multiple owners of the executive rights, usually no one will commit the resources to drilling the property unless a joint exploration and development agreement (or "joint operating agreement" or "participation agreement") is agreed upon where all interest-holders proportionately contribute to costs and share in profits or losses in exploring an "area of mutual interest."

c. The Right to Receive Bonus Payments. A lease bonus is an up-front payment made by the lessee to the lessor under a mineral lease, paid in exchange for conveying the right to explore, drill, extract, and sell oil and gas. The bonus is typically paid to the owner of the mineral interest (lessor) upon signing the lease.

d. The Right to Receive Delay Rentals. Delay rentals are payments made by the lessee to the lessor under a mineral lease to extend the life of the lease during a period of time when drilling or production required to keep the lease in effect is not occurring. Delay rentals are due if the necessary drilling or production has not been instituted during the "primary term" of the lease.

e. Royalty Interest. In *Luckel v. White*, 819 S.W.2d 459, 463 (Tex. 1991), the Court said: "A royalty interest is an interest in land that is a part of the total mineral estate." In *Bagby v. Bredthauer*, 627 S.W.2d at 194-95, the Court wrote:

> A "royalty interest" consists in the right to a fractional share of the mineral production, the owner of which typically has no share in the development and executive rights relative to the mineral estate; he may not explore for the minerals himself and is not a necessary party to a lease of the mineral estate. In the ordinary case, he simply possesses the right to his specified proportionate share of production once the minerals are produced. His interest is an interest in "land," but since he may not enter the premises for the purposes of exploration and development, his interest is viewed as an incorporeal interest in the land. *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 101 (1934).
>
> A landowner may create a royalty interest by grant, reservation or exception. *Humphreys-Mexia Co. v. Gammon*, [p. 195] 113 Tex. 247, 254 S.W. 296 (1923); *State National Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940). The grant of a royalty interest for a term of years and for so long thereafter as minerals may be produced in paying quantities creates in the grantee a fee simple determinable, and establishes in the grantor a possibility of reverter.

f. Shut-In Royalty Payments. A *shut-in royalty* is a payment that the operator pays the royalty owner for the period of time that a mineral lessee ceases production because the operation of all the

wells is suspended. The shut-in royalty is a stated sum for a period of time, such as $500 per year.

3. From the Lessee's Perspective. The lessee's interest under a mineral lease can be broken into the following components: the working interest, an overriding royalty interest, a farm-out agreement, and a pooling agreement.

a. Working Interest. A *working interest* is the right under an oil and gas lease to enter land to explore, drill, produce, and sell oil and gas located under the property. The owner of the working interest is responsible to pay all costs of exploration, drilling, production, and sale. Because the working interest is subject to the royalty interest, the owner of the working interest must pay 100% of the costs of exploration and production, but receives less than 100% of the production and sales; the difference goes to the royalty owners.

b. Overriding Royalty Interest. An *overriding royalty interest* (ORRI) is a right, carved out of the working interest, to receive part of the proceeds from sale of the mineral without having to pay any of the costs of drilling or production. The period of the ORRI is by necessity limited to the term of the lease.

c. Farm-Out Agreement. A *farm-out agreement* is an arrangement where the owner of the working interest conveys a portion of the working interest to a *farmee* who agrees to provide services (typically drilling one or more wells) in exchange for a portion of the working interest. Typically these services include drilling a well to a certain depth, in a certain location, in a certain time frame, and also the farm-out agreement typically stipulates that the well must obtain commercial production. After this contractually agreed service is rendered, the Farmee is said to have "earned" an assignment. This Assignment comes after the services are completed, and is subject to the reservation of an overriding royalty interest in favor of the Farmor." Austin Brister, *Farmout Agreements: The Basics, Negotiations and Motivations.*[1]

d. Pooling Agreement. "Pooling is generally thought of as the joining together of separately owned mineral interests and/or leasehold interests in multiple tracts (or portions of the same tract(s)) for the purposes of having sufficient acreage to receive a permit to drill a single well under relevant state or local density and spacing laws and regulations." Austin T. Lee, *Pooling and Unitization* (4-16-2017).[2] "Unitization, on the other hand, refers to the combination of separately owned mineral or leasehold interests covering all, or part of, a common source of supply (i.e. a field/reservoir) for the principal purpose of the joint operation of that field/reservoir (or part thereof) in order to maximize production, create operational efficiencies and conserve resources (both financial and natural)." (Quoting Bruce Kramer, "The Nuts and Bolts of Pooling: A Primer for the Uninitiated" Section I.B. at 1.)

4. Dominant Estate. When the mineral estate has been severed from the surface estate, the owner of the mineral estate has the right to use the surface of the land as necessary to effectuate the purpose of the mineral lease. Murray, p. 4, citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) ("the oil and gas lessee's estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate").

Murray explained: "While a mineral interest owner has no direct possessory interest in the surface

estate, the owner of a severed mineral estate (or his lessee) has the right to use the surface to the extent reasonably necessary to develop and produce the minerals." [Footnote omitted.] *Id.* at 3.

It is sometimes said that the owner of the mineral estate has an implied easement giving the right of ingress and egress to drill, store, pump, and transport the minerals. *Id.* at 3-4. Murray points out that the right of the mineral owners to use the surface is not really an easement; rather the mineral estate is actually dominant over the surface estate. Murray, p. 5. Practically speaking, a dominant estate and rights under an easement are similar.

"The oil and gas lease has always included an implied right to use as much of the surface estate as reasonably necessary for development of the leased premises and lands pooled therewith, regardless of whether the surface owner is a party to the lease agreement. Many landowners are surprised to learn that this right includes a privilege to drill water wells, build large impoundments and use groundwater with no corresponding obligation to compensate the surface owner. [Footnote omitted.] Brown & Fitzimmons, *Emerging Issues in Surface Use and Energy Development* ch. 8, p. 6 (State Bar of Texas 13th Annual John Huffaker Agricultural Law Course 2019) ("Brown & Fitzsimons").

III. MARITAL PROPERTY PRINCIPLES APPLICABLE TO OIL AND GAS INTERESTS.

A. SEPARATE AND COMMUNITY PROPERTY. Separate property is property owned or claimed by a spouse before marriage or acquired during marriage by gift, devise, or descent. Tex. Const. art. XVI § 15; Tex. Fam. Code § 3.001(1). All property acquired by a spouse during marriage by gift, descent, or devise is separate property, Tex. Fam. Code § 3.001(2), as is property partitioned or made separate in a premarital or postmartial property agreement, Tex. Const. art. XVI § 15. The recovery for personal injuries sustained by a spouse during marriage is separate property, except for recovery of lost earning capacity and medical expenses. Tex. Fam. Code §3.001(3). All other property acquired by spouses during marriage is community property. Tex. Fam. Code § 3.002. All property possessed by a spouse during marriage is presumed to be community property, and the burden is on the party claiming separate property to prove separate property by clear and convincing evidence. Tex. Fam. Code § 3.003(a) & (b). To overcome the presumption of community, the party asserting separate property must trace and clearly identify the property which (s)he claims to be separate. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). In *Arnold v. Leonard*, (273 S.W. 799 (Tex. 1925), the Supreme Court held that "[w]e have no doubt that the people in adopting the Constitution in 1845, as in 1876, understood that it was intended to put the matter of the classes of property constituting the wife's separate estate beyond legislative control. Thereby both the wife and the husband were given constitutional guaranty of the status of all property derived by means of or through the wife. Our duty is plain to give effect to the people's will." The Court applied the rule of "implied exclusion" meaning that no court or legislature could alter the definition of separate property set out in the Constitution. However, in *Graham v. Franco*, 488 S.W.2d 390, 392 (Tex. 1972), the Supreme Court stated what it called and affirmative test for community property: "that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by 'onerous title' and belonged to the community." This affirmative test can come into conflict with the Constitutional definition of separate property, and this collision cannot be easily reconciled.

B. LAW OF MUTATIONS. The character of separate property is not changed by the sale, exchange, or change in form of the separate property. *Rose v. Houston*, 11 Tex. 324, 1854 WL 4287 (Tex. 1854) ("to maintain the character of separate property, it is not necessary that the property ... should be preserved in specie, or in kind. It may undergo mutations and changes, and still remain separate property; and so long as it can be clearly and indisputably traced and identified, its distinctive character will remain"); *Smith v. Bailey*, 1 S.W. 627, 628 (Tex. 1886) ("the wife's separate property may undergo mutations and changes, yet retain its separate character"). If separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate property undergoes mutations or changes in form. Tracing involves establishing the separate property origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property.

C. MARITAL PROPERTY RIGHTS IN GROWING CROPS. In *Cleveland v. Cole*, 65 Tex. 402, 405 (1886), the Court wrote: "It is now firmly settled by the decisions of this court that crops grown upon the land of the wife, although the labor and other means used in their production are of her separate estate, the community property of the husband and wife." The Court cited *DeBlane v. Lynch*, 23 Tex. 25; and *Forbes v. Dunham* 24 Tex. 611. In *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 300 (Tex. Civ. App.--Amarillo 1943, writ dism'd), the court wrote:

> It is the rule in this State that crops produced by annual cultivation, either growing or mature, are distinct in nature from the land on which they are grown. It is only in some instances, such as a sale of the land upon which crops are growing, without reservation of the crops, that they are considered a part of the land. The rule is well established that crops, whether growing or mature, may be segregated from the land by the act of the owner. [Citations omitted.] In our opinion, the crop was community property, regardless of whether it was growing or matured at the time the judgment was rendered. The ground was prepared and the wheat was planted during the coverture of the parties, and it has been consistently held by our courts since an early day that the principle upon which the whole structure of our community property law rests is that whatever property that may be acquired during the coverture of husband and wife, and therefore by their joint efforts, belongs to their community estate. [Citations omitted.]

In the first "citations omitted" above, the Court cited *Dodson v. Beaty*, Tex. Civ. App. 144 S.W.2d 609; *Millingar v. Foster*, Tex.Com.App., 17 S.W.2d 768; *Roth v. Connor*, Tex. Civ. App. 25 S.W.2d 246; *Roberts v. Armstrong*, Tex.Com.App., 231 S.W. 371; *Kreisle v. Wilson*, Tex. Civ. App. 148 S.W. 1132. In the second "citations omitted" above, the court cited *De Blane v. Hugh Lynch Co.*, 23 Tex. 25; *Cleveland v. Cole*, 65 Tex. 402; *Stephens v. Stephens*, Tex. Civ. App. 292 S.W. 290. The court went on to say:

> In the case of *Kreisle v. Wilson*, *supra* [148 S.W. 1134], the court said: "There is no reason why annual products of the soil, capable of being, and which are destined to be, marketed annually, should be treated as real estate for all purposes just because for the time being, and awaiting maturity and removal, they are attached to the soil." Further in the opinion, it is said: "According to our view, the annual crop of grass, in view of its being periodically grown, cut, and marketed, and destined for such use and disposition, was impressed with the character of personalty while growing, and was a part of the community property, * * *." Moreover,

> under the above authorities, appellant could have segregated the crop from his separate land, and since the entire estate of both of the parties was submitted to the jurisdiction of the court, the court had authority to cause a severance of the crop from the land and thereby do that which appellant could have done. By the entry of the decree in which the court awarded the growing crop to the community estate, it was severed from the soil and by that means it became community property of the parties, even if it could be said it was not already such. *Colonial Land Loan Co. v. Joplin*, Tex. Civ. App. 196 S.W. 626.

D. TRANSMUTATION VS. REIMBURSEMENT.

1. Transmutation. When a spouse takes a separate property asset and works it with community labor to the degree that it is significantly enhanced in value, some cases say that the end product may be transmuted into community property. For example, in *Craxton, Wood & Co. v. Ryan*, 3 White & W 439 (Tex. Ct. App. 1888), the wife made a business of working her separate property clay soil into bricks. The bricks were held to be community property. Similarly, in *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859), the wife grew crops on her separate property land, using her separate property slaves. The crops were held to be community property. Again, in *White v. Hugh Lynch & Co.*, 26 Tex. 195 (1862), where a wife took trees from her separate property land and worked them into sawed lumber, the sawed lumber was held to be community property. In *Weed v. Frost Bank*, 565 S.W.3d 397 (Tex. App.--San Antonio 2018, pet. denied), Weed acquired royalty and non-participating royalty interests, and a non-operating interest, with no right or duty to drill wells. Mr. Vaughn had part of the lessee's interest, and he leased, drilled and sold the gas; Weed owned part of the lessor's interest, and collected royalties resulting from other people's work and capital. The Court of Appeals held that *Jensen* did not apply, because *Jensen* "is arguably applicable only to a fact situation where the separate property has remained in a constant form, one that existed at the beginning of the marriage and continued to appreciate in value from the spouse's normal efforts ...." (emphasis added).

In *Weed*, the court recognized that a spouse may spend "a reasonable amount of *time, talent, and effort* in caring for, preserving, making productive, and selling his or her separate property 'without impressing a community character upon that [property].'" The Court went on:

> However, what happens when a spouse spends an unreasonable amount of time, toil, and effort increasing the value of his separate property? Case law appears to reflect the outcome will depend on the degree to which the spouse used his community time, toil, and effort on increasing the value of his separate property. "[W]hen a spouse takes a separate property asset and with community labor significantly enhances its value, the end product may be transmuted into community property." Oliver S. Heard Jr. et al., Characterization of Marital Property, 39 BAYLOR L. [p. 410] REV. 909, 923 (1987) (citing *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859)) (emphasis added).

Id. at 409-10. The appellate court affirmed the trial court's decision that the oil and gas interests, acquired during marriage through Mr. Weed's time, toil, and effort were community property, "even if they were purchases with separate funds." *Id*. at 409.

2. Reimbursement. In *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 679 (1953), the Supreme Court held that mineral leases and working interests acquired during marriage remained community

property even if the husband expended separate property funds to drill the well. The Supreme Court said that "[t]he separate estate would be entitled to reimbursement by the community estate for funds expended in behalf of the community.... Respondent is only entitled to reimbursement for all sums spent out of his separate estate in drilling the wells, and all operating expenses spent in the production and management of the wells after drilling commenced." *Id.* at 682. In *Cone v. Cone*, 266 S.W.2d 480 (Tex. Civ. App.--Amarillo 1953, writ dism'd), a mineral lease that was assigned to husband during marriage had its inception of title prior to marriage and thus was his separate property despite the fact that "the community estate had expended the sum of $105,899.60 in developing and equipping said property for the production of oil and gas and that there were four producing oil wells on the land." The trial court awarded reimbursement to the community for its funds expended. In *In re Marriage of Read*, 634 S.W.2d 343 (Tex. App.--Amarillo 1982, writ dism'd). The husband "was engaged in exploration and production of oil and gas as his business and profession…." The court went on: "'Property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty is community property.'" *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 680 (1953). It follows, we think, that when the acquisition and development of oil and gas interests are engaged in as a business, the profits therefrom are community. *Id*., 260 S.W.2d, at 682. The fact that separate funds may have been used in the development or operation of such oil and gas interests does not change the separate or community status of the property but only, if properly proved, entitles the separate estate to reimbursement. *Id*." The court found that the funds used for acquisition and development came from a commingled account containing income from leases acquired during marriage. *Id*. at 346. There was no line-item or minimum balance tracing. The two leases in question, were acquired during marriage. The husband claimed inception of title as to one lease, but the claim on that lease was based on a premarital oral agreement, which was not enforceable under the statute of fraud. The appellate court upheld the trial court's finding that both leases were community property. In *Tirado v. Tirado*, 357 S.W.2d 468, 472 (Tex. Civ. App.--Texarkana 1962, writ dism'd), the court rejected the husband's claim that the proceeds from the wife's separate property working interest constituted community from a community business, noting held that "appellant and the appellee were non-operators of the working interest [and] [t]hat no labor, effort or talent was required of them other than to deposit the receipts from the oil and gas and pay the expenses in connection with their production."

In *Vallone v. Vallone*, 644 S.W.2d 455, 458 (Tex.1982), the Court said:

> When separate property is combined with community time, talent and labor, and both the community and the separate estate make claim upon the increment, the courts are confronted with conflicting principles of marital property law. It is fundamental that any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty belongs to the community estate. Nevertheless, the law contemplates that a spouse may expend a reasonable amount of talent or labor in the management and preservation of his or her separate estate without impressing a community character upon that estate.

The Court went on:

> A right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. *Dakan v. Dakan*, *supra*. We

> hold it also arises when community time, talent and labor are utilized to benefit and enhance a spouse's separate estate, beyond whatever care, attention, and expenditure are necessary for the proper maintenance and preservation of the separate estate, without the community receiving adequate compensation.... The party claiming the right of reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable.

Id. at 459.

In the watershed case of *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984), the Supreme Court resolved the conflicting principles described in *Vallone* by deciding that community labor does not convert separate property into community property, but instead creates a community claim for reimbursement for undercompensation. In *Jensen*, the Court opted for reimbursement–not ownership--as the best way to resolve the conflicting principles articulated in *Vallone*.

In *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.--Corpus Christi 1990, no writ), the court said: "The general rule is that royalties paid for oil and gas produced from the separate property of a spouse are payment for the extraction or waste of the separate estate, and therefore, remain that spouse's separate property. *Norris v. Vaughan*, 260 S.W.2d 676, 679 (Tex. 1953). If one spouse believes that the other has expended an unreasonable amount of community effort in managing these separate property interests, moreover, it is that spouse's burden to prove an expenditure of community effort sufficient to impress a community character upon the separate asset and to entitle the community estate to reimbursement. See *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455, 458-59 (Tex.1982); *Norris*, 260 S.W.2d at 680. In the present case, the jury found that the community estate was due no reimbursement from the husband's separate estate for time, talent or labor expended by the husband. The royalty payments, therefore, remained the separate property of the husband."

E. MARITAL PROPERTY RIGHTS IN OIL AND GAS.

1. Mineral Interest (Owner's Side). The marital property character of a mineral interest is determined according to general marital property rules. *See In re Marriage of Read*, 634 S.W.2d 343, 346 (Tex. App.--Amarillo 1982, writ dism'd) (working interest was community property); *Cone v. Cone*, 266 S.W.2d 480 (Tex. Civ. App.--Amarillo 1953, writ dism'd) (mineral lease assigned to husband during marriage had its inception of title prior to marriage and thus was his separate property). Income from a community property mineral interest is community property.

a. Royalties. A royalty interest owned or claimed prior to marriage is separate property. A royalty interest reserved from a conveyance during marriage is a continuation of the underlying the mineral interest. Where a royalty interest is acquired during marriage, it is presumptively community property but the interest is subject to the rules of inception of title, gift, inheritance, and mutation and tracing.

Where the mineral interest is separate property, royalty payments are separate property. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 679 (1953) (a "royalty is payment for the extraction or sale of the minerals that comprise the separate estate"); *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.--Corpus Christi 1990, no writ) (royalty payments on separate property real estate are separate

property); *Bantuelle v. Bantuelle,* 195 S.W.2d 686 (Tex. Civ. App.– 1946) ("oil royalty runs" received from a separate property mineral interest during marriage are separate property).

b. Lease Bonus. Lease bonuses received by the lessor on separate property minerals are separate property. *Lessing v. Russek*, 234 S.W.2d 891, 894 (Tex. Civ. App.--Austin 1950, writ ref'd n.r.e.); *Texas Co. v. Parks*, 247 S.W.2d 179 (Tex. Civ. App.--Fort Worth 1952, writ ref'd n.r.e.).

c. Delay Rentals. Delay rentals received by a spouse during marriage are community property, regardless of whether the mineral interest is separate or community property. *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 300-01 (Tex. Civ. App.--Amarillo 1943, writ dism'd). In *McGarraugh* the court said:

> Appellant's second contention under this assignment is that the court erred in decreeing to the community property certain money paid to him as rentals under an oil and gas lease which he and appellee had executed upon appellant's separate lands. He asserts that this money was consideration paid for the ownership of the oil and gas or interest in the minerals in the land for additional periods of six months, and since the land was his separate property, the rentals paid for such ownership during those periods was consideration for a portion of the land and should have been decreed to be his separate property. We are not cited to any case wherein our own courts have passed upon this question. It was held by the United States Circuit Court of Appeals in *Commissioner of Internal Revenue v. Wilson*, 5 Cir., 76 F.2d 766, that delay rentals on oil and gas leases are rents; that they accrue by the mere lapse of time like any other rent; they do not depend on the finding or production of oil or gas, and do not exhaust the substance of the land. It was further held that such rentals bear some likeness to a bonus payment, which is held to be advance royalty, but the delay rental is not paid directly or indirectly for oil to be produced, but is for additional time in which to utilize the land. The court concluded that such payments constitute rents derived from the land and therefore are community property under the rule prevailing in this State. * * * Inasmuch as the items here involved were delay rentals and accrued merely by lapse of time like other rentals, did not depend upon the finding or production of oil or gas, and did not exhaust the substance of the land, we think they constituted personal property and belonged to the community estate.

In *Texas Co. v. Parks*, 247 S.W.2d 179 (Tex. Civ. App.–Fort Worth 1952, writ ref'd n.r.e.), the court wrote:

> It has been held that delay rentals on oil and gas leases are rents, that they accrue by mere lapse of time and do not depend on the finding or production of oil or gas and do not exhaust any substance from the land. Rentals are unlike bonus payments, which have been held to be advance royalties. Rental pay is for additional time in which to acquire a limited dominion over the land. It has also been held that rental payments derived from oil and gas leases on separate property become community and are considered personal property. *McGarraugh v. McGarraugh*, Tex.Civ.App., 177 S.W.2d 296.

d. Shut-in Royalties. There is no Texas case law on point, but because the shut-in royalty payment is called a royalty and substitutes for lost royalties from production, it can be argued that a shut-in royalty should be characterized like a royalty, because it is a payment made as a substitute for missed

royalty payments. On the other hand, it is hard to distinguish a shut-in royalty from a delay rental, other than nomenclature.

2. Mineral Interest (Lessee's Side). The lessee's interest under a mineral lease can be broken into the following components: the working interest, an overriding royalty interest, a farm-out agreement, and a pooling agreement.

a. Working Interest and It's Revenues. A working interest owned or claimed before marriage is separate property. Tex. Const. art. XVI, § 15; Tex. Fam. Code § 3.001(1). In *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953), the Supreme Court held that distributions flowing to a husband during marriage, from working interests in seven wells (the Pakan wells) acquired before marriage, were separate property where there was little or no management involved in the operation of the wells. *Id.* at 678. The production of the natural gas would eventually exhaust the gas reserves and the working interest would terminate. The court concluded: "Production and sale of the natural gas in this instance is equivalent to a piecemeal sale of the separate corpus, and funds acquired through a sale of the separate corpus, if traced, will remain separate property." *Id.* at 679. The Supreme Court then addressed three wells held in the Vaughan Well Co., all owned before marriage. The Court held that the husband was entitled to preserve his separate estate and put it to productive use, without changing the character of the gas royalties to community property. *Id*. at 681. Then the Court looked at two other wells, the "Hill and Cantrell Wells," for which the leases that led to the drilling of these wells were acquired during marriage. The Court also considered ten more wells, under farmout agreements that provided that the leaseholder would assign an interest in the ten wells once they were drilled. The drilling occurred during marriage, "at least partially due to [the husband's] 'talent and labor.'" *Id.* 681. The Supreme Court noted that the two leases and the farmout agreements were all acquired during marriage. The Court went on to say: "The community's acquired rights were fixed and determined at the time the oil leases were executed and the 'farmout' agreements were entered into." *Id.* at 682. The Court concluded its analysis:

> Any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty is community property. *Logan v. Logan*, Tex. Civ.App., 112 S.W.2d 515. Therefore, the right to drill the McDowell and Taylor wells and the Hill and Cantrell wells was a community asset and the dry gas rights obtained by the drilling of the wells are community in nature. The separate estate would be entitled to reimbursement by the community estate for funds expended in behalf of the community. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620; *Snodgrass v. Robertson*, Tex.Civ.App., 167 S.W.2d 534. The respondent contends that all funds expended in drilling the McDowell and Taylor wells by the partnership of Pendleton & Vaughan were separate funds, and that no community funds were so used. Respondent is only entitled to reimbursement for all sums spent out of his separate estate in drilling the wells, and all operating expenses spent in the production and management of the wells after drilling commenced.

Id. at 682.

In *In re Marriage of Read*, 634 S.W.2d 343, 346 (Tex. App.--Amarillo 1982, writ dism'd), the court wrote about two working interests that were acquired during marriage, using funds from an account where the husband commingled separate property funds with funds from his oil and gas business:

> Property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty is community property. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 680 (1953). It follows, we think, that when the acquisition and development of oil and gas interests are engaged in as a business, the profits therefrom are community. *Id.*, 260 S.W.2d, at 682. The fact that separate funds may have been used in the development or operation of such oil and gas interests does not change the separate or community status of the property but only, if properly proved, entitles the separate estate to reimbursement. *Id.*

In *Tirado v. Tirado*, 357 S.W.2d 468, 471-73 (Tex. Civ. App.--Texarkana 1962, writ dism'd), the court held that wife's income from a separate property non-operating working interest was her separate property. The trial court found that "no labor, effort or talent was required of them other than to deposit the receipts from the oil and gas and pay the expenses in connection with their production." *Id.* at 472.

b. Overriding Royalty Interest. (ORRI). An ORRI would be characterized as any other property, under inception of title, gift, inheritance, or mutation. If acquired with separate property funds, an ORRI could be subject to transmutation, if the spouse invested sufficient community labor to acquire the ORRI.

c. Farm-Out Agreement. A farm-out agreement will be treated for marital property purposes like a working interest, subject to inception of title, gift, inheritance, mutation and tracing, and possibly transmutation.

d. Pooling Agreement. "Pooling is generally thought of as the joining together of separately owned mineral interests and/or leasehold interests in multiple tracts (or portions of the same tract(s)) for the purposes of having sufficient acreage to receive a permit to drill a single well under relevant state or local density and spacing laws and regulations." Austin T. Lee, *Pooling and Unitization* (4-16-2017).[3] "Unitization, on the other hand, refers to the combination of separately owned mineral or leasehold interests covering all, or part of, a common source of supply (i.e. a field/reservoir) for the principal purpose of the joint operation of that field/reservoir (or part thereof) in order to maximize production, create operational efficiencies and conserve resources (both financial and natural)." [Lee, at 1, quoting Bruce Kramer, "The Nuts and Bolts of Pooling: A Primer for the Uninitiated" Section I.B.] The character of the leasehold interest or revenues should not change just because of the pooling of the interest.

e. Right to Use Water. Groundwater rights belong to the owner of the surface estate. See Section VII.A. below. However, the lessee under an oil and gas lease has an implied right to drill water wells, impound surface water, and use ground water, with no compensation to the owners. Consequently, there is reason to treat any compensation paid to the lessor under a mineral lease for use of water incident to exploration and production, even if paid in the form of cash separate from the royalty, as compensation to the owner of the mineral interest from the leasing (conveyance) of the minerals and not a sale of the water.

IV. EASEMENTS VS. LEASES VS. PROFIT A PRENDRE VS. LICENSE. There are four arrangements giving a right to use land: easements, leases, "profits a prendre," and licenses.

A. EASEMENT. An easement is a right to use another's property for a certain purpose without owning it. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). The easement is neither a conveyance of ownership nor a possessory interest. It is instead a right to use the land in a certain way. The land over which the easement lies is the "servient estate;" the land the easement benefits is the "dominant estate." Easements can be express or implied. An express easement is granted by a conveyance that specifies the terms of the easement, or is reserved to the grantor in a document of conveyance. An implied easement arises by operation of law because of certain circumstances. There are several implied easements that can arise under Texas law, including an easement by prescription, an easement by necessity, and an easement arising from continued use. "A prescriptive easement (similar to adverse possession) requires use of another's land in a manner that is open, notorious, continuous, exclusive, and adverse for the requisite period of time." Murray, p. 5. "An easement by necessity may be implied where: (1) there is unity of ownership of the dominant and servient estates prior to the severance; (2) access must be a necessity and not a mere convenience; and (3) the necessity must exist at the time of the severance of the two estates." Murray, p. 5. "[A]n implied easement appurtenant may be found if: (1) unity of ownership of the dominant and surface estates exists prior to the severance; (2) the use of the easement was apparent at the time of the grant; (3) the use of the easement was continuous so that the parties intended that its use pass by the grant; and (4) the use of the easement is reasonably necessary to the use and enjoyment of the dominant estate." Murray, p. 5.

Other easements result from a condemning authority taking less than 100% of the rights in private land to use for some purpose, like laying a pipeline, or erecting electricity transmission lines, or building a sidewalk. Typical easements of this type are utility easements, transmission easements (oil, gas, or electricity), and right-of-way easements. These types of easements, and the ownership problems they can engender, are discussed in Brown & Fitzsimons, p. 8-10.

Another type of easement is a conservation easement, in which a landowner voluntarily restricts the right to use the property in certain ways by granting an easement to a governmental entity or qualified conservation organization, which is given the right to ensure that the property is being used consistent with the terms of the easement. Conservation easements are discussed in Brown & Fitzsimons, pp. 10-12.

B. LEASE. A real estate "lease" is an agreement between the lessor (typically the land owner) and a lessee that allows the lessee to use the real property for certain purposes for a specified period of time in exchange for rental payments from the lessee to the lessor for the period of time of the lease. Under a lease, the lessee has a right to possession of the property, which distinguishes it from an easement, which is non-possessory. Mineral leases, however, are considered to be a conveyance of ownership of the mineral interest, subject to conditions stated in the mineral lease. See Section II.B.1.b above.

C. PROFIT A PRENDRE. The following description is taken from David Z. Conoly, *Easements 101*, State Bar of Texas 12TH ANNUAL JOHN HUFFAKER AGRICULTURAL LAW COURSE (2018), "A 'profit a prendre,' or 'profit,' is a right to take a part of the soil or produce from the land of another person [*Evans v. Ropte*, 128 Tex. 75, 96 S.W.2d 973 (1936)]. The right to take timber or coal from land or the right to fish or hunt on property of another are examples of profits a prendre [*Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex. Civ. App.--San Antonio 1978, no writ) (hunting lease

characterized as profit a prendre)]. A profit is considered an interest in land and as such must be evidenced by a writing [*Anderson v. Gipson*, 144 S.W.2d 948, 950 (Tex. Civ. App.--Galveston 1940, no writ)]. Moreover, the document granting a profit will be strictly construed and the rights exercised by the profit holder cannot extend beyond the terms of the grant [*Bland Lake Fishing & Hunting Club v. Fisher*, 311 S.W.2d 710, 715(Tex. Civ. App.--Beaumont 1958, no writ); *Uzzell v. Hoggett*, 430 S.W.2d 846, 848 (Tex. Civ. App.--San Antonio 1968, writ ref'd n.r.e.)]." Conoly, at p. 3. *Uzzell* stated that a hunting lease is a profit a prendre, citing two other cases. 430 S.W.2d at 848.

D. LICENSE. The following description is taken from David Z. Conoly, *Easements 101*, at p. 3: "A 'license' is a privilege or authority given to or retained by a party to do some act on the land of another person. A license is not an interest in the land itself [*Settegast v. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 270 S.W. 1014, 1016(1925); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex. Civ. App.--El Paso 1993, no writ)]. For example, allowing one to conduct a garage sale on another person's property [*Arant v. Jaffe*, 436 S.W.2d 169, 178 (Tex. Civ. App.--Dallas 1968,no writ)]. Licenses are personal, unassignable, and, as a general rule, revocable privileges. They may be conferred in writing or by parol [*Joseph v. Sheriffs' Ass'n*, 430 S.W.2d 700, 703 (Tex. Civ. App.--Austin 1968, no writ) (privilege of using driveway was revocable license, not easement)]. An exception to the rule allowing unfettered revocation of a license is that a license coupled with an interest in property is irrevocable [see Restatement of Property § 513]. Another exception requires revocation to be on a fair and equitable basis when the licensee has made valuable improvements or expenditures in reliance on the continued permission to act [*Joseph v. Sheriffs' Ass'n*, 430 S.W.2d 700, 703(Tex. Civ. App.--Austin 1968, no writ)]."

E. MARITAL PROPERTY PRINCIPLES APPLIED. An *easement* owned or claimed prior to marriage is separate property. An easement retained in the conveyance of separate property would be a continuation of the separate property ownership. An easement acquired during marriage is community property, unless it was claimed before marriage (i.e., the inception of title rule) or was received by gift or inheritance or acquired in exchange for separate property.

While there is no caselaw on point, money received for an easement that is a burden on the surface estate should have the same marital property character as the surface estate, particularly when the easement results from condemnation.

General principles suggest that a *lease* contracted in separate property land is separate property of the landowner, but rental income on the lease during marriage is community property. A lease acquired or claimed prior to marriage is separate property. A lease acquired during marriage is community property, unless it had an inception of title prior to marriage or it is acquired by gift or inheritance or using separate property.

A *profit a prendre* in separate property land is separate property. The payments received on a profit a prendre during marriage should be separate property if the right is to remove part of the land (i.e., gravel or sand), while the payments received for the right to take timber, grass, crops, game, or fish, are probably community property since they do not involve a sale of the land itself. A profit a prendre right owned or claimed prior to marriage is separate property. A profit a prendre acquired during marriage is community property unless it had inception of title prior to marriage or it was acquired by gift or inheritance or in exchange for separate property.

A *license* owned or claimed prior to marriage is separate property. A license reserved in a conveyance of separate property land is a continuation of the prior separate property ownership. A license acquired during marriage is community property unless it had inception of title prior to marriage or it was acquired by gift or inheritance or in exchange for separate property.

V. RIVERS AND LAKES. Under Texas law, rivers and lakes are owned by the State. The State can grant permits for the use of river water or lake water. Because adjacent land owners have no ownership claim to river water or lake water, there is no associated marital property right to the water. A permit to use river or lake water belonging to an individual could have marital property character, and may have value that is divisible upon divorce. The divorce court's power to award the permit is subject to any restrictions on transfer contained in governing law or regulations, or in the permit itself.

VI. SURFACE WATER. In Texas surface water, meaning water flowing across the surface of the land, does not belong to the landowner. However, the landowner is free to capture the surface water, and once it is it captured it is personal property owned by the landowner. Once surface water is captured, it is subject to marital property laws. If the surface water is captured during marriage, it is presumptively community property, so the issue is whether captured surface water is a mutation of the surface rights, if those rights were owned or claimed prior to marriage. It could be argued either way.

A contractual provision relating to surface water in a groundwater lease is set out in Murray, p. 25, ¶ 10.

VII. GROUND WATER. Ground water is water that is under the surface of the land.

A. OWNERSHIP. In *Edwards Aquifer Authority v. Day*, 396 S.W.3d 814, 831-32 (Tex. 2012), the Supreme Court wrote:

> Groundwater is often a renewable resource, replenished in aquifers like the Edwards Aquifer; is used not only for drinking but for recreation, agriculture, and the environment; and though life-sustaining, has historically been valued much below oil and gas. Oil and gas are essentially non-renewable, are used as a commodity for energy and in manufacturing, and have historically had a market value higher than groundwater. But not all of these characteristics are fixed. Although today the price of crude oil is hundreds of times more valuable than the price of municipal water, the price of bottled water is roughly equivalent to, or in some cases, greater than the price of oil. To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult. Drinking water is essential for life, but fuel for heat and power, at least in this society, is also indispensable. Again, the issue is not whether there are important differences between groundwater and hydrocarbons; there certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater.
> * * *
> The Legislature appears to share this view of the common law. "The ownership and rights of the owner of the land, his lessees and assigns, in underground water" were "recognized" in one provision of the Groundwater Conservation District Act of 1949 (the "GCDA"),[99] which later became section 36.002 of the Water Code.[100] That bare recognition of

landowners' rights did not describe them with specificity, but last year, the Legislature amended section 36.002, to set out its fuller understanding of the matter:

> (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.
>
> (b) The groundwater ownership and rights described by this section:
>
> (1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; and
>
> (2) do not affect the existence of common law defenses or other defenses to liability under the rule of capture.[101]

By ownership of groundwater as real property, the Legislature appears to mean ownership in place.[102]

B. SEVERABILITY. In *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927), the Supreme Court wrote:

> the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property.

The Court held that ground water in place is owned by the landowner.

In *Evans v. Ropte*, 96 S.W.2d 973, 974 (Tex. 1936), the Supreme Court wrote:

> It seems to be almost universally recognized that a right created by a grant to enter upon land and take and appropriate the waters of a spring or well thereon amounts to an interest in real estate, regardless of the term by which such right may be designated. In some states it is held to be an easement, but in other cases it is held to be more than an easement. In all events, it is an interest in land.

Contractual provisions relating to a "groundwater estate lease" are set out in Murray, p. 23-25.

C. PRODUCED WATER. "Oil and gas wells drilled by the operator also produce large amounts of water in connection with the hydrocarbon stream from the wellhead—referred to in industry parlance as produced water. Depending upon the characteristics of the subsurface formation, the volume of produced water can greatly exceed the volume of oil and gas coming out of the well." Brown & Fitzsimons, p. 6. The authors continue:

> Important questions remain with respect to ownership of produced water. As mentioned, legal certainty exists with regard to the ownership of groundwater resources by the surface owner, subject to the rule of capture and regulatory limits on production. All indications are that this ownership principle applies regardless of the salinity or quality of the resource in question.[22] Presumably, this ownership assumption should also apply to the water when it is produced from an oil and gas well by the operator. In the past, this legal question has seldom been addressed because produced water was characterized as an expense and a nuisance for the party handling its disposal. Now, when produced water could conceivably become an asset with the potential to produce an income stream for the operator once treated or sold to third parties, the surface owner may be entitled to a portion of the corresponding economic benefits received by the operator.

Brown & Fitzsimons, p. 8.

Tex. Nat. Res. Code § 122.002 says that, when "fluid oil and gas waste" is produced and used by or transferred to a person who takes possession of that waste for the purpose of recycling, the using/receiving person becomes the owner of that fluid waste until ownership is transferred to another person. Section 122.001(2) says: "'Fluid oil and gas waste means waste containing salt or other mineralized substances, brine, hydraulic fracturing fluid, flowback water, produced water, or other fluid that arises out of or is incidental to the drilling for or production of oil or gas."

D. MARITAL PROPERTY ISSUES. Under the *Day* case, groundwater in place belongs to the landowner. It would seem that the proceeds from selling the groundwater from separate property land would be separate property. If the land is separate property, but a spouse invests community money or community property time, toil, and effort to drill the wells, process the water, and get it to market, it could raise the question of whether the revenues from selling the groundwater have been transmuted from separate to community property. In contrast, if the water rights on separate property land are sold for cash, the proceeds would likely be separate property of the landowner, because part of the bundle of rights making up the fee simple interest was sold. However, if the right to enter the land and capture and remove groundwater is not sold but leased, in exchange for the payment to the landowner of a percentage of the water produced, or for recurrent payments of cash, the question arises whether the revenues should be treated as a mineral royalty (i.e., separate property), or rent under a landlord-tenant lease (i.e., community property), or as a profit a prendre, for which the marital property rules have not yet been worked out? Should the difference between a sale and a lease determine the marital property character of the proceeds? Should the facts that payments are in kind (a percentage of the water produced) instead of cash determine the marital property character of the proceeds?

Burkett says that the captured ground water belongs to the owner of the surface estate. *Evans* says that the *right* to capture ground water is part of the landowner's fee simple estate. Ordinary characterization rules apply to the *right* to capture ground water. If the right is separate property, and the right is sold, the proceeds would be separate property. *Burkett* seems to indicate that the *proceeds* from the sale of captured ground water would have the same marital property character as the surface estate. What if the right to capture water is *leased*? Are the lease payments received during marriage community property? What if the spouse makes a business of capturing and selling ground water? It would likely be treated like clay, crops, or trees.

The marital property character of produced water could be the same as the character of the mineral estate, as being part of the lessee's dominant estate under the mineral lease. Or produced water could be treated as ground water, belonging to the owner of the surface estate. Either way, the character of the produced water would seem to be, under the doctrine of mutations, the same as the character of the mineral estate or surface estate, or from the lessee's perspective the same as the character of the working interest or ORRI.

VIII. WIND RIGHTS. According to authors Brown & Fitzimmons, *Emerging Issues in Surface Use and Energy Development ch. 8* (State Bar of Texas 13th Annual John Huffaker Agricultural Law Course 2019), "[f]ollowing the construction of Competitive Renewable Energy Zone (CREZ) transmission line networks across the state, wind farms have proliferated and supplied approximately seventeen percent of the energy used in Texas during 2017." The ownership law on wind production is "largely undefined." Murray, p. 12.

"Many early wind leases appeared to create a determinable fee similar to an oil and gas lease, but most current leases appear in the form of an easement. Thus, it is certainly unclear whether wind is a property right that can be severed or must remain with the land. Texas now produces more than three times the amount of wind power of any other state and its production alone would rank it fifth among all nations of the world." Murray, p. 12. A wind lease is a "tenancy for years" that involves only surface rights. Wetsel, Allen & Lederle, *A Place in the Sun: Solar Leases in Texas*, p. 2. (State Bar of Texas 12th Annual John Huffaker Agricultural Law Course 2018). ("Wetsel et al."). According to Wetsel, et al., "a typical utility-scale wind farm might cover 250,000 acres ...." *Id.* at 2. Under the lease, the lessee will secure ingress and egress to the project, the right to build roads, and the right to construct transmission lines. These rights may take the form of an easement. Entering a wind lease increases the value of the real estate under lease, and causes the landowner to lose his/her agricultural exemption from state property tax. *Id*. at 5. As a result, wind leases frequently require the lessee to reimburse the landowner for the extra tax that must be paid. *Id.* at 5.

A. ARE THERE WIND "RIGHTS"? "That the surface owner holds the right to the wind that flows across it is supported by Texas common law - *Cujus est solum, ejus est usque ad coelum et ad inferos* -- to whomsoever the soil belongs, it is theirs up to the sky and down to the depths." Lisa Chavarria, *The Severance of Wind Rights in Texas*.[4]

"Wind rights" are not analagous to mineral rights, which give the lessee the right to extract the minerals and carry them away. Nor are they like "water rights" which give the assignee the right to capture water and carry it away. Wind is just utilized, as it blows by. What is subject to transfer and sale are the electrons generated by the turning of wind turbines, and they are not "extracted;" if the electrons are owned by anybody they would belong to the owner of the wind turbine, which contains the electric generator that strips the electrons from copper wire located inside the generator. Rather than analogizing wind to oil, or gas, or water, it makes more sense to consider wind turbines and associated transmission lines as adjunct to use of the surface of the land, like roads, fences, gates, water tanks, and even old-fashioned windmills. Using an apparatus placed on the land to generate electricity is analogous to using fences, pens, and stock tanks to raise cattle. This line of reasoning suggests that the revenues from leasing land to locate wind turbines and associated infrastructure is more like renting out surface rights than conveying the right to remove minerals or the right to remove captured surface water or captured ground water.

Some say that Texas courts ill-advisedly patterned the Texas oil and gas rule of capture after early water law. We could be on the verge of ill-advisedly patterning "wind law" after oil and gas law and waterlaw, when wind is nothing like oil or natural gas or water. The wind is not extracted, or even captured. It is merely used to turn equipment, after which it passes on unabated to the next property. No one "owns the wind." No one "captures the wind." No one "severs the wind." No one "sells the wind." No one "buys the wind."

Since the wind is not like oil, gas, or water, the law of oil, gas, and water should not be used to construct the legal framework for "wind rights," either in property law or marital property law.

B. GENERAL FEATURES OF A WIND LEASE. According to Wetsel, et al., "a typical utility-scale wind farm might cover 250,000 acres ...." *Id.* at 2. Murray notes that "[w]ind development requires considerable acreage (20,000 to 100,000 or more acres), but after construction, the actual surface footprint is considerably smaller, with the unused acreage often being released back to the landowner via a retained acreage clause in the wind lease." Murray, p. 14.

1. The Lease Term. The period to evaluate and develop the property, the "development term," under a wind lease is 5 to 7 years. *Id.* at 3. That is followed by an operations term, which for wind operations is typically 40-50 years, *Id*. at 3.

2. Rents vs. Royalties. Compensation under a wind lease commonly takes the form of "royalties derived from the gross production of electricity ..., usually remitted quarterly." Wentsel, et al., at 3. But wind leases often also contain a required or a guaranteed minimum payment, usually called "minimum rent" or "rent," to be paid once a year. *Id.* at 3.

3. Assignments vs. Lease. In *Contra Costa Water District v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272 (Ct. App. 1997), the California court held that wind rights were severable from the land. The case is discussed in Murray, p. 13. Texas courts and Legislature have not yet addressed the question of whether wind rights are severable from the surface estate and can be assigned, or whether they are not severable, and must remain part of the surface estate. The distinction could impact marital property issues. If the winds rights in separate property land are "sold," the proceeds from sale would be separate property under the doctrine of mutation. If wind rights are not severable and assignable, and can only be "rented," there is an argument that the rental income arising during marriage would be community property. Murray gives sample language regarding severability.

4. Easements. A primary concern for a wind lessee is an easement for the unobstructed flow of wind across the property. Brown & Fitzsimons, p. 2. A wind lease will also secure to the lessee ingress and egress to the project, the right to build roads, and the right to construct transmission lines. These rights usually take the form of an easement for the period of the lease. *Id.* at 2. Easements include a project facilities easement, a transmission facilities easement, an access easement, an effects easement, and a non-obstruction easement. *Id*. at 8.

5. Conflict With the Mineral Estate. The owners of mineral rights have the dominant estate, and thus have the right to use the surface of the land as reasonably necessary to locate and extract minerals. This right is superior to a wind lessee's right to use the surface, so a wind lessee needs to secure a waiver of the mineral owner's right to use the surface in a way that impedes the wind project.

The wind lessee might be expected to have to pay the owner of the mineral interest for this waiver. Wetsel, et al., pp. 4-5.

6. Surface Damages. Surface damages are compensation paid under a lease for "any collection, transmission, and distribution lines that are buried in the land and for overhead transmission lines that transport electricity out of the "occupied area." *Id*. at 3-4. Wetsel, et al. say that "[t]he provision for surface damages should always include payments for roads and substations as well as for any transmission, collection, or distribution lines that fall outside of the occupied area." *Id*. at 4.

7. Removal Bond. Nearly every renewable energy lease requires the lessee to provide a removal bond the cover the cost of decommissioning the electricity project. Wetsel at 5. This could be in the form of a letter of credit, or guarantee by a third entity. *Id.* at 5.

C. LEASE VS. EASEMENT. A lease is an agreement to allow the lessee to use real estate in exchange for the payment of rent. Rental income received from separate property during marriage is community property. An easement is a right to use real property in perpetuity, or for an extended period of time, usually upon a one-time payment. Is a one-time payment for a permanent easement more like a rental or more like a sale? It would seem that the granting of a permanent or long-term easement is more like a sale, and the doctrine of mutations could apply.

D. MARITAL PROPERTY ISSUES. The courts could rule that wind is not subject to ownership, or they could rule that wind belongs to the owner of the land while it blows across the surface of the land. See Murray, p. 14. Or they could rule that wind is not "owned" until it is "captured." *See Romero v. Bernell*, 603 F. Supp.2d 1333 (Dist. Ct. N.M. 2009) ("the right to 'harvest' wind energy is, then, an inchoate right which does not become 'vested' until reduced to 'possession' by employing it for a useful purpose. Only after it is reduced to actual wind power can wind energy then be severed and/or quantified."). See the discussion in Murray, p. 14. If wind rights can be owned, and if they are severable from the land, then wind rights can be transferred and under the doctrine of mutations the funds received would have the same marital property character as the surface estate. Building on an analogy to oil and gas, recurrent payments for the electricity generated would be in the nature of a royalty right, reserved by the landowner, which would have the marital property character of the surface estate. See Murray, p. 14. If wind rights cannot be owned, or can be owned but cannot be severed, and can only be leased, and the payments would be more akin to rental income, which when received during marriage is community property. The Author's view is that the wind is not owned or captured. A wind farm is a special adaptation to the land, like a fence or a road or a barn.

IX. SOLAR LEASES. In the last few years, solar leases have come to Texas. The primary source for this portion of the current article is the article by Wetsel, Allen & Lederle, *A Place in the Sun: Solar Leases in Texas*, p. 2. (State Bar of Texas 12th Annual John Huffaker Agricultural Law Course 2018) ("Wetsel, et al."). Additional insights are drawn from Murray, *supra*.

A. GENERAL FEATURES OF A SOLAR LEASE. According to Wetsel, et al., "a typical utility-scale solar farm covers ... 1,500 to 2,000 acres ...." *Id.* at 2.

1. The Lease Term. The period to evaluate and develop the property under a solar lease is 4 to 5 years. *Id.* at 3. That is followed by an operations term, which for solar operations is typically 30-35

years, *Id*. at 3.

2. Rents vs. Royalties. Wetsel et al. wrote: "Almost all, if not all, solar company lease forms structure their payments to landowners as annual per acre payments rather than as royalties derived from the gross production ...." *Id.* However, landowners sometimes obtain a royalty, based on the increase in the price of electricity sold from the project – "which starts at between 3.5% and 4.5% of gross revenues and escalates over the lease term." *Id*. at 3.

3. Easements. A solar lease will secure to the lessee ingress and egress to the project, the right to build roads, and the right to construct transmission lines. These rights sometimes take the form of an easement for the period of the lease. *Id.* at 2. The sample solar lease given by Wetsel, et al. names six types of easements: a solar resource easement; a project facilities easement; a transmission facilities easement; an access easement; and effects easement; and a non-obstruction easement. *Id*. at 8. The sample lease provides:

> Section 2.1 Lease and Grant of Easements. For and in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed by Landowner and Grantee, and provided Grantee satisfies the requirements of Section 2.3 below, Landowner hereby *leases* to Grantee, and Grantee *leases* from Landowner, the Property, together with all rights, privileges, *easements*, and appurtenances belonging or in any way pertaining to the Property, and Landowner hereby grants to Grantee the *Easements*. [Emphasis added.]

Wetsel, et al. p. 10.

The form solar lease contains a separate article regarding "Additional Easements." It mentions the possibility that the lessee may want to obtain easements "install and maintain on the Property (i) transmission lines and facilities, both overhead and underground, which carry electrical energy, (ii) communications lines and facilities, both overhead and underground, which carry communications to and/or from the Project, and/or (iii) metering equipment, substations, switching stations, solar measurement equipment, and any control, maintenance, and administration buildings." The sample form say that the grantee will pay the landowner "a reasonable fee agreed to by Landowner for such easement in addition to all other amounts payable by Grantee to Landowner hereunder." *Id*. at 11-12. Under this lease, the compensation paid for the easement is a separate from the rent paid. Another section discusses stand-alone easements relating to adjacent or later-acquired property. *Id.* at 12. The sample lease has the landowner agreeing to cooperate in good faith to grant such easements. *Id.* Such easements can be permanent easements. *Id.* at 12.

4. Conflict With the Mineral Estate. The owners of mineral rights have the right to use the surface of the land as reasonably necessary to locate and extract minerals. This right is superior to the solar lessee's right to use the surface, so a solar lessee needs to secure a waiver of the mineral owner's implied easement to use the surface in a way that conflicts with the solar project. The solar lessee typically has to pay the owner of the mineral interest for this waiver. Wetsel, et al., pp. 4-5.

5. Property Taxes. The landowner who enters a solar lease will not only lose the ag exemption from state property tax, as to the land leased, but is also subjected to a "rollback tax" for savings

attributable to the state's "open space" tax appraisal method. *Id.* at 5. The solar lease should pass that increased tax to the lessee.

6. Surface Damages. Surface damages are compensation paid under a lease for "any collection, transmission, and distribution lines that are buried in the land and for overhead transmission lines that transport electricity out of the "occupied area." *Id*. at 3-4. Wetsel, et al. say that "[t]he provision for surface damages should always include payments for roads and substations as well as for any transmission, collection, or distribution lines that fall outside of the occupied area." *Id*. at 4.

7. Exclusion From Occupied Area. In a solar lease, the landowner retains the right to conduct agriculture, hunting, and oil and gas development. *Id.* at 4. However, a solar farm can involve thousands or even hundreds of thousands of acres. Wetsel, et al., at 4. Hunting and ranching cannot be conducted in the "occupied area" where the solar arrays and supporting infrastructure are located, and they are normally fenced off. *Id*. at 4; Murray, p. 14 (solar installations are "almost completely covered with panels and supporting infrastructure, effectively precluding all other surface uses."

8. Removal Bond. Nearly every renewable energy lease requires the lessee to provide a removal bond the cover the cost of decommissioning the electricity project. *Id.* at 5. This could be in the form of a letter of credit, or guarantee by a third entity. *Id.* at 5.

B. MARITAL PROPERTY ISSUES. There is no case law involving the marital property issues surrounding solar lease, so we must be guided by general principles.

1. Ownership Questions. While fee simple ownership of land includes (at least initially) the surface, the minerals, and the water, and the space above the surface, ownership does not extend to the sunlight that shines on the land (or more precisely, the photons expelled by the sun that fall upon the land). Talking in terms of "solar rights" makes even less sense than speaking of "wind rights."

We have some legal precedent that could guide us on this issue. When a farmer grows crops, the sunlight and the rain and the soil all contribute to the growth of the crops. When the crops are severed and sold, the revenues for a married farmer are considered to be community property. See Section III.C above. When a rancher raises cattle, the sunlight and the rain and the soil contribute to growing the grass that the cows eat, and the water that the cows drink originates as glacier melt (for the Ogallala Aquifer) or the rain (for rivers, lakes, surface water, and ground water from renewable aquifers). The proceeds from the sale of cattle for a married rancher are (likely) to be considered to be community property. When sunlight is used to generate electricity, rather than plants or cows, why should the proceeds be treated differently for marital property purposes? No one owns sunlight. Sunlight is the epitome of a renewable resource. No extraction or depletion is involved. The "right to capture" sunlight is nothing more than the use of the surface of land to install equipment and infrastructure. A solar installation is an improvement to the land, owned by the lessee who installs the equipment and infrastructure and enjoys the exclusive use of that portion of the land for a specified duration of time. On the other hand, the exclusive use of the land for 40-50 years is essentially a lifetime, which is tantamount to a sale for one or two generations of landowners. Considering the relatively short duration of a marriage on a 50-year timescale, a strong argument can be made that a solar lease should be treated as a sale and not a lease, with the revenues being a mutation of the surface rights and not rental income from the property.

2. Management Right to Lease. The right to lease the surface to install a solar array and transmission lines belongs to the owner of the surface estate.

3. Signing Bonus. Analogizing to oil and gas, where the bonus for leasing separate property mineral rights is separate property, the bonus for leasing separate property surface rights would have the same character as the surface estate.

4. Lease Income. Income from separate property received during marriage is community property. "Delay rentals" from leasing separate property mineral rights (which is a conveyance of the mineral estate subject to reversion upon certain events) have been held to be community property. See Section III.E.1.c above. Rental income arising from a landlord-tenant leasing of a separate property leasehold is community property. The lease income from a solar installation could be considered to be community property, whether the lease was entered into before marriage or during marriage. See *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.--Houston [1st Dist.] 2003, pet. denied) (holding that royalty payments received on patents granted before marriage are community property).

5. Removal Bond. The remove bond protects the surface owners at the end of the solar lease. The bond rights should remain with the owner of the surface estate.

6. Injury to the Land; Reduction in Value of the Land. Wetsel, et al.'s sample solar lease provides that all covenants in the lease "run with the land." *Id*. at 27. That means that buyers of the land acquire the property subject to the terms of the lease. Quite possibly the fair market value of the land will be reduced by the existence of the lease, particularly if the landowner's income stream under the lease are not part of the property sold. If the land is damaged by the solar lessee, the payments from the lessee belong to the owner of the surface estate and probably are the same marital property character as the surface estate. See Tex. Fam. Code § 7.005 (casualty insurance proceeds follow ownership of the property insured).

7. Division Upon Divorce. Where a solar lease on separate property land is executed, whether before or during marriage, and assuming that solar lease income is community property when received during marriage, the community claim to the income should end with the divorce. Where a solar lease on community property land is executed during marriage and there is a divorce, the surface estate may be awarded to a spouse, but the rights and obligations under the solar lease are a contract right, and it would seem that the lease rights and obligations could be awarded independently from the land, to the other spouse or to both spouses. However, compensation for damages to the land, and the rights to the removal bond, would seem to belong to the owner of the surface estate.

Wetsel, et al.'s sample solar lease contains a provision, "Division of Property by Landowner." *Id*. at 23. It provides that, where ownership is divided (i.e, not undivided interests), " the payments and fees described herein shall be payable to the owner of the portion of the Property on which the particular Project Facilities for which payments are calculated are physically located and/or any acreage based payments shall be calculated based on the amount of acreage owned by the then owner." *Id*. It would seem that the payments and fees clause would stay with the owner of the surface rights even if the lease were to be awarded in a divorce to the spouse who does not receive the surface rights.

1.Austin Brister, *Basics, Negotiations and Motivations*
<https://oilandgaslawdigest.com/primers-insights/farmout-agreements-basics-negotiations-motivations/>

2. Austin T. Lee, *Pooling and Utilization*
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