

## **The Affidavit of Heirship . . . On the Naughty or Nice List?**

Affidavits of Heirship are commonly used in the leasing process as a method to confirm title passing from a deceased mineral owner who did not probate his or her estate, either by devise through a last will and testament or, if no will, through the laws of intestate succession<sup>1</sup>. However, even with a recorded Affidavit of Heirship, absent a Personal Representative's Deed, a Court Order for Distribution or a Decree of Heirship, the legal title interest held by an heir or devisee in Colorado is *not* record or marketable title<sup>2</sup>.

In Colorado, an Affidavit of Heirship on record for twenty years in the county where the real property is located *is* prima facie evidence of the facts contained therein<sup>3</sup>; therefore, unless the facts are rebutted, the Affidavit of Heirship is accepted as true. Nevertheless, despite this rebuttable presumption, which only exists after an Affidavit of Heirship has been of record for twenty years, an Affidavit of Heirship - no matter how detailed, no matter how accurate – does *not* transfer title to real property. Furthermore, it may not properly identify all of the legal heirs of the decedent and there is no time limit for future claims by proper heirs. Therefore, reliance on Affidavits of Heirship for the identification of mineral interest owners can lead to dire consequences for an operator.

The lack of evidence of a record title transfer after the death of a mineral interest owner is often thought to be of relatively low risk - a division order issue - which can be handled by merely withholding payment to a royalty owner until such time as the owner properly probates the estate related to his or her interest. This can certainly be true in highly developed areas, where leases are all held by production and the estate issue occurs subsequent to the execution of the lease.

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<sup>1</sup> C.R.S. § 15-12-101.

<sup>2</sup> *Collins v. Scott*, 943 P.2d 20, 22 (Colo.App.1996).

<sup>3</sup> C.R.S. § 38-35-113.

However, in high value asset areas that have no history of production, the risk of exposure to an operator is no longer just the timely disbursement of royalty payments, it is their leasehold interest. Specifically, by leasing an incorrect party (heir), an operator not only loses the bonus paid for that lease, but the lease itself; and in the case of leases covering a large amount of acreage, this can mean risking a high percentage of leasehold interest in a proposed operation. Furthermore, if the incorrect lessor is not identified until after a well has been drilled, the operator's exposure extends to trespass damages and potentially the loss of the drilled well. With these risks, it is critical for the operator to ensure that any mineral interests stemming from a decedent's estate have been or are legally confirmed by the court.

In Colorado, the process to legally confirm the heirs to an estate can be initiated if more than one year has passed since the decedent's death, if there was no administration of the decedent's estate in Colorado, or if there was an administration, but no court determination of the succession of all or a portion of the decedent's property<sup>4</sup>. According to C.R.S. § 15-12-1302, any *interested person* can obtain a Decree of Heirship by petitioning the court to determine the heirs of the decedent. An "interested person" includes anyone claiming an interest derived from an alleged heir or devisee in any property from the descent or succession of the estate in question<sup>5</sup>. Therefore, an operator may initiate the Decree of Heirship process as an *interested person* by virtue of their leasehold interest as lessee to an oil and gas lease covering the mineral interest of a potential heir to the estate in question. This process is even more attractive because multiple decedents can be included under one Petition if the estates are all tied together by successive interests. Therefore, multiple generations involving multiple estates can be rolled into one Petition.

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<sup>4</sup> C.R.S. § 15-12-1302.

<sup>5</sup> C.R.S. § 15-12-1301(1).

Timing is important when initiating the Decree of Heirship process. In order for an operator to qualify as an *interested person*, proceedings must be initiated subsequent to the related leases being executed. Ideally, the Decree of Heirship should be obtained early in the process, preferably prior to operations, in order to mitigate the risk to an operator's leasehold interest if the Decree of Heirship results in unleased heirs owning mineral interests. However, even if operations have commenced or a well is producing, it may still be advisable to protect the interest from future claims by initiating a Decree of Heirship proceeding.

The parameters above, along with proper court filing and notification to known potential heirs, as well as notification by publication to unknown potential heirs, will result in a hearing where the court will issue a Decree of Heirship.

Once the court issues the Decree of Heirship, it is conclusive as to the rights of heirs or devisees<sup>6</sup>. Any unforeseen heir has one year to reopen the proceeding and request a modification of the Decree. However, after one year, all claims are barred. Absent a Decree of Heirship there is no bar of future claims by unforeseen heirs as they can be brought forward at any time, likely after operations have commenced.

So, this holiday season, may your stockings be filled with **Decrees** of Heirships . . . because **Affidavits** of Heirship are on the Naughty List.

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<sup>6</sup> C.R.S. § 15-12-1306.