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If It’s Wrong, You Got Nothin’ - Execution of Instruments

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To state the obvious, one of the most important aspects of any lease, deed, assignment or any other contract is making sure the appropriate party executes it. If the wrong person signs it, it will be either invalid or voidable at best. This is exactly what happened when only one manager of a limited liability company signed a 99 year lease. Unfortunately, the articles of organization on file with the secretary of state required both of the managers identified therein to sign such a lease. The lessee did not know there were two managers or that the articles of incorporation contained such requirement. The court found that the manager who signed the lease lacked actual and apparent authority to execute the lease and the lease was declared invalid.[1] To assist in determining the appropriate party to execute a lease, deed, assignment or other contract, set forth below is a list of the common entities and scenarios that may be encountered in any title examination or transaction. [2]

Attorneys-in-Fact. An attorney-in-fact is one who is authorized by a power of attorney to act on behalf of the actual owner of the property. Such authority will be defined in the power of attorney and will be strictly construed. Several states require recordation of the power of attorney in the county where the property is located.[3]

Associations: Religious, Cooperatives, Lodges, Educational, Non-Profits. These associations may encumber or convey real property held in the association's name through its officers as authorized by its bylaws and resolutions. Such association's governing documents and the laws of the state in which it is organized must be reviewed to determine authority.

Contracts for Deed. Generally, the holder of a contract may convey or encumber the applicable interest, unless the contract specifically provides otherwise. The holder of a contract for deed should join in the execution of the instrument in the same way as a life tenant joins (see below).

Corporations. The laws of the state of incorporation[4] and the corporation's governing documents (articles of incorporation, bylaws or resolutions) define the appropriate officer(s) or agent to execute a contract on behalf of a corporation. Typically, the president or vice president are authorized to execute a contract. If required, the officer's signature should be attested and a corporate seal affixed.

Estates (Personal Representatives, Executors, Administrators). Generally, the authority of the personal representative, executor, or administrator to execute a contract is granted by a court having jurisdiction over the real

property. Accordingly, applicable probate proceedings must be initiated in the state in which the property is located, not the resident state of the deceased. The resulting letters testamentary evidencing the party's authority to act must be reviewed to confirm any limitations that may be imposed on the party's authority, including the time period for which the party's was granted authority to represent the estate of the decedent.

General Partnerships. Typically, an instrument can be executed by any partner, if acting within the scope of his or her authority, unless otherwise restricted in the partnership agreement or the laws of the state in which the partnership is organized.

Individuals. Any competent person may execute a contract. However, a contract executed by a minor is voidable at the minor's election either before the age of majority or within either a statutorily defined time or a reasonable time thereafter. The typical age of majority is 18 years unless otherwise emancipated. If an interest is owned by a minor or incompetent, a guardian or conservator should be appointed by a court, who then may execute on behalf of the minor or incompetent. If a person cannot sign his or her own name, he or she may execute a contract by a mark. The signature of one or more credible witnesses or the acknowledgment by a notary public is typically required. As to competency, absence actual or constructive knowledge, a person of the age of majority is presumed to be competent. A person is not considered mentally incompetent until declared as such by a court. However, there appears to be a general standard that if the person is entirely without understanding, generally such person has no power to execute a contract. Any contract executed by a mentally incompetent person is voidable at the person's election for a reasonable time after the person is judicially declared competent and most likely void if the person is under a guardianship.

If an individual is married, a variety of laws and circumstances exist which must be considered before it can be determined if a married person can legally convey such property without a joinder by his or her spouse. Under certain circumstances, the contract may be void even as to the party who signed.[5] Therefore, it is generally recommended that a contract be signed by both spouses. However, in order to prevent any unintended consequences or benefits to the non-record title owner spouse, the proposed contract should be carefully drafted to avoid any unintended consequences. The types of ownership by married individuals are as follows:

> Community Property. In a community property state, the property is owned by the community or, in other words, each spouse may claim an undivided one-half interest. This type of ownership applies to most property acquired during marriage by the husband or the wife. It generally does not apply to property acquired prior to the marriage or by gift or inheritance during the marriage. After a divorce, community property is either divided equally or according to the discretion of the court. Some of the applicable community property states include Alaska[6], California, Louisiana, Nevada, New Mexico, and Texas[7]. Unless it can be determined that the property is owned separately, both spouses must execute or be a joining party to the instrument.

Generally, upon the death of one spouse, the spouse's interest passes to his or her devisees if the decedent spouse died testate or to his or her surviving spouse if the decedent spouse died intestate. Therefore, it is recommended to have the contract executed by the heirs or devisees of the deceased spouse and by the surviving spouse until the estate of the decedent spouse has been formally probated. Most importantly, even if the real property is not located in a community property state, if the husband and wife are domiciled in a community property state, the community property laws will apply.

Tenancy by the Entirety. Tenancy by the entirety is recognized in Alaska, Michigan, Ohio, Oklahoma, and Wyoming. This type of ownership is similar to joint tenancy, except that the parties must be husband and wife and the property cannot be conveyed by only one spouse. In the event the parties divorce, the property will transform into a tenancy in common.

Joint Tenants. For a joint tenancy to be created, it must be expressly declared in the contract conveying the real property by use of such language as "joint tenants" or "with rights of survivorship."[8] In the event of the death of one of the joint tenants, the surviving joint tenants continue to own the property (as joint tenants), regardless of the will of the deceased or any intestate laws. All joint tenants will need to execute the instrument (preferably the same one) in order to convey the full interest. Execution of an instrument by less than all joint tenants will validly convey the interests of the individual interests who sign and likely sever his or her joint tenancy.

Tenants in Common. An interest in real property created in two or more owners is presumed to be a tenancy in common unless specific language or circumstances indicate otherwise. Although listed under the header "Individuals," a business entity can also be a tenant in common. Each cotenant is generally free to convey and encumber his or her own interest without the consent of the other cotenants. Upon the death of a cotenant, title passes to the cotenant's heirs or devisees as previously designated by will or through intestacy.

Life Tenant and Remainderman. A life estate is an estate in which the duration of interest is measured by the life of one or more persons. The measuring life is usually that of the life tenant, but can also be the life of another (pur autre vie). Although the life tenant has the right of possession, he or she cannot execute a lease or otherwise dispose of the property without being liable to the remainderman for waste. Therefore, unless otherwise provided in the instrument creating the life estate, both the life tenant and the remainderman must execute any instrument affecting the real property .

Limited Liability Companies. Typically, a manager(s) or, if there is not a manager, then any member, is the appropriate party to execute a contract.[9] The state of organization's laws may also determine who has the authority to execute a contract on behalf of the company.

Limited Partnerships. The general partner of the limited partnership is the

appropriate party to execute a contract unless the authority is otherwise provided in the partnership agreement or state laws in which the partnership is organized.[10]

Mortgages and Deeds of Trust. Generally, a mortgagee is not required to join in the execution of a lease. However, it is recommended that the mortgage subordinate its interest to an oil and gas lease in order to protect the rights of the lessee in the event the mortgagor defaults on the mortgage. In the unusual case a mortgage or deed of trust specifically prohibits the mortgagor from performing certain acts (e.g., leasing for oil and gas), the mortgagee should remove the prohibition contemporaneously with the execution of the lease.

Perpetual or Term Royalty Interest. A royalty interest may be reserved or conveyed out of the mineral interest for a fixed or perpetual term. Typically, the mineral interest owner retains the executive rights, subject to the right of the royalty owner to participate in production. Generally, a royalty interest is owned separately from the mineral interest and the royalty owner signs only instruments relating to his or her royalty. However, the instrument creating the royalty interest should be carefully reviewed.

Proprietorships or DBA's. A person may adopt a name in which the person acquires property and transacts business in his or her individual capacity. The sole proprietor has the sole authority to execute in behalf of such an entity. Any contract executed by a sole proprietor should recite the person's name and also that the person is doing business as the adopted name.

Term Mineral Interest. A mineral interest may be reserved or conveyed for either a fixed term only or a fixed term and so long thereafter as minerals are produced in paying quantities. Similar to a life estate interest, a conveyance should be obtained from both the term interest owner and the reversionary interest owner. If a lease is granted by only the term interest owner, a ratification of the lease should also be obtained from the reversionary interest owner.

Trusts. An individual or entity (the trustee) may own legal title to a property for the benefit of another. Each state's laws and the terms of the trust agreement will govern the trustee's authority to execute any contract and any limitations on the trustee's powers. At a minimum, the contract should describe the grantor or grantee trust by including the name of the trust, the date of the trust, and the name(s) of the trustee(s).

As stressed above, the governing state laws and the governing entity documents are critical in determining whether the appropriate party is executing the contract. Many unintended consequences may exist by failing to consult such laws and documents.

[1]*Zions Gate R.V. Resort, LLC v. Oliphant*, 362 P.3d 118 (Utah Ct. App. 2014).
[2]*See also Landman's Legal Handbook* , Rocky Mt. Min. L. Found., 5th ed. 2013; *Oil & Gas Law: Nationwide Comparison of Laws on Leasing, Exploration and Production*, Am. Ass'n Prof. Landmen, 2011.

[3]*See, e.g.*, Colo. Rev. Stat. § 38-30-123; Nev. Rev. Stat. § 111.450; N.D. Title Standard 2-11; N.M. Stat. Ann. § 47-1-7.
[4]*See, e.g.*, Colo. Rev. Stat. § 38-30-144 (allowing the president, vice-president, or other head office of the corporation); Mont. Code Ann. § 70-21-203(1)(b) (allowing president, vice-president, secretary or assistant secretary or by any other person duly authorized by resolution).
[5]If the property is qualified as a homestead, both husband's and wife's signature is required. *See* N.D. Cent. Code § 47-18-05; Mont. Code Ann. § 70-32-301; Wyo. Stat. § 34-2-121. In New Mexico, if a spouse fails to join in the instrument, it is void and of no effect, unless ratified by the spouse in writing. *Marquez v. Marquez*, 513 P.2d 713 (N.M. 1973); *Hannah v. Tennant*, 589 P.2d 1035 (N.M. 1979).
[6]Alaska is an opt-in community property state; therefore, property is separate property unless both parties agree to make it community property through a community property agreement or a community property trust.
[7]Colorado, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming are not community property states.
[8]*See* Cal. Civ. Code § 683; Utah Code Ann. § 57-1-5(3). Additionally, Utah statutes create a presumption in favor of a joint tenancy being created when the granting clause refers to a husband's and wife's marital status without further joint tenancy language. Utah Code Ann. § 57-1-5(1).
[9]*See, e.g.*, Mont. Code Ann. § 35-8-301; N.M. Stat. Ann. § 53-19-30; Wyo. Stat. Ann § 17-29-407 (consent of all members required).
[10]*See* Mont. Code Ann. § 35-12-803, 806; N.M. Stat. Ann. § 54-2A-110; Nev. Rev. Stat. § 88.445; Wyo. Stat. Ann. § 17-14-503.
