

OG Energy Education Series

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Getting Title Out of Defunct Entities in North Dakota

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Overview

- 
- ❖ Trusts
 - ❖ Partnerships
 - ❖ Corporate Succession
 - ❖ Other

I. Trusts



Trusts

- ❖ Trustee named, but trust not identified
- ❖ Trust identified, but trustee not named
- ❖ Death of a Trustee



Conveyance to a “Blind Trust”

- ❖ **Ex.** A conveyance to “John Smith, as Trustee”.
- ❖ **Problem:** No trust identified.

Conveyance to a “Blind Trust”

❖ N.D.T.S. 10-06:

- Identification such as “trustee” or other representative capacity, without further identification of the beneficiary by name or the nature of the trust, are merely description and the person is deemed to be acting in an individual capacity. (*See also* N.D.C.C. § 47-09-12.)

❖ Recommended Curative:

- Place of record either the trust agreement or an affidavit setting forth:
 - (a) identification of the trust; and
 - (b) the individual’s representative capacity.
- Alternatively, if “John Smith, individual” executes the next conveyance, then no curative required.

Conveyance to Trust, But No Trustee Identified

- ❖ **Ex.** A conveyance to “The Smith Trust”.
- ❖ **Problem:** No trustee identified.



Conveyance to Trust, But No Trustee Identified

❖ N.D.T.S. 2-21:

- A conveyance to an express trust is not void or voidable solely because the grantee in the conveyance is a trust, rather than the trustee of the trust, if the trustee is reasonably ascertainable from the conveyance or from other information of public record, or both.
- *See also:* N.D.C.C. § 47-19-42.1; § 59-02-04

❖ Recommended Curative:

- Place of record either the trust agreement or an affidavit setting forth:
 - (a) identification of the trust; and
 - (b) the individual's representative capacity.

Trustee is Deceased

- ❖ **Ex.** John Smith was a trustee for the “The Smith Trust”. However, John Smith is now deceased.
- ❖ **Problem:** Who is the next trustee?

Trustee is Deceased: Co-Trustees

- ❖ If there were co-trustees, then N.D.C.C. § 59-15-04(2):
 - If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled.

- ❖ Recommended Curative:
 - Nothing immediately required.
 - However, in next appearance of record, the surviving trustee should identify itself as the “Surviving Co-Trustee”. (See N.D.T.S. 2-15.)

Trustee is Deceased: Sole Trustee

- ❖ If the trustee was the sole trustee, then N.D.C.C. § 59-15-04(1):
 - A vacancy in a trusteeship occurs if a person designated as trustee declines the trusteeship, a person designated as trustee cannot be identified, cannot be located, or does not exist, a trustee resigns, a trustee is disqualified or removed, a trustee dies, or a guardian or conservator is appointed for an individual serving as trustee.

- ❖ Recommended Curative:
 - Review trust agreement. If trust agreement provides instruction, then recording an affidavit identifying the trustee along with the trust agreement, should be sufficient.
 - If the trust agreement is silent, then may need to seek court approval to appoint new trustee pursuant to N.D.C.C. Title 59.

II. Partnerships



Partnerships

- ❖ Conveyancing to a partnership
- ❖ Conveyancing from a partnership
- ❖ Change in membership; and/or death of partners
- ❖ Dissolution and winding up

Partnerships: Conveyance to Partner, individually

❖ Ex.

- a) Conveyance to “John Smith”.
- b) Conveyance to “John Smith, partner”.
- c) Conveyance to “John Smith and Bob Jones”.
- d) Conveyance to “John Smith and Bob Jones d/b/a Oilfield Support Co.”

❖ **Problem:** Is the interest partnership property?

Partnerships: Conveyance to Partner, individually

- ❖ (a) Conveyance to “John Smith” is deemed separate property.
- ❖ N.D.C.C. § 45-14-04(4):
 - Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

Partnerships: Conveyance to Partner, individually

- ❖ (b) Conveyance to “John Smith, partner” is assumed partnership property.
- ❖ N.D.C.C. § 45-14-04(1)(b):
 - Property is partnership property if acquired in the name of: ...
 - (b) One or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

Partnerships: Conveyance to Partner, individually

- ❖ (c) Conveyance to “John Smith and Bob Jones” is assumed tenancy in common.
- ❖ N.D.T.S. 13-02:
 - A conveyance to two or more individuals in their own names, or indicating that they are doing business under some name, must be considered a tenancy in common and not a partnership.

Partnerships: Conveyance to Partner, individually

- ❖ (d) Conveyance to “John Smith and Bob Jones d/b/a Oilfield Support Co.” is assumed* tenancy in common.
- ❖ N.D.T.S. 13-02:
 - A conveyance to two or more individuals in their own names, or indicating that they are doing business under some name, must be considered a tenancy in common and not a partnership.
- ❖ **But see* N.D.C.C. § 45-14-04(2)(b): If the name of the partnership is indicated in the instrument transferring title to the property, then it may be considered partnership property.

Partnerships: Conveyancing

- ❖ **Ex.** John Smith is a partner of “S & S Partnership”. A conveyance is executed by “John Smith”.
- ❖ **Problem:** Is the partnership interest transferred?

Partnerships: Conveyancing

❖ N.D.T.S. 13-01:

- Real property may be conveyed from the partnership only by a document signed by one or more partners of the partnership, identified as such.

❖ N.D.T.S. 13-03:

- A conveyance of property held in the partnership name signed by one or more partners individually conveys equitable title only, and a new conveyance from the partnership must be obtained.

❖ Recommended Curative:

- Obtain and record a conveyance from the partnership which is executed by one or more partners, identified as such.

Partnerships: Conveyancing (LLPs)

- ❖ **Ex.** “S & S LLP” owns record title. A conveyance is executed by “John Smith, limited partner of S & S LLP”.
- ❖ **Problem:** Can a limited partner execute on behalf of the LLP?

Partnerships: Conveyancing (LLPs)

- ❖ No. N.D.C.C. § 45-10.2-45(1) provides:
 - [P]roperty held in the name of a limited partnership may be transferred by a record of transfer signed by a general partner in the limited partnership name.
- ❖ Recommended Curative:
 - Obtain and record a new conveyance from the limited partnership which is executed by one or more general partners, identified as such.

Partnerships: Change in Membership

- ❖ **Ex.** John Smith and Todd Smith are established to be the partners of S & S Partnership. However, a conveyance is executed by “*Brian Jones*, partner of S & S Partnership”.
- ❖ **Problem:** Does the record require clear evidence of the change of membership of the partnership?

Partnerships: Change in Membership

- ❖ No. N.D.T.S. 13-07 provides:
 - Where a conveyance by a partnership recites membership different from that appearing elsewhere in the record, it may be presumed that it is the same partnership and that the change in membership was in accordance with the provision of the partnership agreement.
- ❖ Recommended Curative: **none**.

Partnerships: Death of a Partner

- ❖ **Ex.** John Smith and Todd Smith are the partners of S & S Partnership. John Smith has died. What needs to be placed in the record related to his death?
- ❖ Nothing. N.D.T.S. 13-08 provides:
 - After the death of a partner, real property owned by the partnership may be conveyed by the surviving partner or partners.

Partnerships: All Partners Deceased

- ❖ **Ex.** John Smith and Todd Smith are the partners of S & S Partnership. Both partners are deceased, with John having died in 2000 and Todd having died in 2001. What now?
- ❖ N.D.T.S. 13-08 provides:
 - After the death of the last surviving partner, the partnership property may be conveyed by the personal representative of the last surviving partner.
- ❖ Recommended Curative:
 - Commence probate estate administration for the last surviving partner; obtain and record a deed from the partnership executed by the personal representative of the estate of the last surviving partner, identified as such in the distribution deed.

Partnerships: Continued Existence

- ❖ **Ex.** “S & S Partnership” owns record title, but it has been decades since the partnership appeared in the record. Can it be assumed that the partnership will cease to exist?
- ❖ No. N.D.T.S. 13-10 provides:
 - A partnership may be presumed to continue in existence, in the absence of actual knowledge of the dissolution of the partnership.

Partnerships: Dissolution

- ❖ N.D.C.C. § 45-20-01 provides that the following events may cause dissolution of a partnership:
 1. Partnership at Will: notice from a partner
 2. Partnership for Definite Period: by express will of all partners, or expiration of the term; completion of the undertaking
 3. Occurrence of Event Agreed to in the partnership agreement
 4. Unlawful to be continued
 5. Judicial determination, upon application by partner
 6. On application by transferee of a partner's transferable interest

Partnerships: Winding Up

- ❖ Dissolution does not terminate the partnership. N.D.C.C. § 45-20-01:
 - A partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed.
- ❖ Query: who can wind up?
 - N.D.C.C. § 45-20-03(1), (2):
 - A partner who has not wrongfully dissociated; or the legal representative of the last surviving partner.

Partnerships: After Winding Up

- ❖ **Ex.** After winding up, it is discovered the partnership still owns a real property interest.
- ❖ N.D.C.C. § 45-20-08 provides:
 - Title to assets remaining after payment of all debts, obligations, or liabilities and after distributions to partners may be transferred by a court in this state.
- ❖ Recommended Curative:
 - Petition the district court to assist in transfer of the discovered asset.

III. Corporate Succession



Corporate Succession

- ❖ Who can execute on behalf of the entity?
- ❖ Succession
- ❖ Where can information about mergers, etc. be located?



Corporate Succession: Who Can Execute?

- ❖ **Ex.** “Smith & Jones Co.” acquires title. A subsequent conveyance from the company is signed by “Sam Smith, President”.
- ❖ This is sufficient. N.D.C.C. § 47-10-05.1 provides:
 - An officer of any foreign or domestic corporation, or a manager of any foreign or domestic limited liability company, is presumed to have the power and authority to execute and acknowledge, in its behalf, any instrument granting, conveying, or otherwise affecting any interest in or lien upon any property of the corporation or limited liability company.
- ❖ If the signor lacks proper authority, obtain a corrective deed signed by an appropriate officer.

Corporate Succession: Naming

- ❖ **Ex.** “Smith & Jones Co.” acquires title. A subsequent conveyance is from “The Smith and Jones Company”. Problem?
- ❖ No. N.D.T.S. 10-05 provides:
 - Alternate use common abbreviations, the omission or use of the word “The”, and the alternate use of “and” and “&” may be disregarded as immaterial unless there is evidence of record that the variation has significance.

Corporate Succession: Name Changes

- ❖ **Ex.** “Smith & Jones Co.” acquires title. A subsequent conveyance is from “SJ Services Co.” Problem?
- ❖ Yes. N.D.T.S. 10-07 provides:
 - A recitation in an instrument of record executed by a regulatory authority or an officer/counsel for the entity, that the entity changed its name, may be relied upon.
- ❖ Recommended Curative:
 - Ideally, execute the conveyances with a reference to the name change. E.g. “SJ Services Co. f/k/a Smith & Jones Co.”
 - Place of record an affidavit describing the name change and corporate succession.

Corporate Succession: Merger

- ❖ **Ex.** “Smith & Jones Co.” acquires title. It subsequently merges with and into “Anderson Oil, LLC”. What should be place of record evidencing this change?
- ❖ Again, N.D.T.S. 10-07 provides:
 - A recitation in an instrument of record executed by a regulatory authority or an officer/counsel for the entity, that the entity is the successor of one or more previous entities, may be relied upon.
- ❖ Recommended Curative:
 - Ideally, execute the conveyances with a reference to the name change. E.g. “Anderson Oil, LLC, as successor via merger to Smith & Jones Co.”
 - Place of record a statement of merger or an affidavit describing the merger.

Corporate Succession: During Dissolution

- ❖ **Ex.** “Smith & Jones Co.” is in the process of dissolving. How can it accomplish a transfer?
- ❖ Voluntary: no special requirements.
- ❖ Involuntary: include the following with a receiver’s deed:
 - (1) certified copy of order relating to persons liquidating assets;
 - (2) certified copy of order authorizing the sale;
 - (3) certified copy of order confirming the sale.

N.D.C.C. § 10-19.1-116 / N.D.T.S. PG-4

Corporate Succession: After Dissolution

- ❖ **Ex.** “Smith & Jones Co.” dissolves and has been wound up. Subsequently, it is discovered that the company owns a real property interest.
- ❖ N.D.C.C. § 10-19.1-126 provides:
 - Title to assets remaining after payment of all debts, obligations, or liabilities and after distributions to shareholders may be transferred by a court in this state.
- ❖ **Recommended Curative:**
 - Petition the district court to assist in transfer of the discovered asset.

Corporate Succession: Locating Information

- ❖ **Ex.** There is a gap in the chain of title between entities. What tools are available to locate succession information?
- ❖ County Recorder records:
 - Try searching online database for entity's name with no reference to lands
 - Grantor-Grantee Index
- ❖ N.D. Secretary of State's "Business Records Search"
- ❖ BLM's Corporate Name Change & Merger Index

Corporate Succession: A Note About Indexing

- ❖ Mergers are often recorded with no legal descriptions. As a result, they are indexed only in the Grantor-Grantee index.
- ❖ However, N.D. utilizes a tract index recording system. *See Hanson v. Zoller*, 187 N.W.2d 47 (N.D. 1971).
- ❖ Recommended Curative:
 - Whenever possible, include legal descriptions with recordings of corporate succession documentation to ensure proper indexing.
 - If no indexing included, consider (a) recording affidavits against particular legal descriptions that refer to the previously recorded but unindexed instrument; or (b) reference the recorded successions in subsequent title transfers.

IV. Other



Other

- ❖ Bankruptcy
- ❖ Minors
- ❖ Unlocatable mineral owners

Bankruptcy

- ❖ N.D.T.S. Chapter 16 provides guidance.
- ❖ **Ex.** Notice of a bankruptcy is filed in the record. Is action immediately required?
- ❖ Nothing yet – simply take notice.

Bankruptcy

- ❖ **Ex.** Notice of the bankruptcy petition *filed after conveyance* by record owner.
- ❖ Problem?
- ❖ No, N.D.T.S. 16-02 provides that it can be presumed that, absent evidence to the contrary, the conveyance cannot be avoided by the bankruptcy trustee.

Bankruptcy

- ❖ **Ex.** Conveyance by debtor *after* bankruptcy filing.
- ❖ Problem?
- ❖ Possibly. However, N.D.T.S. 16-03 provides such a conveyance is allowed under certain circumstances, including:
 - Bankruptcy case already dismissed.
 - Property claimed as exempt and no objection filed in the bankruptcy proceeding.
 - Conveyance was authorized or ratified by an order of the bankruptcy court.

Bankruptcy

- ❖ **Query:** How should an interest be conveyed out of the bankruptcy estate?
- ❖ Generally, the following should be placed of record:
 - ❖ A. Trustee's Deed executed by the bankruptcy trustee; and
 - ❖ B. (i) verification that the notice was served upon the debtor, debtor's attorney, United States Trustee, creditors, and any other interest party who filed a request for notices, and there were no timely objections;
(ii) verification that the property is not cash collateral; and
(iii) a certified copy of the order confirming the sale.

Minors

- ❖ **Ex.** Joe Smith, a minor, inherits a mineral interest.
- ❖ Problem: The minor is restricted from conveying real property interest.
- ❖ N.D.C.C. § 14-10-09:
 - A person under the age of eighteen may not make a contract relating to real property or any interest therein or relating to any personal property not in that person's immediate possession or control.
- ❖ Recommended Action: Utilize N.D.C.C. Ch. 47-24.1 (Uniform Transfers to Minors Act)

Minors

- ❖ Convey or distribute the property to the designated custodian, as follows: “Susan Smith, as Custodian for Joe Smith under the North Dakota Uniform Transfers to Minors Act”. *See* N.D.C.C. § 47-24.1-03.
- ❖ Custodian can then (1) convey on behalf of the minor, (2) supported by an affidavit stating that the minor is under the age required for termination of the custodianship.
- ❖ Upon reaching age of majority, the custodianship will terminate. N.D.C.C. § 47-24.1-20. Accordingly, custodian should distribute the property to Joe Smith, an individual.

Unlocatable Mineral Owners

- ❖ **Ex.** Mineral owner cannot be located. What can the *surface owner* do about the subject interest?
- ❖ Surface owner may be able to utilize the “Dormant” Mineral Act (N.D.C.C. Ch. 38-18.1) if mineral interest not “used” within twenty years
 - A “use” could include being subject to lease, mortgage, or other transfer; or production of the minerals
 - Note: strict compliance with the statute is required.

Unlocatable Mineral Owners

- ❖ **Ex.** Mineral owner cannot be located. What can *the operator* do about the subject interest?
- ❖ Operator may utilize N.D.C.C. Ch. 38-13.1 to have a trust set up for the missing party
- ❖ Requires: a diligent but unsuccessful effort to locate the absent owner; or appointment of a trustee will be in the best interest of all owners of an interest in the mineral, leasehold, or royalty interest.
 - Benefit: County Treasurer, as trustee, may execute oil and gas leases
 - Benefit: no further liability for bonuses, rentals, royalties paid to the trustee

V. Main Takeaways

❖ Trusts:

- Ensure both the trust name and the trustees are properly identified

❖ Partnerships:

- Pay attention to how the partnership acquired the property; and who is signing

❖ Corporation Succession:

- Records often absent; can be found in various locations

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❖ Approved CLE and Credit Details

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❖ Pending Approval

- Texas MCLE, AAPL, and CDOA Core Credit

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