MARRIAGE AND MINERALS IN TEXAS: CONFRONTING THE COMMUNITY PROPERTY PRESUMPTION AND POTENTIAL IMPROVEMENTS IN CALIFORNIA

I. INTRODUCTION

In Texas, widespread mineral interest ownership has created a complex body of law that presents owners with difficulties in proving ownership.[1] Texas recognized mineral interests early—not only in the state's constitution but also by various judicial decisions.[2] Courts have held that the severed mineral estate contains five "essential attributes" that the owner has full authority to sever and convey as the owner sees fit.[3] These interests are as follows:

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1. Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories*, 33 ST. MARY'S L.J. 1, 2–4 (2001) (explaining that the increasing complexity of mineral and royalty deeds has led to difficulty in tracing and proving title).

2. *See* TEX. NAT. RES. CODE ANN. § 52.171 (West 2011) ("The state hereby constitutes the owner of the soil its agent . . . and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas . . . ."). *See generally* State v. Magnolia Petroleum Co., 173 S.W.2d 186, 189 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.) (explaining that the Relinquishment Act does not vest title or interest in mineral-reserved school lands in the surface estate owner; the owner is simply an agent of the state in order to lease the land for oil and gas).

3. *See* Altman v. Blake, 712 S.W.2d 117, 118–19 (Tex. 1986).

> (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments [(a onetime payment in consideration for signing a lease)], (4) the right to receive delay rentals [(payments by the lessee for delays in drilling a well)], and (5) the right to receive royalty payments.[4]

Difficulties arise when this "bundle of sticks" contained within the mineral estate becomes vested in different owners, which can happen when the surface estate owner reserves the interest by retaining the minerals or grants the interest by signing a lease for a lessee to develop the minerals.[5]

As demand and prices have increased, Texas has experienced a boom in oil and gas production.[6] The demand for mineral rights from oil and gas exploration companies and royalty clearinghouses has led to increasing pressure on families and estates to sell or transfer their rights as a viable means to wise estate planning choices.[7] Consequently, estate planning attorneys should understand some of the basics of the mineral estate and some of the long-term implications marriage can have on these unique interests.[8] Texas, as a community property state, presents the unique situation of a large number of married individuals owning interests in minerals such as oil and gas, which results in complex methods for classifying those interests.[9] This leads to highly controversial disputes and begs the question: When dealing with the adjudication of these property rights between spouses, is there an easier way of classifying them or a solution that fixes some of the issues the community property system

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4. *See id.*

5. *See* Christopher M. Alspach, *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance*, 37 TEX. TECH L. REV. 1073, 1075 (2005).

6. Russell Gold, *Drilling for Natural Gas Faces a Sizable Hurdle: Fort Worth*, WOODHAVEN COMMUNITY DEV., INC. (May 4, 2005), http://www.woodhavencommunity.com/WSJ.php. The author discusses the problems arising from the discovery of large reserves of shale gas and oil underneath Fort Worth, which contains approximately 1.6 million people. *See id.* The author presents a troubling situation in which one neighbor receives monthly royalty checks because she owns mineral rights, while her next-door neighbor owns no mineral rights but must still "listen to the whine of a 175-foot-tall drilling rig at the end of his street all night." *Id.*

7. *See id.*

> Because few people thought there was much oil and gas near Fort Worth, mineral and surface rights used to be neatly transferred from owner to owner. In the past couple of years, as word spread, property owners have grown unwilling to part with their mineral rights, even if they sell their house. Without mineral rights, land owners sitting on millions of dollars in natural gas aren't entitled to a dime.

Id. *See generally* UNI ROYALTIES LTD., http://www.uniroyalties.com/selling_mineral_rights.php (last visited Oct. 1, 2012) (showing an example of a company that purchases mineral rights from owners, which have become much more common as the complexities of mineral interest ownership have increased, along with the pressures on owners to sell).

8. *See* Lilly Tade Van Maele et. al., *Comparing Pennsylvania and Texas Law on Ownership and Marital Rights: Common Law v. Community Property—Impact on Oil and Gas Leasing*, 82 PA. B. ASS'N Q. 34, 35, 39 (2011) (stressing the importance for practitioners and landmen to become familiar with community property law).

9. *See id.* at 39–40.

creates for examining title?[10] Thus, the discussion of statutes and presumptions seeks to simplify many of the issues that title and estate planning attorneys often confront.[11]

Mineral interests are treated the same as all other marital property in Texas, and courts subject these interests to the same presumptions found in the Texas Family Code.[12] The Texas Legislature has classified a spouse's separate property during marriage as follows: (1) property owned by either spouse prior to the marriage; (2) any property obtained by gift, devise, or descent; and (3) personal injury rewards (excluding money) received for loss of earning capacity.[13] Texas, historically rich in oil and gas, has produced many judicial decisions regarding the classification of marital property in minerals since petroleum first became a precious commodity.[14] However, to gain a grasp of how Texas courts treat mineral interests in the context of marital property, one must first have a working knowledge of the basic rights of a mineral owner and the legal effects of multiple conveyances over time.[15] Professor Kramer remarks, "One of the universal objectives of real property conveyancing rules is that courts will attempt to reach results which ensure title certainty. But at times, courts in Texas and Oklahoma pay little heed to this objective."[16] This opinion could relate not only to conveyances, as Professor Kramer discusses, but also to current judicial trends in marital property cases that stem from basic misunderstandings of the severable rights contained within the mineral estate.[17]

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10. *See id.* at 35.

11. *See id.*

12. *See, e.g.*, TEX. FAM. CODE ANN. § 3.003 (West 2006). *See also* Pearson v. Fillingim, 332 S.W.3d 361, 363 (Tex. 2011) (explaining that a gift received by a spouse during marriage is the spouse's separate property but may still be subject to a community property presumption).

13. TEX. FAM. CODE ANN. § 3.001 (West 2006).

14. *See* Cauble v. Beaver-Electra Ref. Co., 243 S.W. 762, 763–64 (Tex. Civ. App.—Amarillo 1922, writ granted) *aff'd*, 274 S.W. 120 (Tex. 1925) (holding that a wife was liable for debts incurred by an oil company operating on her separate account because she and her husband had an agreement that all proceeds and losses of the company would be the responsibility of her separate estate). *See also* Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953) (holding that the production and sale of gas distributed to a fractional owner by royalty was the same as "a piecemeal sale of the separate corpus" of the land and, because the husband could prove he acquired funds through sale of the separate corpus, the funds remained his separate property). *Cf. Pearson*, 332 S.W.3d at 364 (holding that revenue from mineral deeds could not be a husband's separate property because he failed to meet the presumption under the Texas Family Code).

15. *See* Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 175 (1990) (commenting that there is a "seemingly infinite variety of ways the fee simple absolute owner of a mineral estate can convey parts of the estate").

16. *Id.*

17. *See id.* at 176. The author explains that an owner can distribute the five "essential attributes" of mineral interest ownership so they are not truly "essential." *Id.* Absent express language and application of specific canons of construction, the "five sticks" will be owned by the transferee when a mineral estate is transferred. *Id.* The author emphasizes that it is "important for both parties to know the nature of the rights attached to each stick." *Id.*

The following is a straightforward analysis of current law that practitioners need to know and recommendations on potential improvements. Part II of this comment expands on the background of Texas as a community property state and provides an outline of the analysis required to determine marital property rights.[18] Part III surveys the treatment of mineral interests under the analytical framework used to determine marital property rights and explains judicial trends of Texas courts characterizing marital property over time.[19] Part IV uses the Texas Supreme Court case *Pearson v. Fillingim* to illustrate the problems caused by the community property presumption in Texas and offers potential improvements based on the burden of proof in California.[20] Part V briefly concludes this comment with a recap of the community property distinctions between Texas and California and stresses the importance of applying an equitable burden of proof in disputes over the characterization of mineral and royalty interests.[21]

II. COMMUNITY PROPERTY AND MINERAL RIGHTS IN TEXAS

The community property system in Texas began when the Spanish first established the area as a province and granted many areas along the coastal rivers to landowners.[22] After the Mexican War of Independence, the newly formed Mexican government gave numerous land grants to impresarios, such as Stephen F. Austin, who had the power to give American settlers title to tracts of land contained in the Mexican grant.[23] After Texas achieved independence, the Texas constitution provided the basic framework for classifying property by identifying specific separate property, which necessarily meant that unidentified property remained community property.[24] Early in the state's history, the Texas Supreme Court precluded the Texas Legislature from altering the provisions set forth in the constitution relating to the classifications of marital property.[25] The Texas Family Code adheres to the constitutional presumption of community property, which requires courts to define community property broadly as

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18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See* Van Maele et. al., *supra* note 8, at 39–40. Few other states follow the community property system. *See id.* at 36. The other states with a community property system are California, Arizona, Idaho, Louisiana, Nevada, New Mexico, Wisconsin, and Washington. *Id.*

23. Aldon S. Lang & Christopher Long, *Land Grant*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/andbook/online/articles/mpl01 (last visited Oct. 3, 2012).

24. *See* TEX. CONST. art. XVI, § 15.

25. *See* Arnold v. Leonard, 273 S.W. 799, 801–02 (Tex. 1925). The court emphasized the rule of construction for constitutions that specify the method for acquiring a right. *Id.* When those methods are contained therein, the constitution impliedly prohibits the legislature from adding or withdrawing from those methods. *See id.* at 802.

"[p]roperty possessed by either spouse during or on dissolution of marriage."[26] However, the legislature added the recovery for a spouse's personal injuries as an item of separate property, and the court has consistently determined that this added recovery does not violate the basic principle against modifying what the Texas constitution identifies as a spouse's separate property.[27]

A. The Texas Presumption and Inception of Title

Although the Texas Supreme Court has long recognized property acquired by the joint and mutual endeavors of a husband and wife as common property, litigants may rebut the presumption and seek to establish the property as separate.[28] For example, litigants can prove through clear and convincing evidence that they purchased the property during marriage entirely with separate funds.[29] Evidence that might suffice to meet the clear and convincing burden includes tracing evidence such as expert testimony from an accountant who was familiar with the spouse's cash flow or other written financial records.[30] Texas courts have also held that even if a spouse purchased property with what would have been community funds, if the spouse acquired the property before the marriage, the property must remain separate.[31]

Texas courts have applied a basic rule of property law called the "inception of title" doctrine to classify mineral interests.[32] Under this doctrine, a court must classify property as either separate or community at the precise moment when the spouse acquired that property or had a claim of right to the property.[33] The court in *Smith v. Buss* went as far as saying that "[w]e think that it is settled law of this State that property acquired during marriage takes its status as separate or community property at the very time of its acquisition."[34] However, the Texas constitution provides that spouses may create an agreement that changes the original

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26. TEX. FAM. CODE ANN. § 3.003(a) (West 2006).

27. *See* TEX. FAM. CODE ANN. § 3.001 (West 2006). *See also* Graham v. Franco, 488 S.W.2d 390, 395 (Tex. 1972) (holding that a historical chose in action for personal injuries "was not 'property' at common law as then understood, and it was not property 'acquired' by any community effort").

28. *See* FAM. § 3.003(b).

29. *See* Van Maele et. al., *supra* note 8, at 37.

30. *See* Sean Y. Palmer, *Property II: Texas Separate Property Tracing: Proving What's Yours*, SEAN Y. PALMER'S TEX. FAM. L. RESOURCE (Oct. 22, 2006, 5:53 PM), http://texasfamilylaw.blogspot.com/2006/10/property-ii-texas-separate-property.html.

31. *See, e.g.*, Odstrcil v. Odstrcil, 384 S.W.2d 403, 406 (Tex. Civ. App.—Houston 1964, writ dism'd).

32. *See, e.g.*, Smith v. Buss, 144 S.W.2d 529, 532 (Tex. 1940).

33. *See id.*

34. *Id. See also* Kiel v. Brinkman, 668 S.W.2d 926, 929 (Tex. App.—Houston [14th Dist.] 1984, no writ).

classification of property, as long as both spouses assent.[35] Finally, if a spouse were to convey his or her own community property to the other spouse, title would vest in the donee or transferee spouse's separate estate.[36]

B. Management of Marital Property and Oil and Gas

Management of property is an important concept for title and estate planning attorneys to master in community property states such as Texas.[37] The Texas Family Code provides that a spouse's separate property will remain under that spouse's "sole management, control and disposition."[38] This control is important because spouses owning separate property may alone cause the execution of an oil, gas, and mineral lease on their separate property.[39] Community property, however, may be under joint management of both spouses or under the management of solely one spouse.[40] Community property under the joint management of both spouses should have the execution of both spouses to a lease, whereas a spouse solely managing community property may validly execute a lease alone that would be binding on the entire estate.[41]

Texas law provides that during marriage, "property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership."[42] However, courts can find community property subject to the joint management of the spouses if no evidence exists that the property is subject to the sole management of one spouse.[43] In that case, the title examiner must know that any conveyance made by either spouse when the property is under joint management should contain the signature of both spouses.[44] Furthermore, these historical considerations and Texas Family Code provisions suggest that if the community property could be managed either jointly or solely by the spouses, the attorney examining title should make his client aware that a

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35. TEX. CONST. art. XVI, § 15.

36. *See* Baker v. Baker, 55 Tex. 577, 578–80 (1881).

37. *See* TEX. FAM. CODE ANN. § 3.101–.102 (West 2006).

38. FAM. § 3.101.

39. *See* Simmons v. Clampitt Paper Co., 223 S.W.2d 792, 794 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.) (holding that the signing of a lease by a husband during his lifetime was not binding on his wife without her joinder in the execution).

40. FAM. § 3.102(b).

41. *See id. See also* Kendrick v. Tidewater Oil Co., 387 S.W.2d 122, 128 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (holding a duly appointed community executor wife's oil and gas lease to be binding on the whole estate).

42. TEX. FAM. CODE ANN. § 3.104(a) (West 2006).

43. Van Maele et. al., *supra* note 8, at 39.

44. *See* FAM. § 3.102(c).

joinder of both spouses must be obtained before executing an oil and gas lease.[45]

III. JUDICIAL TRENDS IN COMMUNITY PROPERTY CLASSIFICATION IN TEXAS

An important and widely accepted Amarillo case of first impression, *Stephens v. Stephens*, illustrates the principle that profit and ownership of a mineral interest acquired before marriage by a spouse remains that spouse's separate property after marriage.[46] Courts such as the *Stephens* court have been classifying property as either separate or community property with substantially the same methodology throughout the years.[47] Current judicial trends in Texas suggest that there is a movement to defeat the presumption of community property, especially where mineral interests are at issue because of problems with tracing ownership of mineral interests.[48] Among other things, these difficulties arise from negligence or even a mere lack of resources.[49]

Similar provisions found in the Texas Family Code support the presumption of community property in the Texas constitution.[50] In Texas, spouses owning mineral interests as separate property face an uphill battle if they come to court unprepared or fail to appear to rebut the community property presumption.[51] For example, in *Tirado v. Tirado*, an appellee met

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45. George A. Snell III, Timothy C. Dowd & Richard W. Revels, Jr., *Probate Estates In: Texas, Oklahoma, Louisiana*, OKLA. CITY ASS'N PROF. LANDMEN, 7 (Oct. 4, 2004), http://www.georgesnell.com/SnellProbate-Estates-in-TX-OK-LA.pdf ("Normally, both spouses execute oil and gas leases jointly, whether the mineral interest is community or separate property. However, if the mineral interest is separate property, that spouse alone can execute a binding oil and gas lease, except upon homestead property.").

46. *See* Stephens v. Stephens, 292 S.W. 290, 294 (Tex. Civ. App.—Amarillo 1927, writ dism'd w.o.j.) ("The land is conceded to be the separate realty of appellee . . . the oil while in place is realty, and like solid minerals is capable of ownership, and as part of appellee's separate realty it belongs to him in his sole and separate right.").

47. *See* Swayne v. Lone Acre Oil Co., 86 S.W. 740, 743 (Tex. 1905) (stating that the wife was not entitled to proceeds because the property was part of the corpus of land). *See also* Texas Co. v. Daugherty, 176 S.W. 717, 720 (Tex. 1915) (holding that oil and gas in place is part of the realty of the property).

48. *See*, *e.g.*, Pearson v. Fillingim, 332 S.W.3d 361, 363–64 (Tex. 2011).

49. *See id.*

50. *See generally* TEX. CONST. art. XVI, § 15. *See also* TEX. FAM. CODE ANN. § 3.003(a) (West 2006).

51. *E.g.*, Myers v. Crenshaw, 116 S.W.2d 1125, 1130 (Tex. Civ. App.—Texarkana 1938) *aff'd*, 137 S.W.2d 7 (Tex. 1940) ("The status of property as being separate or community is fixed by the facts of acquisition at the time thereof."). *See also* Norris v. Vaughan, 260 S.W.2d 676, 679–80 (Tex. 1953) (holding that whoever asserts that gas produced from a separate estate has been transformed into community property has the burden of showing the expenditure of community effort or funds in the production and sale of the gas); *Pearson*, 332 S.W.3d at 363 (holding that a husband's mineral interest—which he allegedly acquired by gift—was deemed community property after he failed to rebut the community presumption by proving that his property was separate by clear and convincing evidence).

the burden of establishing that oil and gas that was produced and sold was separate property; therefore, "it then became the duty of the appellant to produce some evidence to show otherwise."[52] However, it is likely that an experienced title attorney or a petroleum landman would attest that the ability to produce evidence of the distinct, separate nature of an oil and gas interest is not always easy.

A. Classifying Mineral Interests

Texas courts have long held that separate property containing minerals belongs solely to the spouse who owns the land.[53] This implies that proceeds from mineral sales, often in the form of royalty payments, should constitute a continuation of that separate property and remain part of the separate estate.[54] Because an individual who owns both the surface and mineral estate may sever these two estates, it is possible for one person to retain title in the surface estate while another, unrelated individual has ownership of the mineral estate.[55] Therefore, one must remember that courts consider the severed mineral estate to be real property separate from the surface estate, which ultimately subjects marital property classifications to real property requirements.[56] Furthermore, Texas courts follow the general proposition that the inception of title rule determines a mineral estate's character.[57] Inception of title occurs the moment an individual has the ability to make a claim of right to property, which by implication vests title to the property in that individual.[58]

When attempting to make separate or community property determinations, it is helpful to have knowledge of the fee interests that an oil and gas lease creates. Courts in Texas have held that an oil lease creates a determinable fee in the property in question rather than a leasehold on real estate.[59] Generally, the lessee receives the lease for the "primary term," which is a period of years that the lease will remain in effect without oil or

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52. Tirado v. Tirado, 357 S.W.2d 468, 473 (Tex. Civ. App.—Texarkana 1962, writ dism'd). The court determined that the appellant failed to produce evidence to rebut the community property presumption. *See id.*

53. *See, e.g.*, *Norris*, 260 S.W.2d at 679.

54. *See* Stephens v. Stephens, 292 S.W. 290, 295 (Tex. Civ. App.—Amarillo 1927, writ dism'd w.o.j.) (citing Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905)).

55. *See, e.g.*, Kramer, *supra* note 15, at 175–78.

56. *See Norris*, 260 S.W.2d at 679 ("Oil and gas, while in situ, are part of the realty; part of the corpus of the land." (quoting State v. Snyder, 212 P. 758, 762 (Wyo. 1923))).

57. *See In re* Marriage of Morris, 123 S.W.3d 864, 871 (Tex. App.—Texarkana 2003, no pet.). *See also* Wilkerson v. Wilkerson, 992 S.W.2d 719, 722 (Tex. App.—Austin 1999, no pet.) ("When real property is acquired under a contract for deed or installment contract, the inception of title relates back to the time the contract was executed, not the time when legal title [was] conveyed.").

58. *See Morris*, 123 S.W.3d at 871 (discussing determination of rights for timber, which is virtually indistinguishable from minerals with regard to characterization).

59. *See Norris*, 260 S.W.2d at 678 ("It is well established in Texas that the lessee in the usual oil and gas lease obtains a determinable fee in the oil and gas in place, and thus an interest in realty.").

gas production.[60] Once production begins, the lease will go into the "secondary term" for as long thereafter as the lessee produces oil, gas, or other minerals from the land.[61] Texas views a lease interest as a fee determinable interest—the oil and gas under the ground is essentially a part of the real estate of the property; in other words, the oil and gas is "in place."[62]

Thus, when an operator produces the oil or gas from a piece of property characterized as separate property, the product remains the separate property of the spouse held in his or her separate capacity.[63] This production or sale of the oil or gas 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."[64] Therefore, an interesting question for title and estate planning attorneys is how the community property system treats royalty payments.

B. Classification of Royalty Interests

Generally, Texas courts have held that if a lessee pays royalty for produced oil and gas from a lessor spouse's separate property, the paid royalty is an extraction of the lessor spouse's separate estate.[65] This is contrary to the general proposition that rents and revenues generated from a spouse's separate property can become community property and are subject to the community interest of each spouse.[66] For example, typically if a spouse owns a house or houses as separate property but rents those properties out and collects the revenue from the rentals, that revenue is considered community property.[67] The Texas Supreme Court made it clear that the legislature could not violate the constitutional provision establishing clear tests for determining separate property by seeking to enlarge separate estates by statute.[68] However, the same general rule that

60. *See id.* at 679. *See also* Grinnell v. Munson, 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet. h.).

61. *See Grinnell*, 137 S.W.3d at 714.

62. *See Norris*, 260 S.W.2d at 678.

63. *See id.* at 678–79.

64. *Id.* at 679.

65. *See id.*

66. *See* Hughes v. United States, 196 F. Supp. 37, 40 (E.D. Tex. 1961).

67. *See* Arnold v. Leonard, 273 S.W. 799, 800 (Tex. 1925) (holding invalid a statute that purported to increase the constitutional separate property of a wife by including rent and revenues from the rental of houses as the wife's separate estate, thereby protecting the husband's community interest to an extent).

68. *See id.* at 803. In this case, a wife and her husband sought an injunction to restrain the administrator of an estate from attempting to seize rents and revenues received by the wife. *See id.* at 800. The wife received the rents and revenues from several pieces of real estate she owned in Galveston. *See id.* The administrator sought to collect payment from the wife's revenues to pay a judgment he held and owned against the wife's husband, even though all of these properties were a part of the separate estate of the wife. *See id.* The laws in question were portions of a 1917 and 1921 statute

protects the community interest of a spouse from enlarging the separate estate of his or her spouse has limited applicability in the context of royalty revenue received from oil and gas production on a spouse's separately owned property.[69] Thus, courts in Texas make the distinction that income received by way of royalty from the production of oil and gas originating from a spouse's separately owned property remains that spouse's separate property, absent comingling or other alternatives.[70]

C. Bonuses and Working Interests

Courts in Texas view an oil and gas lease as a conveyance of the basic fee title to all of the oil and gas in place under the property.[71] As a result, courts now characterize the bonuses paid to a lessor as consideration for signing a lease to be the owner-spouse's separate property if the lease exclusively covers that spouse's separate property.[72] Further, a spouse may also hold a working interest in a well producing oil and gas.[73] A working interest is unique and distinguishable from other types of interests in minerals because a working interest owner bears all drilling and operating costs, whereas a royalty interest owner bears no such costs and takes royalty free of expenses.[74] The inception of title rule governs the classification of these types of interests.[75] In other words, the characterization of income from a working interest depends on the circumstances in existence at the time of acquisition.[76]

Thus, over time, courts in Texas have established specific rules for determining the classification of marital property in regard to mineral

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purporting to make the rents and revenues from the wife's separate property part of the wife's separate estate. *See id.* at 801. The court held these provisions invalid because they unconstitutionally took the interest in community property entitled to the husband from the rents and revenues while increasing the wife's separate estate. *See id.* at 805. However, the court upheld the portions of the statute that expressly denied the forced sale of a wife's separate property to satisfy debts independently contracted by the husband. *See id.*

69. *Hughes*, 196 F. Supp. at 40 ("Although rents and revenues from the separate property of a spouse are community property, income from production of oil or gas by virtue of a royalty interest in an oil and gas mineral estate which is the separate property of a spouse remains the separate property of that spouse.").

70. *See id.*

71. *See* Norris v. Vaughan, 260 S.W.2d 676, 678 (Tex. 1953).

72. *See* Bennett v. Scofield, 170 F.2d 887, 889 (5th Cir. 1948). *But see* Lessing v. Russek, 234 S.W.2d 891, 894 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.) (drawing the distinction that delay rentals paid for non production over time serving as constructive production was community property whereas the bonus in the form of money paid for the sale or execution of a lease was separate property).

73. *See In re* Cornerstone E & P Co., 436 B.R. 865, 869 (Bankr. N.D. Tex. 2010) ("Under Texas law, a 'working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals.'") (citing H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., 36 S.W.3d 597, 599 (Tex. App.—Austin 2000, pet. denied)).

74. *See id.* at 869.

75. *See In re* Marriage of Read, 634 S.W.2d 343, 346 (Tex. App.—Amarillo 1982, writ dism'd).

76. *See id.*

interests.[77] Once title or estate planning attorneys become familiar with these rules, they may take a more critical look at Texas marital property presumptions and focus on areas of improvement that could increase judicial efficiency.

IV. *PEARSON V. FILLINGIM* AND COMPARISONS WITH THE CALIFORNIA PRESUMPTION

Throughout the history of the state, courts in Texas have applied the previously mentioned rules to the classification of mineral interests and revenues received from royalty.[78] This is primarily because Texas, of all the states in the union, contains the highest per capita rate of individuals deriving part of their income from the production of oil and gas property.[79] In fact, Mirabeau B. Lamar, "the father of Texas education," had the legislature exercise the right of public domain to establish 221,400 oil-rich acres of land in West Texas for the endowment of a university.[80] Texas courts continue to apply the existing community property rules to income received from oil and gas production using the presumptions inherent in the community property system.[81] This creates arguably unfair outcomes in the adjudication of marital rights between spouses as *Pearson v. Fillingim*, a recent Texas Supreme Court case, illustrates.[82] A comparison of the presumption and burden of proof rules in California sheds light on the similarities and differences between California and Texas and suggests possible improvements that may cure unfair outcomes in these controversial decisions.[83]

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77. *See, e.g.*, Van Maele et. al., *supra* note 8, at 36.

78. *See* Cauble v. Beaver-Electra Ref. Co., 243 S.W. 762, 763–64 (Tex. Civ. App.—Amarillo 1922, writ granted), *aff'd*, 274 S.W. 120 (Tex. 1925). *See also* Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953). *Cf.* Pearson v. Fillingim, 332 S.W.3d 361, 364 (Tex. 2011).

79. *See, e.g.*, *U.S. Overview*, U.S. ENERGY INFO. ADMIN. (Jan. 2011), http://www.eia.gov/state/.

80. Mary G. Ramos, *Oil and Texas: A Cultural History*, TEX. ALMANAC, http://www.texasalmanac.com/topics/business/oil-and-texas-cultural-history (last visited Oct. 1, 2012). Much of the acreage first designated to the endowment was located in arid, far-west Texas, which at that time many thought to be relatively worthless. *See id.* The Santa Rita No. 1 well first struck a major oil field in Reagan County, and production on university lands began in earnest. *See id.* The University of Texas has derived immense wealth over the years from the income received from production on these lands. *See id.*

81. *See, e.g.*, *Pearson*, 332 S.W.3d at 361.

82. *See id.*

83. *See*, *e.g.*, Weiner v. Fleischman, 816 P.2d 892, 896 (Cal. 1991) (stating that judicial decisions in California purporting to require clear and convincing evidence must be read in light of the statutory preference for preponderance of the evidence); *In re* Marriage of Peters, 61 Cal. Rptr. 2d 493, 495 (Cal. Ct. App. 1997) (holding that a court must weigh the parties' interests in determining whether clear and convincing evidence or a preponderance of evidence applies as the standard of proof to rebut the community property presumption).

A. Pearson v. Fillingim*: Texas Presumptions Affecting Mineral Interests*

The recent Texas Supreme Court decision *Pearson v. Fillingim* illustrates the risk of reversal that Texas courts face when making the difficult determination of whether mineral interests and royalty income are separate or community property, especially when the court makes the determination pursuant to a divorce.[84] In *Pearson v. Fillingim*, the wife, Rita, and the husband, Dan, married on August 1, 1970.[85] During the marriage, Dan's parents conveyed to him four deeds containing mineral rights, and both spouses jointly leased these rights to third parties.[86] The spouses subsequently divorced on June 9, 1981.[87] Following the divorce, the court divided the spouses' community estate into two separate schedules.[88] The decree included clauses that awarded each party a "one-half interest in all other property or assets not otherwise disposed of or divided herein" but did not mention the mineral rights originally belonging to Dan pursuant to the gift from his parents.[89]

Dan was not present for the last divorce decree hearing, nor did he hire an attorney during the course of the divorce proceedings.[90] After the court finalized the divorce between the parties, both Dan and Rita began receiving royalty payments from the mineral rights.[91] Upon learning that part of the royalty payment was awarded to Rita, Dan filed a petition to clarify the divorce decree to show that his parents gifted him the mineral rights during his marriage to Rita.[92] Dan also filed suit seeking a declaratory judgment that, at the time of his divorce with Rita, the four mineral deeds were his separate property.[93] After consolidation of these matters, the trial court heard evidence and concluded that the deeds were gifts from Dan's parents.[94] After hearing Rita's subsequent appeal, the court of appeals determined that the original clauses in the divorce decree only contemplated the community estate of the spouses and that the trial court was correct in holding that the decree failed to divide the mineral rights.[95]

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84. *See Pearson*, 332 S.W.3d at 362.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* Dan's first mistake was not retaining legal counsel to represent him. *See id.* Had he done so, the unfair outcome of this case might have been different. *See id.*
91. *Id.*
92. *Id.* At trial, Dan claimed that he believed the royalties he was receiving constituted 100% of the royalties. *See id.* He also claimed that he did not understand any differently until March 2002, when he realized that Rita was receiving royalties. *See id.*
93. *Id.*
94. *Id.*
95. *Id.* at 362–63.

Further appeal to the Texas Supreme Court sought to determine whether the trial court could "clarify" the decree and whether the mineral leases were contemplated by the decree.[96] First, the court noted that it could enter a clarification order if the divorce decree was patently ambiguous.[97] However, the court made clear that, under the Texas Family Code, a court exceeds discretion when attempting to "amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment."[98] Normally, a judgment that finalizes a divorce and divides marital property bars the relitigation of the property division.[99] Because trial courts can only divide community property, the supreme court found that the phrase contained in the Fillingim's decree, "estate of the parties," referred solely to the Fillingim's community property.[100] The court then narrowed the ultimate issue for decision down to whether the mineral rights were community property at the time the trial court entered the divorce decree.[101]

The court restated the rule found in Texas Family Code section 3.001 that gifts provided to a spouse are separate property if the spouse receives the gift during marriage.[102] Nonetheless, the court took special notice of the common law tradition the legislature included in the Texas Family Code stating, "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."[103] The court noted that because of the statutory presumption, Dan had the burden to rebut this presumption because he was the litigant claiming the mineral rights as his separate property.[104] To defeat the community property presumption of the Texas Family Code, the court restated that a litigant must "trace and clearly identify the property in question as separate by clear and convincing evidence."[105] The court, applying the law to the facts, noted that Dan failed to attend the final hearing on the decree and did not offer any proof that the mineral rights were his separate property.[106] The court held that although the trial court might have "incorrectly" classified the mineral rights by entering the decree, Dan failed to attend the final hearing and offer any

96. *See id.* at 363.

97. *Id.*

98. *See id.* (citing TEX. FAM. CODE ANN. § 9.007(a) (West 2006)).

99. *See* Reiss v. Reiss, 118 S.W.3d 439, 442 (Tex. 2003). *See also* Baxter v. Ruddle, 794 S.W.2d 761, 762 (Tex. 1990) ("Res judicata applies even if the divorce decree improperly divided the property."), *rev'g in part* 780 S.W.2d 888 (Tex. App.—El Paso 1989, writ granted).

100. *Pearson*, 332 S.W.3d at 363.

101. *Id.*

102. *Id.*

103. TEX. FAM. CODE ANN. § 3.003(a) (West 2006) (alteration in original).

104. *Pearson*, 332 S.W.3d at 363 (citing McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. 1973)).

105. *See id*. *See also* FAM. § 3.003(b).

106. *Pearson*, 332 S.W.3d at 363.

proof that the mineral deeds were in fact his separate property.[107] Ultimately, the court reversed the court of appeals and dismissed Dan's suit for want of jurisdiction.[108]

Pearson v. Fillingim is an odd case because the litigant seeking to rebut the presumption of community property failed to appear to rebut the presumption at the crucial time to do so.[109] However, the real importance of this decision is to illustrate that the burden Texas requires to rebut a community property presumption is clear and convincing evidence.[110] Alternatively, in California, in certain instances, preponderance of the evidence is the standard of proof to rebut the community property presumption.[111]

B. California as a Community Property State

California currently accounts for a substantial portion of the nation's petroleum output, ranking fourth nationally in oil and gas production.[112] Many California mineral owners have started to rework old wells in response to the skyrocketing price of petroleum products.[113] Like Texas, California is another community property state stemming from prior ownership by the Spanish and Mexican sovereigns.[114] California has been a community property state since the state adopted its first constitution in 1849.[115] At this convention, the delegates agreed that the state would continue to utilize the former Spanish and Mexican systems and placed particular emphasis on the married woman's right to separate property.[116] However, in reality, "[d]uring the marriage, the traditional community property system regard[ed] the husband as the manager of the community for the benefit of the marital partnership . . . with community property being the preferred form of ownership."[117] California did elect for the community

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107. *Id.*

108. *Id.* at 364.

109. *Id.*

110. *See id.* at 363.

111. *See* Weiner v. Fleischman, 816 P.2d 892, 898 (Cal. 1991). *See also In re* Marriage of Peters, 61 Cal. Rptr. 2d 493, 495 (Cal. Ct. App. 1997).

112. *See California Oil Production Hits 66-Year Low*, SAN FRANCISCO BUS. TIMES (June 24, 2008, 12:57 PM), http://www.bizjournals.com/eastbay/stories/2008/06/23/daily24.html?page=2.

113. *See id.*

114. *See Spanish California*, CAL. HIST. COLLECTION, http://memory.loc.gov/ammem/cbhtml/cbspanis.html (last visited Oct. 27, 2011); *Mexican California*, CAL. HIST. COLLECTION, http://memory.loc.gov/ammem/cbhtml/cbmexico.html (last visited Oct. 1, 2012).

115. *See* CAL. CONST. art. XI, § 14 (1849) ("[L]aws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with the husband. Laws shall also be passed providing for the registration of the wife's separate property.").

116. *See id.*

117. *In re* Marriage of Haines, 39 Cal. Rptr. 2d 673, 680 (citing Susan Prager, *The Persistence of Separate Property Concepts in California's Community Property System*, 1849–1975, 24 UCLA L. REV. 1, 6–7 (1976)).

property system but in the state's earlier years, the husband held special powers, such as the ability to control and manage his wife's separate property as well as community property.[118] Later in 1850, California went so far as to adopt the common law of England, which classified the wife as merged into a single legal entity with her husband.[119] Under the more progressive Spanish civil law, the wife actually retained a separate legal identity from her husband.[120] Many commentators argue that it was not until 1872, when California finally took steps to modernize the management principle of community property, that the state recognized that both spouses should be able to manage community property regardless of when the spouses acquired the property.[121] Over time, the common law view that the husband should have overall decision-making authority eventually gave way to the view that marriage is a community partnership.[122] Subsequent amendments to the community property rules show that the husband no longer holds dominion over his wife's separate property.[123]

The marital property system in California centers on an assumption that the husband and the wife equally contribute the wealth the spouses build during marriage.[124] Generally in California, both real and personal property a spouse acquires during marriage is community property.[125] Just as in Texas, property that either spouse owns before marriage is that spouse's separate property.[126] In addition, California courts characterize as separate property all property a spouse gains by gift, bequest, devise, or descent.[127]

California places high importance on the equitable treatment of the spouses during marriage because the overarching state goal is to fairly distribute the marital estate upon dissolution of the marriage.[128] Thus, upon the dissolution of a marriage, California courts uniformly begin by characterizing property as either community or separate to maintain

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118. *See id.* at 680–81.

119. *See* Sesler v. Montgomery, 21 P. 185, 185 (Cal. 1889).

120. *See* Packard v. Arellanes, 17 Cal. 525, 537 (Cal. 1861).

121. *See* Prager, *supra* note 117, at 41.

122. *See* Follansbee v. Benzenberg, 265 P.2d 183, 189 (Cal. Dist. Ct. App. 1954).

123. *See id.* ("This hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course.").

124. Mary Charles McRae, *Contribution or Transmutation? The Conflicting Provisions of Sections 852 and 2640 of the California Family Code*, 49 UCLA L. REV. 1187, 1188 (2002).

125. *See* CAL. FAM. CODE § 760 (West 2004) ("Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during marriage while domiciled in this state is community property.").

126. *See* CAL. FAM. CODE § 770 (West 2004). *See also* FAM. § 770(a)(3) (stating that the rents, issues, and profits deriving from a spouse's separate property are also classified as separate property).

127. *See* FAM. § 770(a)(2).

128. *See* CAL. FAM. CODE § 2580(a) (West 2004) ("It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage . . . .").

uniformity.[129] The factors that California courts have historically considered are the effect of any transmutation, the effect of various presumptions, and the characterization of property at the time of acquisition.[130]

C. California Presumptions

Just as in Texas, California retains a general presumption of community property for all property received during marriage unless the property is specifically traceable to a provable separate property source.[131] This presumption squarely affects the burden of proof in a case, and a litigant denying community property classification can defeat the presumption only with the appropriate proof.[132] This is merely a general community property presumption and does not vest title presumptively in one spouse or the other.[133] A litigant may use nearly any type of credible evidence to overcome the general presumption, including the following: (1) adequate tracing of the asset to separate property, (2) showing an agreement between the parties or a clear understanding in relation to ownership status, and (3) presenting evidence that tends to show that a spouse received property as a gift.[134] Modern cases in California have held that the burden of proof for the party denying community property status is the preponderance of the evidence burden.[135] Under the general presumption of section 760 of the California Family Code, tracing assets with expert testimony can be enough to defeat the presumption as long as the evidence is "credible."[136] In contrast, property acquired in joint form is subject to a quasi-statute of frauds contained in section 2581 of the California Family Code, which provides:

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129. *See In re* Marriage of Haines, 39 Cal. Rptr. 2d 673, 681 (Cal. Ct. App. 1995).

130. *See id.*

131. *See* CAL. FAM. CODE § 760 (West 2004). *See also* TEX. FAM. CODE ANN. § 3.003 (West 2011).

132. *In re* Marriage of Mix, 536 P.2d 479, 483 (Cal. 1975) (citing See v. See, 415 P.2d 776, 779–80 (Cal. 1966)).

133. HOGOBOOM ET AL., CALIFORNIA PRACTICE GUIDE: FAMILY LAW 8:363 (The Rutter Group 2011).

134. *Id*. Tracing can include the use of expert testimony or financial records. *See also* Palmer, *supra* note 30.

135. *Compare In re* Marriage of Ettefagh, 59 Cal. Rptr. 3d 419, 429 (Cal. Ct. App. 2007) ("The interests of the parties are inverse but equal. Since both parties have identical economic interests at risk in contesting [the method of acquisition], it would otherwise be appropriate to apply the preponderance standard on the issue because of its roughly equal distribution of the risk of error."), *and In re* Marriage of Foley, 117 Cal. Rptr. 3d 162, 166 (Cal. Ct. App. 2010) (holding that the party contesting community property classification must rebut the presumption by a preponderance of the evidence), *with* Kircher v. Kircher, 117 Cal. Rptr. 3d 254, 261 (Cal. Ct. App. 2010) ("On the other hand, 'this general community property presumption is not a title presumption' . . . and it may be rebutted by credible evidence under a preponderance of the evidence standard.").

136. HOGOBOOM ET AL., *supra* note 133.

> For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
> (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
> (b) Proof that the parties have made a written agreement that the property is separate property.[137]

Therefore, even though section 2581 requires a writing to rebut the presumption specifically for jointly acquired property, the California presumption system generally favors a more equitable approach and does not require the higher burden of proof—clear and convincing evidence—as Texas does.[138]

D. Case-by-Case Analysis Reveals Where Texas Went Wrong

Two California cases, *In re Marriage of Peters* and *In re Marriage of Ettefagh*, illustrate the state's preference for an equity-based approach when determining what burden of proof should apply in rebutting the community property presumption.[139] In *Peters*, the court dealt primarily with a dispute between spouses over what burden of proof—clear and convincing or preponderance of the evidence—should apply to determine the date of separation between the spouses.[140] The case does not speak directly to a general community property presumption but does give a succinct and detailed explanation of why California courts favor the preponderance burden in civil actions.[141] In the case, Joy M. Peters appealed from a judgment that established the date of separation from her husband, Eric W. Peters.[142] Joy argued that "public policy" and the law of the state required

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137. *See* CAL. FAM. CODE § 2581 (West 2004) (clarifying that tracing, oral, and implied agreements do not suffice to defeat this presumption).

138. *In re* Marriage of Ettefagh, 59 Cal. Rptr. 3d 419, 427–29 (Cal. Ct. App. 2007). The court in this case justified California's preference for the preponderance standard when it was important that "the parties to an action share the risk of an erroneous determination more or less equally." *Id.* at 427. The court hinted that any other standard would appear to express a preference for one of the side's interests. *See id.* The court clarified that "the clear and convincing standard is imposed in those cases in which particularly important individual interests or rights are at stake." *Id.* at 427–28.

139. *See In re* Marriage of Peters, 61 Cal. Rptr. 2d 493, 496–97 (Cal. Ct. App. 1997) (explaining that preponderance of the evidence should apply to "date of separation" analysis). *See also Ettefagh*, 59 Cal. Rptr. 3d at 427–29 (weighing the equities of the suit in order to determine the most appropriate standard of proof to overcome the general community property presumption).

140. *See Peters*, 61 Cal. Rptr. 2d at 494.

141. *See id.* at 495–96.

142. *Id.* at 494.

that when a court determined the date of separation, the court would have to apply a higher burden than preponderance of the evidence.[143] The court stressed the importance of the burden of proof determination as "the degree of confidence society wishes to require of the resolution of a question of fact."[144]

Risk of error was an important factor considered, with the court noting that the burden of proof can vary according to the harm that might result from an erroneous resolution.[145] The court agreed that the preponderance of the evidence standard would result in the parties to the suit sharing an equal risk of error.[146] Finally, the court concluded that the risk of error in this particular classification was the same for the spouses and that "[b]ecause the interests at stake are the same for both parties and the interests involved are economic, the parties should share the risk of error roughly equally. The preponderance of the evidence standard is sufficient."[147] Thus, one of the substantive differences between marital property presumptions and burdens of proof in Texas and California is that the California courts seem more apt to include considerations of equity and fairness when determining what burden of proof to apply in any given case.[148]

In the second case, *In re Marriage of Ettefagh*, the California court considered the general community property presumption contained in section 760 of the California Family Code to determine what standard of proof was required to rebut the presumption.[149] The parties in this case were the wife, Semrin, a native of Turkey, and the husband, Vahid, a native of Iran.[150] The couple married in August 1972, but they subsequently separated in 1996, with this suit commencing shortly thereafter.[151] The principal issue in this case was the characterization given to four parcels of California real estate.[152] The trial court heard evidence in the case and concluded that a party wishing to overcome the section 760 presumption must prove the separate nature of the property in question by a

143. *Id.*

144. *Id.* at 495 (citing Weiner v. Fleischman, 816 P.2d 892, 896 (Cal. 1991)).

145. *Id.*

146. *Id.* ("Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake; even severe civil sanctions not implicating such interests or rights do not require a higher burden of proof.").

147. *Id.* at 497.

148. *See id.*

149. *See In re* Marriage of Ettefagh, 59 Cal. Rptr. 3d 419, 420–21 (Cal. Ct. App. 2007).

150. *Id.* at 421.

151. *Id.*

152. *Id.* The first was a parcel of land called "Santa Ana Court." *Id.* The second was the "Larkspur Shopping Center property." *Id.* at 421–22. The parties referred to the third and the fourth properties as "Santa Rosa large" and "Santa Rosa small," which were located in Santa Rosa. *Id.* at 422. Both spouses also had large property holdings abroad in Iran and Turkey. *Id.* Real property in California would receive the same treatment as oil and gas "real property" in Texas; the latter is merely found underground. *See id.*

preponderance of the evidence.[153] The court stressed that under section 760 of the California Family Code "virtually any credible evidence" could defeat the general presumption.[154]

On appeal, the court could not find any constitutional or statutory support for Semrin's contention that Vahid must rebut the general community property presumption by clear and convincing evidence.[155] Instead, the court pointed out that Semrin relied entirely on case law to establish the requirement of clear and convincing evidence.[156] The appellate court distinguished the cases Semrin relied upon on their facts or apparent lack of analysis.[157] Especially important to the appellate court was the supreme court's admonition that litigants should be cautious when reading judicial opinions purporting to require a clear and convincing standard.[158] Here again the court looked first to the interests of the spouses as reflected and "defined by the [l]egislature in the Family Code."[159] Citing *In re Marriage of Peters*, the court explained, "In this case, as in *Peters*, only money is at stake and both spouses share an equal risk that the court may err in classifying the property."[160] Therefore, the court concluded that the trial court correctly applied the preponderance of the evidence standard because the parties' interests were purely economic and relatively equal.[161]

Thus, *Peters* and *Ettefagh* reveal a fundamental difference in the judicial treatment of community property presumptions by showing California's preference for the preponderance of the evidence standard.[162] California courts use a hierarchy of burdens of proof in any civil action but tend to only use the clear and convincing standard for the adjudication of rights that are deeply important and require a higher threshold to prove.[163] In the rare instances California courts use the clear and convincing burden, all the cases have something more than just money at stake.[164] In comparison to the outcome in the Texas case *Pearson v. Fillingim*, one

153. *Id.* at 422–23.

154. *Id.* at 423 ("[T]he evidence demonstrates that Vahid acquired interests in the California properties as gifts from his father Hashem. There is insufficient testimony and no written documentation to the contrary.").

155. *Id.* at 424.

156. *Id.*

157. *S*ee *id.* at 424–25.

158. *See id.* at 425. *See also* Liodas v. Sahadi, 562 P.2d 316, 323 (Cal. 1977) ("The standard of proof by clear and convincing evidence is required on certain issues by statute . . . [b]ut it remains an *alternative* to the standard of proof by a preponderance of the evidence.").

159. *Ettefagh*, 59 Cal. Rptr. 3d at 428.

160. *Id.* (citing *In re* Marriage of Peters, 61 Cal. Rptr. 2d 493, 495(Cal. Ct. App. 1997)).

161. *Id.* at 429.

162. *See id.* at 425. *See also Peters*, 61 Cal. Rptr. 2d at 493, 495.

163. *See Ettefagh*, 59 Cal. Rptr. 3d at 427–28. The court listed instances of when it would be appropriate to consider the clear and convincing evidence burden. *Id.* at 428. Examples include proof of equitable adoptions, "withdrawal of artificial nutrition and hydration from conservatees," termination of parental rights, commitment to mental hospitals, and deportation. *Id.*

164. *See, e.g.*, *id.* at 428–29.

potential improvement stands out because the property at issue in that case partly included royalty interests in oil production.[165]

As previously stated, a mineral interest is an interest in the whole of the land or an interest in the oil and gas "in place," and Texas courts classify oil and gas as real property.[166] A royalty interest owner on the other hand, despite retaining an interest in the land itself, accepts royalty either "in kind" or by a payment of money from the proceeds of production.[167] As the majority of royalty interest owners do not possess the transportation and marketing capabilities of working interest owners, many will opt to receive royalty through money payments.[168] If Texas courts used the "more likely than not" burden of proof with respect to oil and gas royalty disputes, it would be much easier for litigants like Dan in *Pearson v. Fillingim* to successfully rebut the community property presumption by using tracing evidence.[169] Dan had more problems than the burden of proof, however, as he did not attend any of the hearings in his divorce proceeding.[170] However, assuming Dan attended his hearing, he could have easily rebutted the presumption under the community property rules of California, which allow a successful rebuttal with "virtually any credible evidence."[171] Thus, Texas courts should consider mineral interest disputes containing more weighty property interests under a quasi-statute of frauds like section 2581 of the California Family Code while applying the clear and convincing burden to rebut that presumption.[172] Conversely, a burden of proof similar to the preponderance of the evidence standard of section 760 of the California Family Code should apply to royalty interest disputes.[173]

V. CONCLUSION

Past and present cases in Texas reflect the need for an understandable and workable system for marital property classifications of mineral

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165. *See* Pearson v. Fillingim, 332 S.W.3d 361, 362 (Tex. 2011).

166. *See* Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953).

167. *See* Wilson v. United Tex. Transmission Co., 797 S.W.2d 231, 233 (Tex. App.—Corpus Christi 1990, no writ) ("An oil and gas lease may provide for the payment of royalty 'in kind' or 'in money' [sic].") (citing Morriss v. First Nat'l Bank, 249 S.W.2d 269, 279 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.)).

168. *See, e.g.*, George A. Bibikos & Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, TEX. J. OIL, GAS & ENERGY L. 11–12 (June 4, 2009), http://tjogel.org/wp-content/uploads/2009/10/King_Final.pdf.

169. *See* Palmer, *supra* note 30.

170. *See Pearson*, 332 S.W.3d at 362.

171. *In re* Marriage of Ettefagh, 59 Cal. Rptr. 3d 419, 423 (Cal. Ct. App. 2007).

172. *See* CAL. FAM. CODE § 2581 (West 2004) (relating to property acquired in joint form).

173. *See* CAL. FAM. CODE § 760 (West 2004).

interests.[174] Texas currently applies a presumption of community ownership to both mineral and royalty interests and requires clear and convincing proof to rebut the presumption.[175] California, however, has adopted a more lenient approach to rebutting the general community property presumption requiring proof only by a preponderance of the evidence in certain cases.[176] Under this approach, it is only appropriate to apply the clear and convincing burden of proof for rights that require a higher degree of certainty.[177] Given the difficulties in proving ownership of mineral rights, judicial efficiency would better reflect the underlying chain of title if Texas adopted a preponderance of the evidence standard.[178] Under this standard, when royalty interests are in dispute, spouses can easily trace these interests through bank statements and other financial documents.[179] As previously suggested, a quasi-statute of frauds requiring a deed and proof by clear and convincing evidence could apply to mineral interests, which contain more intrinsic property value than royalty interests.[180]

In the future, the number of divorces in Texas involving the characterization of mineral interests as either community or separate property will continue to rise as the market expands.[181] In addition, conveyances and transfers of interests will become complex and difficult to trace as oil companies and landowners become increasingly more sophisticated.[182] Texas, as a community property state, must develop a system that treats both spouses fairly, and this preponderance burden would alleviate many of the problems married individuals seeking divorce, such as Dan in *Pearson v. Fillingim*, face.[183] Until lesser burdens apply, attorneys representing mineral interest owners going through a divorce must understand the community property rules and anticipate gathering the types of evidence that will successfully rebut the community property presumption.[184]

by Bryan Mackay

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174. *See* Cauble v. Beaver-Electra Ref. Co., 243 S.W. 762, 763–64 (Tex. Civ. App.—Amarillo 1922, writ granted), *aff'd*, 274 S.W. 120 (Tex. 1925). *See also* Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953). *Cf. Pearson*, 332 S.W.3d at 364.

175. *See Pearson*, 332 S.W.3d at 363.

176. *See In re* Marriage of Foley, 117 Cal. Rptr. 3d 162, 166 (Cal. Ct. App. 2010) (quoting *Ettefagh*, 59 Cal. Rptr. 3d at 429).

177. *See Ettefagh*, 59 Cal. Rptr. 3d at 427–28.

178. *See supra* Part IV.

179. *See supra* Part IV.C.

180. *See* discussion *supra* Part IV.D.

181. *See* Gold, *supra* note 6.

182. *See* Kramer, *supra* note 15, at 175.

183. *See* discussion *supra* Part IV.D.

184. *See supra* Part IV.