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## THE LIFE ESTATE AND THE POWER TO COMMIT WASTE: USING A POWER ANALYSIS TO RESOLVE OIL & GAS TITLE ISSUES CREATED BY FUTURE INTERESTS

ANTHONY J. FORD

### *I. Introduction*

The law of future interests has a well-deserved reputation as a difficult area of law: it “revels in unhelpful complexity, elevates form over substance, and frustrates the very transactions it should facilitate.”<sup>1</sup> Title examiners and land professionals frequently encounter future interests and have long recognized that the presence of a life estate can complicate oil and gas development.<sup>2</sup> Development can be further complicated when the creator of a life estate grants “extra” rights or powers to the life tenant.<sup>3</sup> It is generally acknowledged, for instance, that a grantor who creates a

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1. T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 514 (2003). Future interests are, in another scholar’s pithy formulation, “ugly, ancient, and absurdly complicated.” D. Benjamin Barros, *Towards a Model of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 20 (2009).

2. See Sheryl L. Howe & Scott L. Turner, *Advanced Mineral Conveyancing and Title Issues – Part 1*, in ADVANCED MINERAL TITLE EXAMINATION: OIL, GAS, AND MINING, Paper No. 1, 1-12 (Rocky Mtn. Min. L. Found. 2014); see also 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 8.1, at 211 (Anderson Publ’g Co. 1989) (“the life estate is...an important estate in oil and gas transactions”). “A title examiner will often see conveyances creating successive interests,” according to Howe and Turner. Howe & Turner, *supra*, at 1-12.

3. Howe & Turner, *supra* note 2, at 1-13 (noting the absence of case law addressing the development rights of a life tenant who holds “without impeachment for waste”).

tenancy for life can also endow the life tenant with the power to consume or dispose of the corpus of the estate.<sup>4</sup> However, the effect of such a grant is not always clear.<sup>5</sup>

This paper surveys the available authorities that address life tenants with the power to consume, or “waste,” the corpus of an estate in the context of oil and gas development. Because of the limited case law on this topic, cases addressing minerals other than oil and gas have also been included. This paper first addresses the common law rules regarding ordinary life estates. It then examines life estates with the power to commit waste, both generally and within the specific context of mineral development. This paper concludes with a survey of some of the types of powers that can allow a party who does not own a fee simple interest in a property to make a permanent, irrevocable change to its legal disposition, and discusses a Texas oil and gas pooling case that is best understood as an application of this “power analysis.”

## *II. Life Estates at Common Law*

According to Prof. John Lowe, “[a]t common law, neither a life tenant nor a remainderman can develop oil and gas, grant a valid oil and gas lease, or create any other oil and gas interest without permission of the other because neither possesses the full rights to the property.”<sup>6</sup> The United States Court of Appeals for the Tenth Circuit has noted that it is “well settled” that oil and gas development must have the consent of both the life tenant and remainderman to be lawful.<sup>7</sup>

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4. See, e.g., RESTATEMENT (FIRST) OF PROP. § 111 (1936).

5. See JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 105 (4th ed. 2003). “[I]f the instrument merely creates a life estate ‘without impeachment for waste,’” according to Prof. Lowe, “there is an unanswered question as to whether the life tenant has the right to grant lease rights beyond his or her lifetime.” *Id.*

6. LOWE, *supra* note 5, at 103.

7. *Welborn v. Tidewater Associated Oil Co.*, 217 F.2d 509, 510 (10th Cir. 1954). See also *Eide v. Tveter*, 143 F. Supp. 665, 671 (D.N.D. 1956) (“it is the uniform rule that the life tenant...is not privileged to take oil and gas, nor has he the power to create such privilege in others by way of lease of the land for oil and gas purposes”); Owen L. Anderson, *Geophysical “Trespass” Revisited*, 5 TEX. WESLEYAN L. REV. 137, 156 (1999). Williams & Meyers cites to *Welborn*, *Eide*, and eight other cases from jurisdictions in the United States in support of the proposition that a life tenant does not have the unilateral power to develop minerals. 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, WILLIAMS & MEYERS OIL AND GAS LAW § 512.1 n.1 (Patrick H. Martin & Bruce M. Kramer eds., 2013); see also G.H.P., Annotation, *Rights of Life Tenants and Remaindermen Inter Se as to Oil and Gas*, 43 A.L.R. 811, pt. II (1926) (“it is established, practically without dispute, that a life tenant has no right to exploit the gas and oil resources of the property for his own benefit”).

When a life tenant and a remainderman jointly allow oil and gas development to take place, they are free to agree to divide the proceeds of the lease as they see fit.<sup>8</sup> Absent such an agreement, however, the common law of most states classifies royalty and bonus payments as part of the corpus of the estate, with the life tenant entitled only to the interest earned on the payments and the remainderman entitled to take the principle when he inherits the estate.<sup>9</sup> Rental payments, such as delay rentals, are classified as income and paid to the life tenant.<sup>10</sup> The principal exception to these rules is the so-called “open mine doctrine,” which allows life tenants to take all of the royalties from any leases that were entered into, or wells that were drilled, prior to the creation of the life estate.<sup>11</sup>

If the two parties do not jointly agree to allow oil and gas development, a life tenant who unilaterally develops minerals commits waste against the remainderman’s inheritance, while a remainderman who unilaterally develops minerals commits a trespass against the life tenant’s present possessory interest in the property.<sup>12</sup> Scholarly authorities generally recognize two exceptions to this rule: a limited exception in cases where a property’s minerals are threatened by drainage, and a broad exception when a life tenancy includes an explicit power to commit waste.<sup>13</sup>

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8. WILLIAMS & MEYERS, *supra* note 7, § 512.2 (citing to *Welborn*, 217 F.2d at 510).

9. LOWE, *supra* note 5, at 107-08. States that classify the property interest created by an oil and gas lease as a license or profit could treat bonus as income, not corpus. See *VanAlstine v. Swanson*, 417 N.W.2d 516, 520 (Mich. Ct. App. 1987); *Franklin v. Margay Oil Corp.*, 153 P.2d 486, 501 (Okla. 1944); LOWE ET AL., *CASES AND MATERIALS ON OIL AND GAS LAW* 459 (6th ed. 2013) (“In such a jurisdiction, a bonus is consideration for the right to invade the present possessory interest and should be treated as income to the life tenant”).

10. LOWE, *supra* note 5, at 107.

11. *Id.* at 108-09.

12. LOWE ET AL., *supra* note 9, at 450. See also WILLIAMS & MEYERS, *supra* note 7, § 512.1.

13. *E.g.*, WILLIAMS & MEYERS, *supra* note 7, § 512.1. In cases of drainage, a court can compel a life tenant to allow the drilling of offset wells in order to prevent waste of the estate. See A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 143-44 (1928). Any proceeds generated by the offset wells are treated as corpus. *Id.* at 144. A court that hesitates to act to prevent drainage of a mineral estate subject to a life estate “does not support sound conservation practices and does not preserve the estate for both parties, which was undoubtedly the intent of the grantor or testator,” according to one analysis of this issue. Ernest R. Fleck, *Selected Leasing Problems – Protection Leases, Life Estate and Remainder Interest, Interest in a Particular Stratum*, 15 ROCKY MTN. MIN. L. INST. 217, 233 (1969).

*III. The Life Tenancy “Without Impeachment for Waste”*

It is possible for a grantor to create a life tenancy that is not subject to the typical restrictions against committing waste. The *Restatement (First) of Property* notes that the conveyer of a life estate has the ability to “create in favor of the conveyee a power, either limited or unlimited, to dispose of the complete property in such land.”<sup>14</sup> Early English law used the label “without impeachment for waste” to describe a life estate with an unlimited power to dispose of a property.<sup>15</sup> English cases on this issue tended to focus on the right to harvest timber from land that is subject to a life estate without impeachment for waste.<sup>16</sup>

The general rule appears to be that a life tenant who holds an estate without impeachment for waste has the same legal right to commit waste as an owner in fee, including the right to develop minerals.<sup>17</sup> However, a direct application of this rule to cases in the United States may be problematic. English courts limited the scope of the rule in equity: the doctrine of “equitable waste” prevents a life tenant who is unimpeachable for waste from exercising his power in an “unconscientious, malicious, or unreasonable” manner.<sup>18</sup> Some scholars have defined equitable waste in ways that could be read as even more restrictive: “[i]t would seem, then, that a tenant for life unimpeachable for waste is in equity treated, in regard to equitable waste, much the same as is an ordinary life tenant in regard to legal waste.”<sup>19</sup>

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14. RESTATEMENT (FIRST) OF PROP. § 111.

15. *See* *Clement v. Wheeler*, 25 N.H. 361, 365-66 (1852). The Statute of Marlbridge (1267) allows tenants to commit waste only if they possess “special Licence had by Writing of Covenant.” 52 Hen. 3, ch. 23, available at <http://www.legislation.gov.uk/aep/Hen3c23/52/23/section/XXIII>. Lord Coke would later comment that a “tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure, as tenant in tail had.” *Bowles’ Case*, 11 Coke 79b, 83b (New ed. 1826).

16. *See Clement*, 25 N.H. at 365-367 (providing extended commentary on life tenancies without impeachment for waste in English law).

17. 2 HERBERT T. TIFFANY & BASIL JONES, *TIFFANY REAL PROP.* § 639 (3d ed. 2013) [hereinafter *TIFFANY*] (“the effect of such a provision is that the tenant can, at law, commit waste to the same extent as a tenant in fee simple, as by cutting timber or digging minerals for the purpose of sale”); *see also* 93 C.J.S. *Waste* § 9 (2014) (“Where a tenant holds ‘without impeachment for waste,’ he or she is enabled to do many things, such as cutting wood or opening new mines, which would generally amount to waste”).

18. *TIFFANY*, *supra* note 17, §645.

19. Case Note, *Waste – Tenant for Life without Impeachment of Waste – Whether Entitled to Proceeds from Ornamental Trees Taken by the Government*, 33 *HARV. L. REV.* 618, 618 (1920).

In addition, life estates with a general power to commit waste – as opposed to a power to commit specific types of waste in specific situations – have historically been uncommon in the United States.<sup>20</sup> As a result, American courts have not had many opportunities to address the concept of equitable waste: a New Jersey court once called it “a nebulous term – a doctrine of obscure limitations....The difficulty is in delineating the scope of the principle that seems to have governed the interposition of equity in such cases.”<sup>21</sup> One commentator goes so far as to claim that “[i]n this country...the extent to which there is such a thing as equitable waste, as distinct from legal waste, appears doubtful.”<sup>22</sup> However, scholarly authorities in the United States still generally assert that a life tenant without impeachment for waste has the right to develop minerals, in spite of the minimal case law addressing this specific question.<sup>23</sup>

#### *IV. Oil and Gas Development When a Right to Commit Waste Is Present*

##### *A. Explicit grants of mineral development rights*

While the general rule seems to be that an explicit grant of development or leasing rights will, unsurprisingly,<sup>24</sup> give a life tenant the right to unilaterally execute an oil and gas lease, states courts appear divided as to whether such a lease continues to be valid after the expiration of the life estate. In an Indiana case, *Ireland v. Francisco Mining Co.*,<sup>25</sup> a husband

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20. TIFFANY, *supra* note 17, §639 (“Such a general provision as to waste is probably but rarely to be found in this country”).

21. *Camden Trust Co. v. Handle*, 26 A.2d 865, 870 (N.J. 1942)

22. TIFFANY, *supra* note 17, § 645.

23. See WILLIAMS & MEYERS, *supra* note 7, § 512.1; 3-83 AM. LAW OF MINING § 83.05 (Rocky Mtn. Min. L. Found. ed., 2d ed. 2014) (citing to a Texas case involving a life tenant explicitly granted a right to “execute...oil, gas and mineral leases,” rather than one given a general grant to commit waste); 93 C.J.S. *Waste* § 9 (2014) (citing to a New Jersey case that does not address mineral rights, and addresses timber rights in a way that may not support the annotation author’s position); Anderson, *supra* note 7, at 156 n.79 (citing no authority). The Powell treatise notes that “in the United States the phrase ‘without impeachment for waste’ is not frequently found, but phrases of similar meaning, raising similar problems, are fairly common.” 8 RICHARD R. POWELL, POWELL REAL PROPERTY §56.05 n.75 (Michael Allen Wolf ed. 2014). The supporting authorities cited by Powell, like the relevant English case law, involve disputes over timber rights; a life tenant without impeachment for waste generally has the right to cut and sell timber and keep the proceeds. *Id.*, see also *Sauls v. Crosby*, 258 So. 2d 326, 327 (Fla. Dist. Ct. App. 1972); *Derham v. Hovey*, 161 N.W. 883, 884 (Mich. 1917); *Clement*, 25 N.H. at 361; *Wingard v. Lee*, 336 S.E.2d 498, 501 (S.C. Ct. App. 1985).

24. See RESTATEMENT (FIRST) OF PROP. § 111 (1936).

25. 151 N.E. 700 (Ind. App. 1926) (en banc).

and wife conveyed a tract of land to their son, reserving “a life estate in each of them in the land so conveyed.”<sup>26</sup> The conveyance also gave the life tenants authority over mineral development:

[D]uring the life estates hereinabove mentioned, the respective life tenants shall in turn have the right to mine and remove from said lands, in the ordinary and usual course of mining, any coal, petroleum, oil, natural gas and minerals found therein, and to appropriate and use as their own the proceeds of such mining without becoming in any manner accountable to the remaindermen for waste.<sup>27</sup>

After the husband’s death, the wife entered into an agreement with a coal company: “she sold all the coal of what is known as vein No. 5,” receiving a four cents per ton royalty on coal removed in return.<sup>28</sup> The remainderman filed suit, arguing that the life tenant did not have the authority to convey title to the coal in place.<sup>29</sup> The court rejected the remainderman’s argument, noting the clear and unambiguous language in the conveyance regarding the life tenant’s right to mine and remove coal.<sup>30</sup> Other states have followed Indiana’s approach.<sup>31</sup>

While *Ireland* does stand for the proposition that a court will give effect to an explicit grant of authority over mineral development to a life tenant, that case involves a sale of coal in place and so does not directly speak to the validity of a lease after the expiration of a life estate. Texas courts,

26. *Id.* at 700.

27. *Id.* (emphasis added).

28. *Id.*

29. *Id.* at 700-01 (asserting further that “the life tenant was a trustee charged in equity with a duty, not to invade, but to protect the rights and interests of the remainderman”).

30. *Id.* at 701. “It is elementary law that the intention of the parties in the execution of deeds and other like instruments must control,” according to the court. *Id.* (concluding that “it clearly appears that it was the intention of the parties that the grantors in the deed . . . should have the right to mine and remove the coal from the land”).

31. See *Guest v. Bizzell*, 271 S.W.2d 472, 475-76 (Tex. Civ. App. 1954). There, a life tenant given authority to execute oil and gas leases “for the purpose of meeting her [own] expenses in life” was entitled to all bonus and royalty payments. *Id.* A life tenant given such authority is entitled to decide whether executing a lease is necessary for his or her support, according to the court: “so long as she acted in good faith and not merely for the purpose of defeating the rights of the remaindermen, her decision on the question is final.” *Id.* A Texas Court of Appeals decision reaffirmed *Guest* on this point in 1996. *Montgomery v. Browder*, 930 S.W.2d 772, 777 (Tex. App. 1996). The life tenant was still alive when *Guest* was decided, so the court did not have the opportunity to address the question of whether the lease at issue would remain valid after the end of the life estate. See *Guest*, 271 S.W.2d at 473.

however, have spoken on this issue, and case law in that state seems to support the idea that such leases will continue to be valid after the life estate ends. The life estate at issue in *Amarillo Oil Co. v. McBride*<sup>32</sup> was granted the authority to “execute and deliver oil and gas, or other mineral leases to all or any part [of the estate].”<sup>33</sup> The deed creating the life estate also explicitly addressed the continued validity of any leases after the life tenant’s death:

And if oil, gas or other valuable minerals be discovered on or under said land, then and in such case the leasehold estate shall remain in the lessee, his heirs and assigns for such term and upon such conditions and requirements of the lessee after the death of my said father Dave N. McBride, as if he were living, except that the rents and royalties therefrom shall be payable to my said above named brothers and sisters [i.e., the remaindermen].<sup>34</sup>

The life tenant executed an oil and gas lease before he died, and the court had little difficulty concluding that the lease remained valid after the life tenant’s death.<sup>35</sup>

Subsequent cases in Texas have upheld the validity of leases granted by life tenants even when the scope of a life tenant’s authority to bind the remaindermen is less clear than it was in *Amarillo Oil*. A lease executed by a life tenant with the right to lease “for oil, gas, and mineral production, the primary term of any lease not to exceed ten (10) years in duration and so long thereafter as oil, gas or other minerals or either of them, are produced in paying quantities” was enforceable after the life tenant’s death.<sup>36</sup> Additionally, in 2004 a Texas appellate court held that a lease executed by a life tenant with the power “during...her lifetime” to “make leases of whatever nature” and “extract...all oil, gas and/or other minerals” remained

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32. 67 S.W.2d 1098 (Tex. Civ. App. 1934).

33. *Id.* at 1099.

34. *Id.*

35. *Id.* at 1101 (“The provisions of the deed...are not ambiguous”).

36. *Glass v. Skelly Oil Co.*, 469 S.W.2d 237, 240-41 (Tex. Civ. App. 1971) (“The creator of a life estate may empower the life tenant to dispose of the corpus. The courts will construe such provisions to give the fullest effect to the testator’s intentions”). The will creating the life estates at issue in this case did not explicitly state that a lease ratified by a life tenant would survive the expiration of the life estate. *See id.* at 238-39. *Glass* is factually unique in that the mineral development rights of the parties derived from Texas’s Relinquishment Act; the minerals at issue were owned by the state of Texas, but under the Act the surface owner is given authority to act as agent for the state in regards to mineral leasing, and is allowed to keep one-half of all bonus, royalty, and rental payments. *See id.* at 238.



valid after the end of the life estate.<sup>37</sup> “[W]e decline to hold,” said the court, “that the *time limits*...placed on [the life tenant’s] exercise of the powers granted to her – her lifetime – limited the *types* of leases she could enter.”<sup>38</sup>

As noted earlier, however, other states have shown a willingness to limit the term of an oil and gas lease executed by a life tenant with explicit authority over mineral development. In *Waters v. Monroe Coal Co.*,<sup>39</sup> an Ohio trial court held that a life tenant with the right to “use, possess and sell...coal and timber” did not have the power to bind future interests; the coal lease signed by the life tenant terminated upon his death.<sup>40</sup> Pennsylvania law, meanwhile, seems to require something like the explicit grant of authority to bind future interests seen in *Amarillo Oil*. In 1898, the Pennsylvania Supreme Court declined to terminate a lease after a life tenant’s death, although there the remaindermen saved the lease by ratifying it.<sup>41</sup> Had the ratification not occurred, according to the court, “in the absence of anything showing a different intention, we would be forced to the conclusion that this lease terminated at the death” of the life tenant.<sup>42</sup> In *Doverspike v. Chambers*,<sup>43</sup> a Pennsylvania court vacated a summary judgment order upholding the enforceability of an oil and gas lease after the

37. *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 373-74 (Tex. App. 2003) (emphasis omitted).

38. *Id.* at 374 (emphasis in original). The court further explained that “if a life tenant is granted the power to lease, but cannot bind future interests, ‘there is very little utility to the power because of the natural reluctance of any lessee to accept a lease which might be terminated by the death of the lessor.’” *Id.* (quoting 1 KUNTZ, *supra* note 2, § 8.1, at 214).

39. 376 N.E.2d 977 (Ohio Ct. Com. Pl. Muskingum Cnty. 1977).

40. *Id.* at 979 (“possess and sell from said land coal and timber”); *id.* at 980-81 (concluding “that the interest of the coal company in the subject property ceased with the death of Fred Waters”).

41. *Lake Erie Gas, Coal & Coke Co. v. Patterson*, 39 A. 68, 68-70 (Pa. 1898). The court described the remaindermen’s ratification as follows:

[A]ll of the parties interested in the property...joined in the execution of an instrument in writing to the plaintiff, assuring it (the said plaintiff) that it would not be dispossessed of the said leased premises, and agreeing to protect it in the possession thereof, to the full end of the term of said lease, and to execute any and all papers and assurances necessary to secure it in the possession of said premises.

*Id.* at 68. The court held that this ratification was effective under the terms of the lease, which it read as permitting the lease to remain valid as long as the life tenant could “through his executors, administrators, and assigns...in any way secure the peaceable possession guaranteed [to the lessee].” *Id.*

42. *Id.*

43. 516 A.2d 392 (Pa. Super. Ct. 1986).

death of a life tenant with mineral development rights, because the life tenant did not explicitly have authority to bind the future interests:

Unlike the intent to reserve a lease-making power in the life tenant, there is no language in the deed or the lease which would indicate any party's intent to extend the lease given by the life tenant beyond her life. Thus, we cannot say as a matter of law that the life tenant had the authority to bind the remaindermen to a mineral lease after the termination of her life estate.<sup>44</sup>

*B. Grants that do not address mineral development*

Some states have held that the power to initiate mineral development or bind future interests does not have to be explicit, but can be implicit in the grant of authority to the tenant.<sup>45</sup> In addition, at least three states have case law indicating that a general power to commit waste gives a life tenant the right to unilaterally develop minerals and keep the proceeds.

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44. *Id.* at 395-96. The deed creating the life estate in this case gave the life tenants the "coal and mining rights" to the land. *Id.* at 394. The deed also noted that the property was "under and subject to outstanding gas and oil leases" and assigned "the gas rentals and/or royalties" to the life tenants. *Id.* The oil and gas lease at issue in this case was executed in 1976 – six years after the creation of the life estate – by the sole remaining life tenant. *Id.* While it certainly seems possible to read the grant of authority to the life estate as limited to mining rights only, with the life tenants entitled to royalties from the then-valid gas lease but not authorized to execute any new oil and gas leases, the court rejected such an interpretation. *Id.* at 395. However, its explanation does not seem entirely persuasive, given that a right to royalty does not necessarily include development rights: "not only did they intend to preserve their rights under existing leases, but they reserved...the right to gas rentals or royalties. Therefore, it is clear that the grantors intended to give the life tenants the power to execute leases in addition to those already existing." *Id.*

The court did not directly comment on whether the language granting mining rights to the life tenants would have been sufficient to give them power to bind the remaindermen through a mining lease. On its face, however, the statement quoted above ("Unlike the intent to reserve a lease-making power") would suggest that the life tenant did have the power to bind the remaindermen as to mining.

45. *Schuylkill Trust Co. v. Schuylkill Mining Co.*, 57 A.2d 833, 835 (Pa. 1948) ("it is regarded as waste for a tenant in possession to open new mines or quarries upon the premises and take rock, oil, minerals, etc., therefrom unless expressly or by implication included in his agreement with the reversioner"). West Virginia, in a case where mineral development was not at issue, has also given at least some recognition to the idea that a life tenant can acquire a power by implication, rather than solely by an express grant. *Ray v. Frick Co.*, 57 S.E.2d 890, 893 (W.Va. 1950) ("it is not questioned that a grantor in a trust instrument such as is here involved may, expressly or impliedly, reserve unto himself the right and power to execute a lease which may extend beyond his lifetime").

In *Danielson v. Danielson*,<sup>46</sup> a father deeded a tract of land to his children, who conveyed a life estate back to him in return.<sup>47</sup> The conveyance gave the life tenant the “right to use [the land], as he may deem fit, and to receive the income and proceeds . . . .”<sup>48</sup> The life tenant began removing gravel from the land for commercial purposes; his children protested the removal of the gravel and filed suit.<sup>49</sup> A trial court permanently enjoined the life tenant from removing gravel from the property, but on appeal the Montana Supreme Court held that the language of conveyance unambiguously gave the life tenant unrestricted use of the land, and reversed.<sup>50</sup> According to the court, “the [lower court’s decision] imposed a restriction on the use of the premises by the life tenant that the parties themselves did not include in the written instrument creating the life estate.”<sup>51</sup>

Courts in Texas have also given some recognition to a life tenant’s right to develop minerals, when the tenant has been granted a general right to commit waste. In *Singleton v. Donalson*,<sup>52</sup> a life tenant in Texas with the power “to enjoy . . . [the] use and benefits” of an estate was entitled to all bonus and royalty payments generated by the estate’s leases.<sup>53</sup> In an earlier Texas case, a court imposed a traditional corpus/income distinction to divide the proceeds of a lease executed by the owner of a life estate with a right to sell the corpus “if necessary, for [the] comfortable support” of the original life tenant.<sup>54</sup> However, there the court’s ruling was a product of the unique facts at issue in the case, and not a rejection of the general principle that a right to consume the corpus of an estate includes a unilateral right to develop minerals.<sup>55</sup>

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46. 560 P.2d 893 (Mont. 1977).

47. *Id.* at 893.

48. *Id.* at 894.

49. *Id.* at 893-94.

50. *Id.* at 894-95.

51. *Id.* at 895.

52. 117 S.W.3d 516 (Tex. App. 2003).

53. *Id.* at 519-20.

54. *Johnson v. Messer*, 437 S.W.2d 643, 645 (Tex. Civ. App. 1969).

55. *Id.* at 646-47. In *Johnson*, a widower had been granted a life estate through his first wife’s will, and he later deeded the life estate to his second wife. *Id.* at 645. The second wife had a right to sell the corpus only if necessary for the comfortable support of the widower, and the court found “no evidence...to even indicate that it was necessary to sell the real estate or execute the oil and gas lease for [the original life tenant’s] comfortable support.” *Id.* at 645-46. The lease at issue in *Johnson* was executed by both the life tenant and the remaindermen; its validity was therefore unaffected by the court’s decision. *Id.* at 645-46.

Kentucky appellate courts have heard cases involving general grants to commit waste at least three times. Life tenants in Kentucky who had the power to use a tract “as they wish[ed]” were held to have the right to exercise control over the timber and mineral privileges associated with the land.<sup>56</sup> Later, a life tenant with “full and unconditional control” over a tract was found to have the right to harvest timber.<sup>57</sup> Finally, *Givens v. Givens*<sup>58</sup> is the Kentucky case most often cited in support of the proposition that a general right to commit waste gives a life tenant the right to develop minerals.<sup>59</sup> The life tenant in *Givens* executed a coal lease with a 40 year term and died nine days later.<sup>60</sup> The court acknowledged the general rule that a life tenant has no authority to lease for a term beyond the expiration of the life estate, but held that the power to encroach upon the corpus gives a life tenant the authority to make a lease that will remain valid after the tenant’s death.<sup>61</sup> “The argument,” according to the court, “is that if the life tenant could convey the property, she could lease it. There is merit in this argument.”<sup>62</sup>

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In addition, because the life tenant only had the right to *sell* the corpus, it is unclear if the life tenant had authority to lease unilaterally. The court chose to explicitly note that it saw the execution of a lease as distinct from a sale: “we do not consider that John E. Johnson and Esther Johnson ever sold an oil and gas lease; but that they...only executed an oil and gas lease.” *Id.* at 645. Kentucky courts, as discussed later in this section, appear to reject the implication made by the court in *Johnson* that a power to sell the entire corpus of an estate does not include or imply a power to lease the estate’s minerals. *See infra* notes 61-62 and accompanying text.

56. *Chappell v. Chappell*, 119 S.W. 218, 219 (Ky. 1909) (unpublished). The life tenants “had the right to use *for life* the land, its timber, and mineral privileges in any manner necessary to enable them to have a comfortable support,” which seems to raise the possibility that a mineral lease executed by these life tenants would have terminated at the expiration of the life estate. *Id.* (emphasis added).

57. *Cundiff v. Shackelford*, 150 S.W. 670, 671-72 (Ky. 1912). This case also appears to raise the possibility that, just as in England, equity could place limits on the actions a life tenant possessing a general right to commit waste can take: “[i]t does not appear that she was guilty of wanton and malicious waste in selling the timber in question...” *Id.* at 672.

58. 387 S.W.2d 851 (Ky. 1965).

59. *See, e.g., WILLIAMS & MEYERS, supra* note 7, § 512.1 n.1.

60. *Givens*, 387 S.W.2d at 852. The court described the life estate as having “a power to encroach upon the corpus,” but the opinion does not provide the precise language of the grant. *Id.*

61. *Id.* The fact that the coal lease lessee was also one of the remaindermen may have been a mitigating factor for the court in this case. *Id.* (“It may be observed that the remaindermen will benefit from this lease”). The court also forced the lessee to share the benefits of the lease with his co-remaindermen. *Id.* at 854.

62. *Id.* at 852. In support of this statement, the court cites to *Holland v. Bogardus-Hill Drug Co.*, 284 S.W. 121 (Mo. 1926) (en banc), calling it “[t]he only authority we have been

Not all states appear to follow Montana, Texas, and Kentucky on this issue. The Georgia Supreme Court, in a case not involving mineral development, has stated that unless given express authority to do so, a “life-tenant with other broad authority, does not have the power to will the property at his death, nor to lease property for a time extending beyond his own term.”<sup>63</sup> Additionally, in Kansas it is at least possible that the rationale in *Givens* – that the power to convey a property includes or implies a right to execute an oil and gas lease that will bind successors-in-interest – would not apply. In *Woelk v. Woelk*,<sup>64</sup> a life tenant who had “full power to sell and convey . . . real estate,” but was expressly denied the power to “mortgage or incumber” the estate was found to not have a unilateral right to execute oil and gas leases.<sup>65</sup>

#### V. *The Power to Commit Waste*

It is difficult to “find answers to new problems,” according to Prof. Eugene Kuntz, without “appraisal of the policies and purposes behind [a] doctrine.”<sup>66</sup> The purpose behind empowering a life tenant to commit waste seems reasonably clear: it is to give the tenant the maximum freedom to use and enjoy the corpus of the estate for his or her own benefit. As Prof. Kuntz and a Texas appellate court have both noted, a court that focuses on the purpose of a grant will be more likely to uphold the validity of a lease from a life tenant after the tenant’s death: “[i]f the holder of the power cannot bind future interests, there is very little utility to the power because of the natural reluctance of any lessee to accept a lease which might be terminated by the death of the lessor.”<sup>67</sup> Giving a life tenant a generalized

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able to discover on this point.” *Givens*, 387 S.W.2d at 852. In *Holland* – a case that does not involve mineral rights – a husband willed a life estate to his wife, giving her the right to use and dispose of the property subject to the life estate “just as I should have power to use, dispose of and enjoy it during my life for the use of myself and family did I survive her.” 284 S.W. at 122. The life estate included a building that the life tenant later leased out for term of over twelve years. *Id.* at 121. The life tenant died before the end of the lease, and the Missouri Supreme Court held that the lease was enforceable for its entire original term. *Id.* at 126.

63. *Phillips v. Sexton*, 255 S.E.2d 15, 17 (Ga. 1979) (citations omitted).

64. 254 P.2d 297 (Kan. 1953).

65. *Id.* at 299, 301. The court ruled that the encumbrance restriction prevented the life tenant from asserting a sole power to execute a lease; the opinion did not indicate how this case would have been decided if the grant to the life tenant did not include the restriction against encumbrances. *Id.* at 300-01.

66. 2 KUNTZ, *supra* note 2, § 20.4 at 126.

67. 1 KUNTZ, *supra* note 2, § 8.1 at 214; *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 374 (Tex. App. 2003) (quoting Prof. Kuntz).

power to commit waste should, therefore, create a presumption that the tenant has the authority to enter into agreements concerning the property that will bind its future owners.

American law provides other examples of actions authorized under a power that remain legally enforceable after the power is terminated or after the principal's death. An attorney-in-fact acting under a power of attorney generally has the power to bind the grantor of the power of attorney and the grantor's successors in interest.<sup>68</sup> Also, when a party is given a power coupled with an interest – that is, when a party is granted both a power and a “present interest in the property upon which the power is to operate”<sup>69</sup> – the holder of the power will have an agent's customary ability to bind the grantor, but also holds the power irrevocably.<sup>70</sup> The life tenant with a power to commit waste is very similarly situated to the holder of a power coupled with an interest: they both have a power over a given property, they both have a present interest in the property they have power over, and the power they exercise is not a “true agency power” – that is, the holder of the power exercises it in his or her own best interests instead of the grantor's, and the grantor cannot terminate the power at will.<sup>71</sup>

Texas case law on oil and gas pooling can also be read as potentially supporting the idea that a life tenant with the power to commit waste can grant a lease that will continue to be enforceable after the end of the life estate. In *Wagner & Brown, Ltd. v. Sheppard*,<sup>72</sup> a lease covering a tract of land that was part of a pooled unit expired.<sup>73</sup> The Texas Supreme Court held that the expiration of the lease did not remove the tract from the pooled unit; the lessee's decision to add the tract to the pool survived and remained effective after the lease expired.<sup>74</sup>

While the court's explanation of its decision in *Sheppard* is not entirely persuasive,<sup>75</sup> the result of the case can be reconciled with current

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68. *See, e.g.*, KAN. STAT. ANN. § 58-659(b) (2014).

69. HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 47(B) at 99 (2d ed. 1990).

70. *Id.* § 47(B) at 100 (“Generally, such a power is not terminated by the death or loss of capacity of either the donor or the holder of the power”).

71. *Id.*

72. 282 S.W.3d 419 (Tex. 2008).

73. *Id.* at 424. The Sheppard lease contained a provision terminating the lease if the lessee did not begin paying royalties within 120 days of first gas sales. *Id.* at 421. Both of the unit's producing wells were located on the Sheppard tract. *Id.*

74. *Id.* at 424. “Just as owners and operators generally must agree to create a pool,” according to the court, “they should also be able to agree when one terminates.” *Id.*

75. The court's rationale seemed to be based in part on a distinction between leases and lands: “both Sheppard's lease and the unit agreement pooled certain ‘premises’ and ‘lands,’

scholarship on voluntary oil and gas pooling, which involves the application of a power analysis to the rights a lessor receives under a lease's pooling clause.<sup>76</sup> A pooling clause, according to Prof. Lowe, "grants the lessee a power of attorney to pool the lessor's interest."<sup>77</sup> Because the lessee holds a power of attorney, it has the authority to make decisions that can bind the lessor, even after the power of attorney is revoked or expires.<sup>78</sup> Given that there is little dispute that a life tenant with the right to commit waste can grant a lease that will, at minimum, remain valid for as long as the life estate exists,<sup>79</sup> it is difficult to see how a life tenant could have the authority to give a lessee a power of attorney to pool lands without possessing a similar power to make binding decisions in his or her own right regarding oil and gas development on the property.

#### VI. Conclusion

While the available case law generally supports the idea that a life tenant whose estate is without impeachment for waste does not need the remaindermen's permission to develop minerals, it is unclear whether an oil and gas lease solely executed by such a life tenant is sufficient to bind the future interests after the expiration of the life estate. In Texas and Kentucky, however, there is authority to support the proposition that a life tenant with the right to commit waste can grant a lease that will remain binding, even when that tenant has not explicitly been granted the right to bind future interests. In addition, the very nature of the power given to this type of life tenant suggests that the tenant's right to permanently alter the value of the corpus must necessarily include the power to issue a lease that will remain valid after the life estate expires. Practitioners in states without significant case law on this issue, however, may prefer to follow the cautious approach advocated by some scholars: "[o]nly in the case where the grant clearly establishes the right to alienate mineral is it appropriate to

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not just their leased interests. Although Sheppard's lease expired, the lands themselves obviously did not." *Id.* at 422-23. Whatever the validity of such a distinction, it does not seem to adequately explain how the lessee's rights under the lease gave it the power to make decisions regarding the "lands" that would remain legally valid after the lease expired.

76. See LOWE ET AL., *supra* note 9, at 279-80 ("a pooling clause expands the lease grant by giving a lessee the power of attorney to pool the lessor's interest").

77. LOWE, *supra* note 5, at 243.

78. See RESTATEMENT (THIRD) OF AGENCY § 6.01-6.04 (2006).

79. See LOWE, *supra* note 5, at 105 ("if the instrument...creates a life estate 'without impeachment for waste,' the life tenant has no duty to conserve the minerals against depletion *under an oil and gas lease*" (emphasis added)).

deal only with the life tenant. Even then, it is prudent to seek ratification by remaindermen.”<sup>80</sup>

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80. Tom Galbraith & Timothy R. Smock, *Remaindermen and Other Interest(ed)(ing) People*, MINING AGREEMENTS II, Paper No. 3, 3-9 (Rocky Mtn. Min. L. Found. 1981).