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# A Tale of Two Owners: Real Property Co-Ownership and Mineral Developments

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Chapter 20  
A TALE OF TWO OWNERS:  
REAL PROPERTY CO-OWNERSHIP AND  
MINERAL DEVELOPMENT

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## § 20.01 Introduction

### [1] The Concept of Owning Together

Blackstone has defined the hallmark of private property as the ability to exclude others from use of property, subject only to the rules of law governing society.<sup>1</sup> When parties “own property together,” the right to exclude is modified: the co-owners cannot exclude each other, but they may protect the property and exclude non-members of the “owning” community, primarily through trespass laws. Although the form of “owning together” may vary, concurrent ownership is an all-inclusive term. Once there are two concurrent owners, a tale of two owners may begin.<sup>2</sup>

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<sup>1</sup> William Blackstone, *Commentaries on the Laws of England* \*2 and \*134.

<sup>2</sup> General treatments of concurrent ownership and mineral development include the following, in alphabetical order: Owen L. Anderson & Michael D. Cuda, “The Nonconsenting Cotenant in Oil and Gas Development: The Oil Patch Version of the ‘Little Red Hen,’” 12 *Eastern Min. L. Inst.* 16-1 (1991); Frank Erisman & Elizabeth Jennings Dalton, “Multi-Party Ownership of Minerals—Some Real Property Consequences of Joint Mineral Development,” 25 *Rocky Mt. Min. L. Inst.* 7-1 (1979); Richard W. Hemingway, *The Law of Oil and Gas* (3d ed. 1991); Will A. Knight, “Cotenancy—A Sometimes Unholy Alliance,” 33rd *Oil & Gas Inst.* 225 (Sw. L. Fdn. 1982); 1 Eugene Kuntz, *Law of Oil and Gas* §§ 5.1 - 5.12 (1987); Eugene Kuntz, “Gas Balancing Rights and Remedies in the Absence of a Balancing Agreement,” 35 *Rocky Mt. Min. L. Inst.* 13-1 (1989); Patrick H. Martin, “The Gas Balancing Agreement: What, When, Why, and How,” 36 *Rocky Mt. Min. L. Inst.* 13-1 (1990); Cheryl Outerbridge, “Missing and Unknown Mineral Owners,” 25 *Rocky Mt. Min. L. Inst.* 20-1 (1979); Homer J. Penn, “Cotenancy Problems: Is the Gas Balancing

Concurrent ownership originates in several ways. A common genesis is through marriage: a husband and wife seek to have their lives arranged as “one.” A similarly common, albeit less celebratory reason for concurrent ownership, arises from death. Either through intestacy or through devise, heirs or children are often left property to “share and share alike.” A final common rationale for concurrent ownership is more peculiar to the mineral industry. The presence or absence of minerals is often speculative. To spread risks and increase revenue possibilities, investors may buy partial mineral interests in several tracts. Shares of minerals can also compensate geologists or other collaborators.<sup>3</sup>

To fully understand the concurrent ownership problems that may confront the oil and gas developer, three major types of concurrent ownership must be addressed.<sup>4</sup> In the mineral investment realm, most concurrent ownership is as tenants in common. This mode of ownership therefore will receive primary attention. In distinguishing cotenancy from the other major forms of ownership, four attributes should be compared: (1) the right to alienate inter vivos by gift or sale, (2) the right to devise by will operable at death, (3) the right to pass the property at death through the relevant jurisdiction’s intestacy statutes, and (4) the ability to end the relationship and own the property individually. The cotenant has all four rights. The remaining two of the big three forms of concurrent ownership

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Agreement the Answer?” 33 *Rocky Mt. Min. L. Inst.* 18-1 (1987); James L. Shepherd, Jr., “Problems Incident to Joint Ownership of the Oil and Gas Leasehold Estate,” 5th *Oil & Gas Inst.* 215 (Sw. L. Fdn. 1954); Ernest E. Smith, “Gas Marketing by Co-Owners: Disproportionate Sales, Gas Imbalances and Lessors’ Claims to Royalties,” 39 *Baylor L. Rev.* 366 (1987); W.L. Summers, *Oil and Gas* (2d ed. 1954); and 2 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* §§ 502-10 (Martin & Kramer ed., 1996).

<sup>3</sup>Owners may also seek to cash in on a boom by granting multiple interests. See Outerbridge, *supra* note 2, at 20-3 to 20-5.

<sup>4</sup>Community property, tenancy in coparcenary, and tenancy in partnership are not discussed. For concurrent ownership generally, see, 4 *Thompson on Real Property*, Thomas Edition 1-189 and 313-46 (David A. Thomas ed., 1994); John E. Cribbet & Corwin W. Johnson, *Principles of the Law of Property* 86-107 (3d ed. 1989); and Roger A. Cunningham, William B. Stoebeck & Dale A. Whitman, *The Law of Property* 187-246 (2d ed. 1993).

that often impact title opinions are joint tenancy and tenancy by the entirety. These have only some of the incidents of a cotenancy. Both joint tenancy and tenancy by the entirety provide for a right of survivorship, which eliminates both the second and third attributes of a cotenancy. One fundamental difference between these two forms, however, is that a tenancy by the entirety may only be held by a husband and wife but anyone may be a joint tenant with anyone chosen.

## [2] Inherent Problems with Concurrent Ownership

Because no two people view the world identically, concurrent owners may not agree on property development. As a judge astutely noted, “Two . . . cannot plow the same furrow.”<sup>5</sup> Each owner could rush to reach his or her favored outcome. This leads to the phenomenon referred to as the “Tragedy of the Commons.”<sup>6</sup> Externalities may increase as each concurrent owner attempts to maximize his or her self-interest without considering the ultimate impact on the property’s value. Moreover, if anyone desired to purchase or otherwise develop the concurrently owned property, transaction costs increase if all co-owners must concur.

To clarify these principles, consider the consequences of a bequest by an Uncle Jed of a fishing cabin to his two favorite relatives, the siblings Avery and Lou, as tenants in common. It was the best of times; it was the worst of times. The loss of Uncle Jed was sad, but the thought of the cabin was pleasing. Nevertheless, some discontent would creep in over use of the cabin. And then, to unashamedly intermix cultural icons, the discord would increase as “up through the ground came some bubbling crude, oil that is, black gold.”<sup>7</sup>

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<sup>5</sup>Mastbaum v. Mastbaum, 9 A.2d 51, 55 (N.J. 1939).

<sup>6</sup>Garrett Hardin, “The Tragedy of the Commons,” 162 *Science* 1243 (1968) (when pasturage is owned in common, no individual herder has incentive to limit cattle grazed because others would consume forage if herder did not; decreased productivity may result).

<sup>7</sup>“The Ballad of Jed Clampett.”

## § 20.02 Tenants-in-Common and Non-Mineral Development

### [1] Basic Ownership Rights

Under current law, a deed or gift to one or more parties without additional verbiage is presumed to be a tenancy in common. Avery and Lou, as tenants in common, each have an “undivided” right to the whole. There is no line down the center of the fishing cabin as might be placed in the center of a room two squabbling children share. For a tenancy in common to exist, only one unity is required. The cotenants must have a unity of possession; they do not have to have the same shares in the property or have received their rights from the same source. It is essentially a relationship between people:

A tenancy in common has been defined as a joint interest in which there is unity of possession, but separate and distinct titles. The relationship exists where property is held by several distinct titles by unity of possession, and is not an estate but a relation between persons, the only essential being a possessory right, as to which all are entitled to equal use and possession.<sup>8</sup>

The cotenants, however, can treat their interests in the property as separate interests. Each tenant in common may sell his or her interest or even subdivide it. At the death of either sibling, if not earlier sold, the cotenant’s interest passes to a devisee by will or to the dead sibling’s heir by intestacy.

Nevertheless, both Avery and Lou during their co-ownership must let the other have possession of the cabin. Neither one can “oust” the other. Ouster is a denial of the right to share the property. Ouster, however, is difficult to define. Changing locks may not be sufficient to create an ouster if Avery answered the door bell and let Lou in. Physical removal definitely would be an ouster.<sup>9</sup> Cotenants also must not commit waste of the

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<sup>8</sup>De Mik v. Cargill, 485 P.2d 229, 232 (Okla. 1971). See also Thompson, *supra* note 4, § 32.06(a).

<sup>9</sup>For potential ousters in the oil and gas arena, see Anderson & Cuda, *supra* note 2, at 16-13 and 16-14 (need notorious, open actions that are communicated to the

property. In other words, one cotenant cannot unreasonably interfere with the other's expectations and injure the property. Removal of items from the land could be waste but the cotenant so removing, despite liability for waste, may gain title to the trees or other crops removed.<sup>10</sup> In order to end the relationship of cotenancy, however, partition is available. Partition would separate the property either physically (so ownership of separate tracts will be in severalty) or partition may ensue by selling the property and dividing the proceeds.

### **[2] When Cotenant Can Recover for Expenditures Made to Benefit Estate**

Not all cotenants will take equal interest in the concurrent estate. Presume, however, that neither Avery nor Lou are in exclusive possession of the fishing cabin. Avery, nevertheless, is a tinkerer and compulsive bill payer. If Avery wants to make Lou bear a proportionate share of expenses, the reckoning between the managing cotenant and the passive one can arise at three points of time. The first is during the pendency of the cotenancy when Avery might want an immediate contribution from Lou. The second possibility arises during a court proceeding for an accounting of rents and profits. The final time frame would be when partition is sought to end the estate. The last two scenarios assume that there may be some proceeds to be divvied up.

#### **[a] Property Leased by One Cotenant**

To continue our tale of two owners, without objection from Lou, Avery rents the fishing cabin for the season for \$2400.<sup>11</sup>

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other cotenant).

<sup>10</sup>The Statute of Westminster II in 1285 first authorized an action by a cotenant alleging waste or seeking partition. (13 Edw. I, 1 Statutes at Large 196). If a defendant was guilty of waste, the defendant could either accept a partition of the land or refrain from depleting the land except to the extent other cotenants depleted. In essence, the relief was "partition in kind or balancing in kind, at the election of the defendant." Kuntz, *supra* note 2, § 13.03[1] (calling remedy incomplete).

<sup>11</sup>Statute of Anne of 1705 (4 Anne, C. 16 VII, 11 Statutes at Large 161) allowed for accounting for the profits of renting co-owned property if one party received more than a just share or proportion. It, like the Statute of Westminster, was incorporated into the common law of the various states.



Avery had paid the following: \$500 for taxes; \$1000 on interest on the cabin's mortgage; \$100 principal on the cabin's mortgage; \$50 to unclog a drain; and \$75 to install a shower stall. In all, Avery spent \$1725. Avery might or might not seek recompense from Lou.

Avery's first possibility is an independent action for contribution against Lou for half of the costs.<sup>12</sup> To evaluate the remedy's availability, each item must be considered separately. If the repair of the drain was necessary, some courts would allow such an action if Avery gave notice to Lou of the need, although other courts seem to demand an agreement between the parties before allowing independent contribution for repairs. The shower stall presents a different question; if it is considered an improvement no contribution will lie.<sup>13</sup> As for the taxes and mortgage payments, some courts will allow an independent action if both were liable for the payments. The theory for recovery is subrogation; Avery would have paid the debts of Lou and might be able to enforce Lou's duties by a new lien on the property.<sup>14</sup> Avery, however, might not worry at this point because Avery has the \$2400 rent proceeds.

Naturally, Avery's enriched bank balance might arouse Lou's interest. Lou could seek an accounting to go after half the proceeds, namely \$1200.<sup>15</sup> Avery will seek credit for half of the expenditures: \$250 taxes, \$550 mortgage payments, and at least the \$25 drain repair. Lou would get the proceeds less these expenses. As for the shower stall, Avery would get credit if the stall was an improvement that increased the value of the fishing cabin.

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<sup>12</sup>See generally 4 Thompson, *supra* note 4, § 32.07(b).

<sup>13</sup>An exception from the rule of no contribution for improvements is if the improvement is necessary to prevent waste. A new roof might be such an example. *Shaw & Estes v. Texas Consolidated Oils*, 299 S.W.2d 307 (Tex. App. 1957 writ refused n.r.e.).

<sup>14</sup>Some jurisdictions have modified the tax responsibilities of co-owners. Hence, additional payments would be voluntary and not subject to reimbursement. See *Smith v. Anderson*, 57 Cal. Rptr. 774 (1967) (principle that tax payment inures to benefit of all cotenants inapplicable if interests separately taxed).

<sup>15</sup>See generally 4 Thompson, *supra* note 4, § 32.07(c).

Some variants on the hypothetical can further clarify the relationship of the parties. What if the mortgage interest was \$2000? Lou would then be liable for an extra \$500. A suit for accounting would not be advisable by Lou; Lou would owe \$125 if Avery sought contribution through a counter claim. In this situation, however, Avery might want to seek an accounting to clarify obligations and get the extra \$125 owed by Lou on the books for later reckoning even if Avery could not get the money by an independent contribution action.

As another variant, suppose that Avery transforms the fishing cabin into a more winter-proof dwelling and rents it to skiers for \$300 a week. The total take one season was \$1200. Avery would not have to account to Lou for these proceeds. Nor could Avery directly get the improvement costs from Lou.<sup>16</sup>

### **[b] Property Exclusively Used by One Cotenant**

To change the hypothetical, presume Avery made the original \$1725 worth of expenditures and used the fishing cabin each weekend. Lou is in Maine and has no desire to use the cabin but, in fact, seeks partition. The effect of Avery having exclusive possession varies from jurisdiction to jurisdiction. Under the majority approach,<sup>17</sup> Avery would have no right to any credit for excess expenditures in an accounting because Avery's exclusive possession would be presumed to offset the increased expenses; the expenses would be equivalent to the rental value of the cabin. Under a second approach, the cotenant out of possession may prove the value of exclusive possession and, in theory, may be owed

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<sup>16</sup>The concept behind not allowing contribution for improvements is that no one should be forced out of their estate by another voluntarily incurring unneeded costs.

<sup>17</sup>*Mastbaum v. Mastbaum*, 9 A.2d 51 (N.J. 1939); *Barrow v. Barrow*, 527 So. 2d 1373 (Fla. 1988). This approach encourages property use; improvements would be made and normally the using cotenant will not owe rent. But even under it, at some point the non-possessing cotenant may have a right to 1/2 of the cabin's reasonable rental value if that cotenant could prove ouster. Flexible, individual attention to when an ouster transpired allows the expectation of the parties to enter the equation. For example, if children inherit a house, what they might expect if one sibling remains in the house may turn on the type of property, the wealth of each sibling, and the siblings' conduct before and after the death of their parents.

rent if half the expenses were less than 1/2 the rental value.<sup>18</sup> A second minority approach would enable Avery to be recompensed for the excess payments because Lou was not formally ousted; Lou retained the right to possession.<sup>19</sup> According to these jurisdictions, the Statute of Anne only requires accounting for third party rents and Avery's actions benefitted all concurrent owners.

### [3] How to End the Tenancy-in-Common

Partition would separate the property either physically (so ownership will be in severalty) or partition may take place by selling the property and dividing the proceeds. As the Kansas court put it in *Muslow v. Gerber Energy Corp.*,<sup>20</sup> partition is "much favored in law because it secures peace, promotes industry and enterprise and avoids compelling an unwilling person to use their property in common."<sup>21</sup> Partition in kind is the theoretical first choice so each party could retain realty.<sup>22</sup> If separation cannot be accomplished evenly, one cotenant may make a cash payment known as owelty.<sup>23</sup> Additionally, if separating the property would lower its overall value, courts may order partition by sale, also referred to as licitation.

Often, an accounting accompanies the partition action. The majority rule treats improvements made by one cotenant as being credited totally to the improving cotenant with one caveat: the so-called improvements must have actually improved the value of the property.<sup>24</sup> Giving the improving cotenant the total increase in value may credit that cotenant

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<sup>18</sup> *Cohen v. Cohen*, 106 N.E.2d 77 (Ohio 1952). This may lead to less incentive to seek partition and end potential problems.

<sup>19</sup> *Baird v. Moore*, 141 A.2d 324 (N.J. 1958).

<sup>20</sup> 697 P.2d 1269 (Kan. 1985).

<sup>21</sup> *Id.* at 1273.

<sup>22</sup> See generally 4 Thompson, *supra* note 4, § 38.04.

<sup>23</sup> *Cain v. Christie*, 937 P.2d 119 (Okla. Ct. App. 1997).

<sup>24</sup> See generally Cunningham *et al.*, *supra* note 4, § 5.12.

with more than the tenant's expenditures. If the so-called improvements did not increase the value of the property, however, the expending cotenant bears their full cost. The rationale for giving all the increase in value to the active cotenant reflects the fact that often there is no incentive to improve common property. The rule therefore encourages risk. Assigning the active tenant any loss, however, helps to prevent improvident modifications to the property.

Repairs, however, are generally treated differently in an accounting. The expending cotenant is at least always given a credit. Repairs are deemed somehow necessary; they could preserve the estate and prevent waste. Sometimes, however, it is difficult to draw the line between repairs and improvements.<sup>25</sup>

#### **[4] Extent of Fiduciary Duties Between Co-Owners**

Cotenants, especially when they receive interests by the same deed or transaction, such as a will, are often viewed as fiduciaries. These types of concurrent owners owe a high degree of care for interests of others. This makes sense in the situation of a will, which normally deals with families.<sup>26</sup> It is less material in the investment situation.<sup>27</sup>

#### **§ 20.03 Joint Tenancy Contrasted with Tenancy-in-Common and Tenancy by Entirety**

Both of the remaining types of concurrent ownership differ from tenancy in common in one respect: the concurrent owners who hold by joint tenancy and tenancy by the entirety have rights of survivorship. In other respects, the joint tenancy acts like a tenancy in common hypothetical; a tenancy by the entireties, however, has different rules about management of the co-owned property. Although later sections of this article pay primary attention to mineral development, relevant peculiarities of these two forms of concurrent ownership will be addressed directly as they are explained.

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<sup>25</sup>See *supra* note 13 for the problems of classifying a new roof.

<sup>26</sup>See *Cunningham et al.*, *supra* note 4, at 217-22.

<sup>27</sup>See § 20.11, *infra*.

## [1] Joint Tenancy

### [a] Creation

For joint tenancy, it would be preferable to make the tale one of three owners. A typical conveyance that would create a joint tenancy would grant to "A, B, and C as joint tenants." Often a scrivener will add "with rights of survivorship."<sup>28</sup> At common law, conveyances to "A, B, and C jointly" or simply to "A, B, and C" were presumed to create a joint tenancy; tenancy in common, however, is the preferred construction of an ambiguous grant today, but some common law traditions still do govern for joint tenancies. Most importantly, four unities mark a joint tenancy.<sup>29</sup>

At common law, to be joint tenants required four unities to be present. The first is the same unity required for a tenancy at common: the concurrent owners must have unity of possession. Each must have the right to possess the whole. The second unity is that of time. The joint tenants must have received their interest at the same time. The third unity is the unity of title: rights must be derived from the same source, be it a deed, will or by adverse possession together. The fourth unity is referred to as unity of interest. It is presumed that the joint tenants have equal undivided shares and their rights must be of equal duration, that is, either a leasehold, fee, or life estate. Therefore, an initial grant from O to A, B, and C as joint tenants would be interpreted as A, B, C each owning an 1/3 undivided interest in fee as joint tenants. To illustrate how survivorship works, if no inter vivos conveyances are made by A, B, or C, when A dies then B and C would each own an 1/2 undivided interest in fee as joint tenants. On the death of B, C would own all the property in fee simple.

### [b] Concept of Severance of Joint Tenancy

Because of the importance of the four unities to a joint tenancy, a joint tenancy is a fragile vehicle. A joint tenancy

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<sup>28</sup>In some jurisdictions, such as Texas, the parties must clearly contract for survivorship. Tex. Probate Code Ann. § 46 (1987). See generally Cribbet & Johnson, *supra* note 4, at 106-08 and Cunningham *et al.*, *supra* note 4, at 196-98.

<sup>29</sup>See generally 4 Thompson, *supra* note 4, § 31.06.

may be “severed” by the action of one of the joint tenants that interferes with the four unities.<sup>30</sup> To illustrate, return to A, B, and C, who are all living joint tenants. Next, presume that A conveys A’s interest to D. After the conveyance, title will not remain the same with D substituted. D cannot be a joint tenant with B and C because the unities of time and title are not present.

There could be two possible ways to appraise title at this point. One alternative would be that A, B, and D each have 1/3 undivided interests as tenants in common. An argument against this is that B and C still have all the unities that were required to create the joint tenancy. It was only A who interfered by the conveyance to D. This analysis leads to the correct response. Title to this land is now “blended”: B and C hold 2/3 as joint tenants and D owns an undivided 1/3 as a tenant in common. If B then dies intestate under a statute dictating that all of B’s property was to go to H, H would not get B’s interest in the property. B was a joint tenant and C’s rights of survivorship would take effect. C and D would then be tenants in common, with C having an undivided 2/3 interest and D an undivided 1/3 interest. To slightly vary the problem, presume B had died and left a will expressly giving the subject land to H. The result, nevertheless, would not change. Despite the fact that the will showed B had an intent to sever the joint tenancy, a will operates as of death and, at the instant of death, C got B’s share. An inter vivos transfer is needed to create a severance.

One inter vivos transfer that raises questions is whether or not an oil and gas lease executed by one joint tenant should sever the joint tenancy.<sup>31</sup> Obviously, if it does not sever the joint tenancy and the leasing joint tenant dies, the oil company would have no rights. The preferred view of commentators is to consider the lease as severing only the oil and gas estate for the life of the lease. The surviving joint tenant would have 1/2 of the oil and gas unburdened by the oil and gas lease and the

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<sup>30</sup>See generally *Cunningham et al.*, *supra* note 4, § 5.4.

<sup>31</sup>See 1 Kuntz, *supra* note 2, § 5.9 and Marjorie P. Mosburg, “Effect of Mineral Lease On Joint Tenancy,” 12 *Okla. L. Rev.* 302 (1959).

existing lease would burden the remaining half. At the end of the leasehold, the surviving joint tenant would own all the minerals and land. One reason commending this solution is the nature of property most often held in joint tenancy: farms, ranches, homes, and investment housing. Laymen favor joint tenancy for these types of properties because of the automatic nature of the estate. The property goes to the other joint tenant at death if neither did anything. This avoids probate delays, and creditors of the dead person.<sup>32</sup> An oil and gas lease totally severing the joint tenancy would interfere with this fundamental estate planning.

### **[c] Partition of Joint Tenancy**

Most statutes directly allow for partition of joint tenancies. Even if they do not allow the same directly, because the joint tenancy can be severed and a tenancy in common created, partition is available to all joint tenants, albeit circuitously.<sup>33</sup> Despite the fact that one of the four unities of a joint tenancy is unity of interest, on partition one joint tenant could prove that the shares were not equal based on contributions to the purchase price or other intentions.<sup>34</sup>

### **[2] Tenancy by the Entirety**

There are differences between joint tenancy and tenancy by entirety despite both having rights of survivorship and requiring the four unities for creation. A joint tenancy may be severed and generally may be partitioned. Anyone may decide to be a joint tenant with anyone, but a tenancy by entirety requires a husband and wife. Therefore, the estate needs a fifth unity, that of marriage. Moreover, with a tenancy by the entireties, a conveyance cannot sever the relationship. Furthermore, neither owner can seek partition. Divorce or conveyance from one spouse to the other are the only ways to modify the

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<sup>32</sup>The technique will not avoid estate taxes because property passes because of death. The Internal Revenue Service computes the share that goes to the survivor based on contributions to its purchase; it does not necessarily presume equal shares. Cribbet & Johnson, *supra* note 4, at 110.

<sup>33</sup>See generally 4 Thompson, *supra* note 4, § 38.03(a).

<sup>34</sup>Jezo v. Jezo, 127 N.W.2d 246, 250, *reh'g denied*, 129 N.W.2d 195 (Wis. 1964).

estate. Currently, only twenty-five states at most recognize the estate at all.<sup>35</sup>

There are four models or theories of how a tenancy by the entireties can be managed. All four recognize that neither the husband nor the wife can defeat the survivorship rights of the other.<sup>36</sup> The first model, however, would follow the old common law and views the husband as the sole manager of the property. He can convey the property and his creditors can attach his interest, subject to the wife's survivorship rights. A second model converts the estate to something resembling a tenancy in common with survivorship rights; creditors of either spouse may attach their individual debtor's interest. The third way of looking at the estate is that a conveyance by one spouse alone is wholly void and a creditor of one spouse cannot reach even that party's interest. The final view is that a creditor of an individual spouse could attach its debtor's contingent right of survivorship.

Little caselaw exists on tenancies by the entireties and oil and gas. It is presumed states would follow the model they adopt in other settings.<sup>37</sup> Regardless of the theory of management adopted, however, neither spouse can defeat the right of survivorship. Therefore, even if at common law the husband and/or wife individually could lease, such an oil and gas lease would be risky if the leasing spouse dies first. One reported case required both spouses to lease.<sup>38</sup> Another case, *Tyler v. Boucher*,<sup>39</sup> explains the estate in some detail. The court found

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<sup>35</sup> 4 Thompson, *supra* note 4, at 112 n.85. Included in these are Alaska, Arkansas, Oklahoma, Oregon, and Wyoming. Other commentators list fewer states. See Cunningham *et al.*, *supra* note 4, at 203 n.3.

<sup>36</sup> See generally *Ward Terry & Co. v. Hensen*, 297 P.2d 213 (Wyo. 1956); *Sawado v. Endo*, 561 P.2d 1291 (Haw. 1977).

<sup>37</sup> See 1 Kuntz, *supra* note 2, § 5.10; and 2 Williams & Meyers, *supra* note 2, § 502 at 576.3 (assumes lack of litigation reflects few disagreements between spouses and little productive land is held this way).

<sup>38</sup> *Eadus v. Hunter*, 228 N.W. 782 (Mich. 1930), *rev'd on other grounds*, 256 N.W. 323 (Mich. 1934).

<sup>39</sup> 285 S.W.2d 524 (Ark. 1956). See also *Hercules v. Jones*, 609 A.2d 837 (Pa. Super. Ct. 1992) (if parties owned 1/2 interest in a joint tenancy as tenants by the



the husband's sole conveyance gave the husband's rights to the grantee. When the husband and wife subsequently conveyed a 1/2 interest jointly, the grantee received all rights during the life of the spouses. Furthermore, because of the husband's individual conveyance, the grantee's interest would be indefeasible if the wife died first. However, if the husband died first, the wife would get survivorship rights and the grantee and wife would be equal tenants in common.

### § 20.04 Who Can Authorize Use of Oil and Gas

The following discussion applies to concurrent ownership in the form of joint tenancy and tenancy in common.<sup>40</sup> A reference to "co-owner" will include either type of owner. As noted above, co-owners have the undivided right to possess the entire estate. Minerals provide a different problem than a fishing cabin; to accommodate more cotenants in the cabin simply requires extra beds. Minerals, however, are "used" in two ways. The first is by actual development. This would consume part of the estate and therefore could theoretically be waste. The second way to use a mineral estate is through geophysical exploration. Geophysical exploration can determine the boundaries of the estate's value.<sup>41</sup> Two theories have evolved to reconcile the relationships between co-owners.

To continue our tale, different oil companies that believe there is some potential in the area now contact Avery and Lou. Avery, as we may expect, is more enthusiastic than Lou. What rights the co-owners will have to develop or prevent oil and gas development are different than those employed to reconcile using or renting the fishing cabin itself.<sup>42</sup>

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entireties, the survivorship mechanisms of both tenancies applied and the survivor of the marriage became the joint tenant with the other party).

<sup>40</sup>Whether or not leasing by one joint tenant severs the estate is immaterial to the discussion of whether the leasing or development could take place. The rules for tenancy by entirety were briefly discussed in § 20.03[2], *supra*. For a review of community property rules and other implications of marital rights, see Steven J. Hull, "Spousal Joinder Requirements in the Rocky Mountain States," 29 *Rocky Mt. Min. L. Inst.* 545 (1983).

<sup>41</sup>*Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957).

<sup>42</sup>For treatments of the problems for minerals other than oil and gas, see

### [1] Minority Rule: No Co-Owner Can Individually Develop Minerals

A unilateral decision to remove part of a jointly owned estate has concerned various jurisdictions, partly because it intrudes upon common law notions of waste, which require co-owners to preserve the co-owned estates.<sup>43</sup> An oft-cited and cogently argued case for the minority position is *Law v. Heck Oil Co.*<sup>44</sup> It notes that a mineral interest is real property, but the produced minerals are personalty. To the West Virginia court, each owner has the right to keep real property as real property and an injunction is proper if all do not concur in development.<sup>45</sup> The court did acknowledge that one co-owner might need to act in the face of potential drainage or else literal waste or loss of the estate would ensue.<sup>46</sup>

The result of the *Law* case, however, was that the holder of a very small interest could block development by “holding-out” for an exorbitant sum. In the particular case, the owner of an undivided 1/768 interest in the oil and gas under the

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Erismann & Dalton, *supra* note 2, and Bruce E. Cryder & Lynn F. Hendon, “Concurrent and Successive Ownership of Coal Property,” 11 *Eastern Min. L. Inst.* 10-1 (1990).

<sup>43</sup> *Murray v. Haverty*, 70 Ill. 318 (1873) (interpreting mineral development by one cotenant as violating statute authorizing actions against a cotenant who “shall take away, destroy, lessen in value or otherwise injure the common property”). Loosely defined, waste is any action that will diminish the value and enjoyment of the property.

<sup>44</sup> 145 S.E. 601 (W. Va. 1928).

<sup>45</sup> The other major proponents of the rule are Illinois, Louisiana, and Michigan. *Zeigler v. Brenneman*, 86 N.E. 597 (Ill. 1908); *Campbell v. Homer Ore Co.*, 16 N.W.2d 125 (Mich. 1944); *GMB Gas Corp. v. Cox*, 340 So. 2d 638 (La. Ct. App. 1976). Louisiana’s adoption of the rule is not founded on waste, but on the theory that co-owners are owners of the whole and must agree. As between the owner of the estate subject to the servitude and the servitude co-owners, however, production by one (although unauthorized by the other) interrupts prescription. *Cox v. Sanders*, 421 So. 2d 869 (La. 1982). Virginia may have adopted the rule in a recent controversial case. *Chosar Corp. v. Owens*, 370 S.E.2d 305 (Va. 1988).

<sup>46</sup> *Law*, 145 S.E. at 601. See also *Paxton v. Benedum-Trees Oil Co.*, 94 S.E. 472 (W. Va. 1917) (non-leasing cotenant may permit lessee to continue operations and require lessee to account for the cotenant’s proportionate share of royalty).

131 acre tract demanded \$1000. Methods to break the logjam that can arise in such jurisdictions include seeking partition, attempting to use compulsory pooling statutes, or resorting to specific statutory provisions that enable development to go forward on the desire of specified amounts of undivided interests.<sup>47</sup> Absent the availability of any statute to assist Avery, Lou could block actual oil development unless drainage was imminent. Other jurisdictions provide for accounting remedies for co-owners such as Lou if Avery develops the property.<sup>48</sup>

The oil companies might, however, merely want to do seismic investigations of Avery and Lou's land. There is less precedent dealing with whether one co-owner in a minority jurisdiction could unilaterally authorize geophysical exploration, which is an attribute of a mineral estate.<sup>49</sup> Unlike development, exploration can be performed multiple times.<sup>50</sup> Nevertheless, unsuccessful exploration could lower

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<sup>47</sup> See generally Ernest E. Smith, "Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests," 43 *Tex. L. Rev.* 129 (1964). The followers of the minority rule with statutory provisions include La. Rev. Stat. Ann. §§ 31:174 - 31:177 (1988 & Supp. 1997) (majority rule governs if 80% of interest owners agree); 765 Ill. Comp. Stat. Ann. 520/0/01-520/10 (West 1993) (owners of majority may seek court order to authorize drilling for the benefit of all); and Mich. Comp. Laws Ann. § 319.101 (1984) (similar to Illinois). For an examination of compulsory pooling statutes and minority jurisdictions, see Anderson & Cuda, *supra* note 2, at 16-30 to 16-34, and Smith, *supra*, at 138-40. For Louisiana law, see Guy E. Wall, "Joint Oil and Gas Operations in Louisiana," 53 *La. L. Rev.* 1 (1992).

<sup>48</sup> *Campbell*, 16 N.W.2d at 125. See generally Anderson & Cuda, *supra* note 2, at 16-25 to 16-30 and 2 Williams & Meyers, *supra* note 2, § 504.2. A Michigan case also allowed one producing cotenant to obtain the other cotenant's title through adverse possession without an ouster of the other cotenant. *Thomas v. Rex A. Wilcox Trust*, 463 N.W.2d 190 (Mich. Ct. App. 1990). Generally, one cotenant cannot adversely possess against another without ouster because each has the right to use the property. Michigan considers development by one cotenant waste and thus adverse.

<sup>49</sup> See *Smith v. United Fuel Gas Co.*, 166 S.E. 533 (W. Va. 1932) (cotenant may enter to explore but production would be waste). Louisiana covers geophysical operations under its statute, allowing those with 80% interest to proceed. La. Rev. Stat. § 175 (1996) (added by amendment in 1995).

<sup>50</sup> *Cf. Mustang Production Co. v. Texaco, Inc.*, 754 F.2d 892 (10th Cir. 1985) (do not presume lessee gets exclusive exploration rights unless lease is specific).

the speculative value of the property, and potentially injure the non-consenting co-owner.<sup>51</sup>

## [2] Majority Rule: Each Co-Owner Can Individually Develop Minerals

If Avery and Lou's land is in a jurisdiction that follows the majority rule, each co-owner could develop the minerals individually. They would not be liable for waste for producing oil or gas.<sup>52</sup> The theory behind allowing each co-owner to develop is that each co-owner has an undivided right to possess and use the co-owned property. An eloquent expression of this concept is found in *Prairie Oil & Gas Co. v. Allen*.<sup>53</sup>

Tenants in common are the owners of the substance of the estate. They may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such ownership. Since an estate of a cotenant in a mine or oil well can only be enjoyed by removing the products thereof, the taking of mineral from a mine and the extraction of oil from an oil well are the use and not the destruction of the estate. This being true, a tenant in common, without the consent of his cotenant, has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants. He must not, however, exclude his cotenant from exercising the same rights and privileges.<sup>54</sup>

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<sup>51</sup> Cf. *Martel v. Hall Oil Co.*, 253 P. 862 (Wyo. 1927) (loss of speculative value not compensable from trespass) and *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190 (Tex. Com. App. 1925) (loss of speculative value is compensable damage from trespass).

<sup>52</sup> This does not mean that one cotenant could not be liable for "waste" for actions other than simple production. Waste is hard to define, but it includes permanent damage to the property from an abandoned well used for salt water disposal. *Cooperative Refinery Association v. Young*, 393 P.2d 537 (Okla. 1964) (operating cotenant liable to other cotenants).

<sup>53</sup> 2 F.2d 566 (8th Cir. 1924) (applying Oklahoma law).

<sup>54</sup> *Id.* at 571. As expressed by Martin, *supra* note 2, at 13-9:

In addition to recognizing development as a co-owner's appropriate possession, the majority rule recognizes that for hydrocarbons, their fugitive character could mean that if co-owners must wait for all to concur, minerals could be drained.<sup>55</sup> An important corollary of the rule that each co-owner has the right to develop and sell the oil is that the purchaser from the developing cotenant does not convert oil owned by another co-owner.<sup>56</sup> The rule is followed in Alabama, Arkansas, California, Florida, Georgia, Kansas, Kentucky, Missouri, Montana, North Dakota, Oklahoma, Pennsylvania, and Texas.<sup>57</sup>

There are two constraints on the developing cotenant. First, the cotenant cannot exclude the other co-owner from also developing.<sup>58</sup> Second, the developing co-owner must account

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The "true cotenancy" approach postulates an ownership right in every molecule of gas, and any sale of the gas stream inures to the benefit or detriment of every party with an ownership interest. Failure to account for the value realized by a selling party would be keeping money that belongs to others. Such an approach must reject the idea that any party has a right to take a share in kind because everyone shares an ownership right in each and every molecule.

Although his definition is correct, industry custom did develop so as to allow cotenants to balance in kind if desired.

<sup>55</sup>Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. Civ. App. 1912), *aff'd*, 195 S.W. 1139 (Tex. 1917). A cotenant, however, does not have an affirmative duty to drill and protect another cotenant from drainage. Zimmerman v. Texaco, Inc., 409 S.W.2d 607 (Tex. Civ. App. 1966 error ref'd, n.r.e.) (involved unleased owner of 1/12 interest suing lessee of remaining 11/12 interest; unleased owner could drill if desired).

<sup>56</sup>Bullard v. Broadwell, 588 S.W.2d 398, 400 (Tex. App. 1979) (developing co-owner must account).

<sup>57</sup>Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968); Marias River Syndicate v. Big West Well Co., 38 P.2d 599 (Mont. 1934). For additional cases, see 2 Summers, *supra* note 2, § 472; 1 Kuntz, *supra* note 2, § 5.3; and Fife v. Thompson, 708 S.W.2d 611 (Ark. 1986).

<sup>58</sup>Superior Oil Co. v. Oklahoma Corp. Comm'n, 242 P.2d 454, 456 (Okla. 1952) (drilling only well allowable under relevant spacing rules not an ouster). Because each co-tenant has the right to develop the minerals, it is difficult for one cotenant to clear title by adverse possession. A clear, communicated ouster is needed. Patrick J. Carver & Patricia J. Winmill, "Medicine for Ailing Mineral Titles: An Assessment of the Impact of Adverse Possession, Statutes of Limitation, and Dormant Mineral Acts," 29 *Rocky Mt. Min. L. Inst.* 267, 276-77 (1983).

to the other co-owners and bears the financial risk. The non-consenting co-owner is “carried” for the test well and need not pay for a dry hole out of pocket.<sup>59</sup>

Absent a mining partnership, the non-developing co-owner is not personally liable for costs. For example, in *Sparks Brothers Drilling Co. v. Texas Moran Explor. Co.*,<sup>60</sup> a 1/4 interest owner was found only liable to the extent of its interest in well, which was operating under a standard Joint Operating Agreement (JOA) that denied the creation of a partnership. The court found there was no mining partnership, which requires: (1) a joint interest in the property, (2) an express or implied agreement to share profits and losses, and (3) cooperation in the project.<sup>61</sup> In *Sparks Brothers*, there was a question as to whether the cotenant participated in management. It is clear, however, that cotenancy alone does not create a partnership. For a partnership, a community of losses as well as profits is needed.<sup>62</sup> If cotenants develop pursuant to an agreement, they can, of course, have personal liability for costs and each could lien the other cotenant’s interest.<sup>63</sup>

### [a] Each Co-Owner May Lease for Oil and Gas

One of the primary attributes of the majority rule is that each co-owner can lease individually, so Avery could proceed. The lease from one co-owner will not bind the non-consenting cotenant, but will be a lease of the consenting co-owners’ share. In other words, the lessee steps into the shoes of the

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<sup>59</sup>*Krug v. Krug*, 618 P.2d 323, 325-26 (Kan. Ct. App. 1980); *Willson v. Superior Oil Co.*, 274 S.W.2d 947, 950 (Tex. Civ. App. 1954) (driller does so at own risk of a dry hole).

<sup>60</sup>829 P.2d 951 (Okla. 1991).

<sup>61</sup>*Id.* at 953. For mining partnerships in general, see *Shepherd*, *supra* note 2, at 234-50 and *Erisman & Dalton*, *supra* note 2, at 7-38 to 7-60.

<sup>62</sup>*Germer v. Donaldson*, 18 F.2d 697, 699 (3d Cir. 1927) (agreement allowed cotenant when notified to participate in expenses and if co-tenant does not do so, even if not notified, would only get royalty). See also *Krug*, 618 P.2d at 325.

<sup>63</sup>*Hill v. Field*, 384 F.2d 829, 831 (10th Cir. 1967).

lessor.<sup>64</sup> The lessee is not a trespasser as to the non-leasing co-owners but becomes upon entry a tenant in common. As will be made more vivid later, the Kansas court correctly recognized that while a lease from one co-owner gives legal rights, a lease from one co-owner might not be worthwhile economically because of the need to account; deductibility of expenses will often be an issue and create hazards for the developer.<sup>65</sup>

The difficulty arises out of a basic premise of the majority rule, namely that one co-owner cannot compel another co-owner to sign a lease. The Tenth Circuit underscored this point when it rejected an innovative remedy the district court ordered. A co-owner of a term interest claimed that the other co-owner was trying to freeze out development until the term ended. The district court remedy was to let first one party have the option to drill, and then the other. The non-consenting party would get a proportionate royalty.<sup>66</sup> The Tenth Circuit in *Shell Oil Co. v. Seeligson*<sup>67</sup> said the remedy would inappropriately convert a mineral interest to a royalty.<sup>68</sup>

Another corollary of individual development is that the oil and gas lease one co-owner executes is valid between its parties, but does not affect the other co-owner.<sup>69</sup> For example, when some co-owners leased and communitized the concurrently owned land with other land, non-leasing co-owners had no right to share in proceeds when the production was not from the land in which they owned minerals. To

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<sup>64</sup>*Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 572 (8th Cir. 1924).

<sup>65</sup>*Brooks v. Mull*, 78 P.2d 879 (Kan. 1938). *Cf. Gerhard v. Stephens*, 442 P.2d 692, 716 (Cal. 1968) (rationale for non-development that countered abandonment claim was that 148 cotenants existed who could not be located).

<sup>66</sup>*Seeligson v. Eilers*, 131 F. Supp. 639 (D. Kan. 1955).

<sup>67</sup>231 F.2d 14 (10th Cir. 1955).

<sup>68</sup>*Id.* at 18. *See also Bemis v. Bemis*, 98 P.2d 156 (Kan. 1940) (cannot compel one cotenant to sign a lease).

<sup>69</sup>*Willson v. Superior Oil Co.*, 274 S.W.2d 947 (Tex. Civ. App. 1954).

share proceeds, the non-leasing co-owners must ratify and join the lease and communitization agreement.<sup>70</sup>

The premise that one co-owner cannot tie another to a lease does make it appear incongruous that a non-leasing co-owner can ratify a lease. Normally, ratification is possible when someone could have entered into a contract on another's behalf, but a technicality prevented the contract from being valid. A co-owner, however, can ratify the act of one who could not have previously bound the co-owner's interest. Signing of division orders could be a ratification.<sup>71</sup> Other forms of ratification may include signing copies of the lease and accepting rentals with knowledge of the lease.<sup>72</sup> The non-developing co-owner thus has a choice. Generally, a proportionate share of net proceeds would be worth more than the royalty in a lease proportionately reduced by the same fraction, but actual circumstances may lead to different results. If a well is not likely to pay out, joining the lease and getting an immediate royalty may make more sense than remaining entitled to a proportionate share of net proceeds.

### **[b] Basic Relationship Between Co-Owners When One Develops**

To present an overview of the relationship between co-owners when one is developing and one is not and to continue to imbue some personality to the discussion, the developing co-owner will be Avery, who has leased to an oil company named Dudley Do Oil, and Lazy Lou will be the unleased co-owner. Again, *Prairie Oil & Gas Co.*, in which the non-leasing cotenant held a 1/10 interest, provides the general contours of the relationship:

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<sup>70</sup>Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966), discussed in Knight, *supra* note 2, at 234-36. See also Donnan v. Atlantic Richfield, 732 S.W.2d 715 (Tex. App. 1987) (cotenant may execute a lease with a pooling clause and need not inform other cotenants).

<sup>71</sup>Texas & Pacific Coal & Oil Co. v. Kirtley, 288 S.W. 619, 622-23 (Tex. Civ. App. 1926).

<sup>72</sup>Gulf Refining Co. v. Travis, 30 So. 2d 398 (Miss. 1947).



Under the general rule . . . [the] Oil Company would be bound to account to . . . [Lazy Lou] for one-tenth of the net profits determined by deducting from one-tenth of all reasonable and legitimate expenses for development and operating the property for oil and gas, but in the event of loss it could not compel her to reimburse it for any part of the loss.<sup>73</sup>

Costs could be recovered because Dudley Do Oil Co. was neither a willful trespasser nor even a trespasser; therefore it could not be treated worse than good faith trespassers, who are allowed to deduct costs from proceeds in computing damages.<sup>74</sup> To phrase it as one Texas court did, “a cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same.”<sup>75</sup>

The developing co-owner, therefore, cannot keep all proceeds, and the duty to account to Lazy Lou arises out of law and is not a partnership obligation. Both the accounting duty and right to develop are “quasi-contract principles under which an obligation may be implied in law to do justice and prevent unjust enrichment.”<sup>76</sup> As a quasi-contractual obligation, the right to an accounting for the profits of production is not a tort remedy for which punitive damages are available; even a failure to make bookkeeping entries necessary for an accounting does not make failure to pay Lazy Lou a conversion.<sup>77</sup> Additionally, a co-owner must account to other

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<sup>73</sup>Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 573 (8th Cir. 1924).

<sup>74</sup>*Id.* at 573-74; see also Cox v. Davison, 397 S.W.2d 200 (Tex. 1965).

<sup>75</sup>397 S.W.2d at 200.

<sup>76</sup>Krug v. Krug, 618 P.2d 323, 325 (Kan. Ct. App. 1980). In one instance, the Internal Revenue Service treated the proceeds of a suit for accounting as capital gains, not royalty. This could indicate that the sums represented diminution of value of the property, not ongoing income. Gail v. United States, 58 F.3d 580 (10th Cir. 1995).

<sup>77</sup>Mitchell Energy Corp. v. Samson Resources Co., 80 F.3d 976 (5th Cir. 1996).

co-owners even if the developer did not mine more than its proportionate share or exclude others from mining. This is because one co-owner cannot unilaterally partition the property.<sup>78</sup> Moreover, the right to an accounting is personal to the cotenant and past accruages do not impliedly transfer with a transfer of the cotenancy property absent an express assignment.<sup>79</sup> There is, however, some support for royalty as the measure of liability to the non-developer in some situations.<sup>80</sup>

### § 20.05 Basic Contours of Accounting for Oil and Gas Production

The process of accounting in the oil and gas venue is not dramatically different than the problems Avery and Lou had over their fishing cabin. The value of repairs and improvements may be questioned either in an independent accounting or in an accounting appurtenant to a partition. For oil and gas, the basic rule is that net proceeds go to the non-developing co-owner only after a well pays out; the developer may deduct costs of drilling, producing, and marketing.<sup>81</sup> More specifically, reasonable costs of production include costs of drilling, equipping, and operating a well, repairs and replacement of equipment, and taxes and overhead expenses. The basic caveat is the expenses must be proper to production.<sup>82</sup> Moreover, the non-developing co-owner is only due

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<sup>78</sup>White v. Smyth, 214 S.W.2d 967, 976 (Tex. 1948) (rock asphalt involved and property differed in mineability).

<sup>79</sup>Weiser-Brown Oil Co. v. Samson Resources Co., 966 F.2d 431 (8th Cir. 1992) (no gas balancing agreement existed).

<sup>80</sup>McIntosh v. Ropp, 82 A. 949 (Pa. 1912) (life tenant executed lease and remainderman of 1/2 interest ratified it; development was not a trespass as to the other remainderman either before or after death of life tenant); Petroleum Explor. Corp. v. Hensley, 284 S.W.2d 828, 831 (Ky. 1955) (royalty basis of award to non-leasing co-tenant when the lease provided for a flat royalty and there was no meter on the gas well; damages based on value of production minus costs would be speculative because product amount unknown). In Kentucky, a non-consenting co-owner only gets a royalty until the co-owner notifies the developer of its interest; from that date net profits are the measure of accounting. Gillispie v. Blanton, 282 S.W. 1061 (Ky. 1926).

<sup>81</sup>Meeker v. Denver Prod. & Ref. Co., 188 P.2d 854 (Okla. 1947).

<sup>82</sup>Petroleum Explor. Corp. v. Hensley, 284 S.W.2d 828 (Ky. 1955); Burnham v.

a proportionate share of proceeds and the developing co-owner may only recover costs out of proceeds. There is no right to an independent action for contribution such as Avery had in the fishing cabin scenario. Oil and gas lien statutes, however, depending on their breadth, may assist the developing cotenant in recovering the expenses.<sup>83</sup>

Although the majority position generally allows a developing co-owner to only account for net profits, if the developing cotenant actually excluded the other cotenant, then it is possible that the cotenant may not receive a credit for expenses. If the wrongful exclusion was in good faith, perhaps because of a valid title dispute, accounting for net proceeds would still be appropriate.<sup>84</sup> If, however, the exclusion was in bad faith, the producing cotenant will not be able to recover costs.<sup>85</sup>

### [1] Proof of Proportionate Shares of Proceeds in an Accounting

Both Dudley Do Oil Co. and Lazy Lou may run into obstacles in determining the net proceeds due the non-developing co-owner. Because of the vagaries of litigation, therefore, most instances requiring accounting arise from an inadvertent failure to join all interests rather than a purposeful plan to develop individually. Three major items often are disputed: the amount of hydrocarbons produced, the

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Hardy Oil Co., 147 S.W. 330, 334 (Tex. Civ. App. 1912).

<sup>83</sup>John Carey Oil Co. v. W.C.P. Investments, 533 N.E.2d 851 (Ill. 1988) (operator of cotenancy property without a lien right granted by agreement may use the statutory lien process); *accord* Amarex v. El Paso Natural Gas Co., 772 P.2d 905 (Okla. 1987); Kenmore Oil Co. v. Delacroix, 316 So. 2d 468, 469 (La. Ct. App. 1975); Davis v. Sherman, 86 P.2d 490 (Kan. 1939) (in dicta, oil lien claimed only on a fractional interest of a cotenant and not on the entire leasehold partially owned by the lien claimant may be allowed). *But see* Gaudreau v. Smith, 21 P.2d 330 (Kan. 1933) (one cotenant cannot file lien on entire leasehold in which cotenant has interest). *See also* Fife v. Thompson, 708 S.W.2d 611, 611-12 (Ark. 1986) (equitable lien rather than statutory lien allowed on one whose interest was "tantamount to co-tenancy" with lienor).

<sup>84</sup>New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920).

<sup>85</sup>Foster v. Weaver, 12 A. 313 (Pa. 1888); Erisman & Dalton, *supra* note 2, at 7-14 & 7-15.

proceeds from sale of the hydrocarbons or their value, and the appropriateness of items of expense. This cautions against voluntarily developing without concurrence of all or most owners.

From the viewpoint of the developer, the best stratagem is to have testimony on expenses indicating that they were such as would be incurred by an ordinarily prudent operator.<sup>86</sup> It is important to remember that the right to an accounting for a share of reasonable expenses out of production arises out of cotenancy. Other agreements may not modify the rights unless expressly so stated. For example, if the non-developing cotenant had also signed an Authorization for Expenditure (AFE), the amount listed in the AFE would only limit the non-developing co-owner's exposure if the amount was exceeded and the well was a non-producer. The AFE affects personal liability, but it does not limit an accounting from proceeds.<sup>87</sup>

In the realm of accounting proof, the non-developing co-owner does operate at a disadvantage because the developer controls the bulk of the information. Discovery mechanisms may not provide relief if Dudley Do Oil is not the best of bookkeepers. Therefore, one court has given those like Lazy Lou some leeway; in estimating production for revenue accounting, the non-producing cotenant's expert can rely on information from a commercial production service, which in turn relies on information from the state, which came from the operator.<sup>88</sup>

## [2] Specific Items of Expense Considered

Court decisions on accounting issues have been sympathetic to the developer's actual physical outlays, but have sometimes balked at expenses that could not be proven to have been needed or to have benefitted the non-developing co-

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<sup>86</sup> *Ashland Oil & Refining Co. v. Bond*, 263 S.W.2d 74, 76 (Ark. 1953).

<sup>87</sup> *Id.*

<sup>88</sup> *South Central Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1018-19 (8th Cir. 1992) (applying Arkansas law).

owner.<sup>89</sup> As an example of the first premise of generosity, reasonable compensation for the developer's services and use of its machinery and plant have been allowed.<sup>90</sup> Expenditures for a pumping plant and pipeline also were approved.<sup>91</sup> Additionally, courts have recognized that overhead is a legitimate charge to the transaction. For example, the cost of supervision, which included an office and personnel, was credited because the developer needed to check on contractors and this was the most economical and efficient way to do the work.<sup>92</sup> Insurance is also an allowable cost.<sup>93</sup> On the other hand, a clear example of a cost not benefitting the non-leasing co-owner would be royalty paid to the leasing cotenant.<sup>94</sup> More controversial expenditures require additional elucidation.

First, in assessing reasonableness, courts look to the normality of expenses. Sometimes an unusual expense may not be allowed, even if it was the only way to develop at the particular time. For example, in order to get equipment and a driller during a period of tight availability, the developer had to offer an oil payment to avoid black market prices for the work. The court disallowed the oil payment as an expense and only deducted "actual expenses" for drilling at normal rates.<sup>95</sup>

Moreover, not every undertaking by even a reasonable and prudent operator brings forward a clear benefit. One court

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<sup>89</sup>Johnson v. Kansas Natural Gas Co., 135 P. 589 (Kan. 1913) (burden on operator to prove deductible expense). See generally Annotation, "Basis of Computation of Cotenant's Accountability for Minerals and Timber Removed from the Property," 5 A.L.R.2d 1368 (1945).

<sup>90</sup>White v. Smyth, 214 S.W.2d 967, 979 (Tex. 1948) (rock asphalt).

<sup>91</sup>Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. Civ. App. 1912).

<sup>92</sup>Connette v. Wright, 98 So. 674, 676 (La. 1923); New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245 (Ky. 1920).

<sup>93</sup>Smither v. Betts, 264 S.W.2d 255 (Ky. 1954).

<sup>94</sup>Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 574 (8th Cir. 1924).

<sup>95</sup>Essley v. Mershon, 262 P.2d 417 (Okla. 1953).

rejected charging unsuccessful fracking to the non-consenting co-owner from profits of other joint wells, using the premise that the developer only gets reimbursed for expenses that enhance the property.<sup>96</sup> By analogy to cases dealing with conservation commission approved unit expenses, however, it is possible that costs for wells that accidentally deviated or ended up being drilled illegally could be recovered from proceeds from other producing wells.<sup>97</sup>

In a similar vein, because not every well drilled is a producer, the ability to recoup costs of dry holes has been controversial. *Connette v. Wright*<sup>98</sup> involved cotenants in a leasehold. The first well drilled was a producer. In fact, there were multiple producers but some dry holes were also drilled. The non-developing cotenant signed division orders. The Louisiana court held the cotenant liable for the reasonable costs of drilling all wells:

The execution of the division orders and the receipt of his share of the proceeds of all of the oil produced and sold was a complete ratification by defendant of the drilling operations conducted by plaintiff on the whole property. The acquisition of the property jointly as a whole and the drilling of wells by plaintiff on all of the leases, the benefits of which were availed of by defendant, must be considered as a single enterprise, jointly engaged in by the parties.<sup>99</sup>

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<sup>96</sup>*Knight v. Mitchell*, 240 N.E.2d 16, 18 (Ill. App. Ct. 1968). "Fracking" seeks to increase permeability and hence recovery by fracturing the formation.

<sup>97</sup>*Pennaco Resources Corp. v. Oklahoma Corp. Comm'n*, 831 P.2d 656 (Okla. Ct. App. 1992) (parties knew geological conditions were difficult and order contemplated need to sidetrack); *Wagner & Brown v. Ward Petroleum Corp.*, 876 F. Supp. 255 (W.D. Okla. 1994).

<sup>98</sup>98 So. 674 (La. 1923).

<sup>99</sup>*Id.* at 676; *see also* *Moody v. Wagner*, 23 P.2d 633 (Okla. 1933) and *Martel v. Hunt*, 197 So. 402 (La. 1940). *Cf.* *Davis Oil Co. v. Steamboat Petroleum Co.*, 570 So. 2d 495 (La. Ct. App. 1990) (dry hole costs billed to non-operator under commission authority to consider reasonableness of drilling costs charged a non-operator).

Other courts have not viewed the dry hole costs as recompensable from other producing wells. In *McMillan v. Powell*,<sup>100</sup> the developer sought recompense from other jointly owned properties, but because there was no agreement to operate the leases as a group, the dry hole costs were not allowed.<sup>101</sup>

Whether or not interest could be charged to the non-developing cotenant on the sums expended by the developer has been similarly debated, although courts have disallowed it. In *Cox v. Davison*,<sup>102</sup> the question of whether the producing cotenant could get interest on money put forward was answered in the negative because the non-developing co-owner has no personal obligation to pay any part of the cost of development. The court found it immaterial whether the developer actually borrowed money or not. It did, however, recognize some business realities:

Ordinarily, money will make money and it is probable that had the producing cotenants put their money to work in some other business undertaking, they probably would have realized some returns therefrom. Arguments may be and have been marshalled to support the equitable claim of the producer. It is he who takes the risk and, if successful, he usually produces financial gain for both himself and his cotenants. However, there is something to be said for the nonjoining cotenant. Actual production of minerals is not the only way by which benefits may be obtained from the ownership of mineral interests in land. Drilling may and often does condemn property for mineral purposes.<sup>103</sup>

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<sup>100</sup>362 S.W.2d 721 (Ark. 1962).

<sup>101</sup>*Id.* See also *Davis v. Sherman*, 86 P.2d 490 (Kan. 1939) (no recovery when producer was drilled before dry hole); *Ashland Oil & Ref. Co. v. Bond*, 263 S.W.2d 74 (Ark. 1953); *Katnig v. Johnson*, 383 P.2d 195 (Okla. 1963); *Burnham v. Hardy Oil Co.*, 147 S.W. 330 (Tex. Civ. App. 1912); and *Williamson v. Jones*, 27 S.E. 411 (W. Va. 1897). See generally 2 *Williams & Meyers*, *supra* note 2, § 504.3.

<sup>102</sup>397 S.W.2d 200, 201-02 (Tex. 1965).

<sup>103</sup>*Id.* at 202. See also *Essley v. Mershon*, 262 P.2d 417 (Okla. 1953) (claim was unliquidated before judgment so interest was not a recoverable item of production

The court acknowledged the use value of money, but also recognized that the non-developing cotenant might have chosen to not develop in order to maintain the speculative value of the property. The dissent in *Cox*<sup>104</sup> argued that the majority misconstrued the issue: "The basis for the settled law that the passive cotenant must account to the active one upon successful completion of a well, is that it restores to the active cotenant the funds he expended in the venture, the costs he incurred for the benefit of all cotenants."<sup>105</sup> In its view, the recompense due is calculated by looking at the benefits of the overall venture. This approached the heart of the issue: whether accounting should be based on a per well or a per tract basis.

### [3] Accounting Per Well or Per Tract?

Resolving the question of whether accounting should be per well or per tract could solve some of the dilemmas over dry holes and interest charges. Naturally, the developer only recovers expenditures out of some proceeds, so there must be some successful production. Allowing per tract accounting is logical. It also promotes development.

A co-owner, or the lessee of a co-owner, bears 100% of the risk of the first dry hole. If the first well is successful, the developer will not reap 100% of the proceeds. If the outstanding interest is small, less than 10%, the feasibility of proceeding may not alter significantly. Nevertheless, if the outstanding interest is 50%, the prospect would have to improve before drilling. If the developer, however, would be able to recoup the cost of the dry hole out of later producing wells, the financial picture could change.

Essentially, a per tract accounting would look at all reasonable expenditures made to develop jointly owned property

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and marketing expense); *Wood Oil Co. v. Corporation Comm'n*, 268 P.2d 878 (Okla. 1953) (no interest on operating cost of a well largely on ground that there was no evidence operator paid the same or that interest expense was necessary to obtain production).

<sup>104</sup>397 S.W.2d at 204.

<sup>105</sup>*Id.*



and allow proportionate recovery of expenditures out of successes. For some items, such as roads, this procedure has the additional advantage of simplicity; a road could be needed to drill or service several wells and apportionment among wells is difficult. The test for deductibility should be whether a reasonable and prudent operator would have incurred the costs in a good faith effort to recover oil and gas.<sup>106</sup> Even dry holes provide the benefit of geological knowledge.

### § 20.06 Relationship of Lessees Leasing From Separate Cotenants

If each co-owner leases to separate oil and gas companies, the respective lessees will step into the shoes of their lessors and become cotenants. In our hypothetical, Lazy Lou now enters the fray and leases to the Lucky But Lazy Oil Company. This company and the Dudley Do Oil Company, however, will not jointly own one lease, but each company will be a lessee governed by the terms and conditions of the lease its co-owner lessor granted. If the two companies enter into an operating agreement, which is a contractual arrangement to share the risks and costs of drilling, and Dudley Do drills a well under that agreement, it would make the well the activity of the Lucky But Lazy Oil Co. so as to preserve its lease.<sup>107</sup> If there is no operating agreement, the scenario differs.

In *Earp v. Mid-Continent Petroleum Corp.*,<sup>108</sup> one lessee drilled a well before delay rental payments were due under the lease of the non-developing lessee. The well was a

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<sup>106</sup> *Thompson on Real Property, Thomas Edition* 256 (David A. Thomas ed., 1994). Alternatively, the question could be framed as whether it would unjustly enrich the non-developing co-tenant to not share the costs. Hemingway, *supra* note 2, § 5.1(B). This question subtly differs from the prudent operator standard; a search for unjust enrichment employs hindsight and the prudent operator standard looks at the situation at the time the development plan is undertaken.

<sup>107</sup> *Willson v. Superior Oil Co.*, 274 S.W.2d 947, 951-52 (Tex. Civ. App. 1954). For a general discussion of an operating agreement, see 2 Williams & Meyers, *supra* note 2, § 503.2.

<sup>108</sup> 27 P.2d 855 (Okla. 1933).

producer and two questions arose: first, did the drilling of the well forestall the need for rental payments and, second, did the well extend the non-developing lessee's lease into the secondary term. The court concluded that the act of one lessee will satisfy the requirements of the lease of the other only if an agreement exists between the two lessees.<sup>109</sup> Because the parties, however, had construed the delay rental requirement as simply requiring the commencement of a well on *the* land, the lease did not end during the primary term.<sup>110</sup> Nevertheless, to enter the secondary term required the lessee to produce.<sup>111</sup> Under *Earp*, the Lucky But Lazy Oil Co.'s lease would have expired after the primary term and Lou would be considered an unleased cotenant due an accounting directly from the Dudley Do Oil Company.

The *Earp* scenario was revisited in a case from North Dakota, *Schank v. North American Royalties, Inc.*<sup>112</sup> The lessee of another cotenant had drilled a well before the rental payment date of the second, subject lease. That lessee did not participate in the drilling of the well. The court held that the well would not meet the unless clause requirements.<sup>113</sup> As the court stated: "Under the terms of these contracts, the lessors have every right to look to the lessees to carry out these terms by some affirmative action on the part of the lessees, not by the refusal on the part of the lessees to participate with the lessee of other fractional interests who drills a well on the land."<sup>114</sup> A lessee must

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<sup>109</sup>*Id.*

<sup>110</sup>*Id.* But see *Hughes v. Cantwell*, 540 S.W.2d 742, 744 (Tex. Civ. App. 1976) (failure to include "by the lessee" after requirement to pay rentals unless drilling was commenced within a year did not mean that lessee could rely on drilling by lessee of a co-tenant).

<sup>111</sup>27 P.2d at 865-66. *Accord Mattison v. Trotti*, 262 F.2d 339 (5th Cir. 1959) (interpreting Texas law) (well was shut-in and non-developing lessee did not even try to pay shut-in royalties).

<sup>112</sup>201 N.W.2d 419 (N.D. 1972).

<sup>113</sup>*Id.* at 426.

<sup>114</sup>*Id.* at 433.

show more than passive acquiescence in the drilling of wells by others. As in *Earp*, the court founded its rationale on the avoidance of speculative holding. An Oklahoma court similarly construed *Earp*:

The contract being executed for the purpose of procuring development upon the premises by the lessee the clause should be interpreted to mean that the lessee is required to do the drilling and that the act of a third party independent of any co-operation on the part of the lessee is not in compliance with the terms of the lease.<sup>115</sup>

Therefore, the lessee would only meet its lease's requirements by drilling itself or through contracting with another to so drill.<sup>116</sup> The Lucky But Lazy Oil Company lease would not have survived.

Dudley Do Oil Company's situation obviously differs. The developing co-owner's lessee indisputably meets the requirements of its lease. The lessee will begin to pay Avery, its lessor, royalties immediately upon receipt of proceeds. Presuming the lease of the second cotenant is still valid,<sup>117</sup> the developing lessee will then account to the lessee that is not developing. How and when a non-developing lessee such as the Lucky But Lazy Oil Co. must pay its lessor is less clear. Royalties are due immediately but the non-developing lessee, unless it has paid costs pursuant to a JOA, gets no money until after the well pays out. Some jurisdictions allow deferral of royalties with the lessee required to make-up past due royalties; all proceeds will go to the lessor until back royalties are paid.<sup>118</sup>

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<sup>115</sup>*Buckles v. Wil-Mc Oil Corp.*, 585 P.2d 1360, 1362 (Okla. 1978), quoting *Earp*, 27 P.2d at 864.

<sup>116</sup>*Id.* (lease can be extended by well drilled by a farmee). Some courts have looked at whether or not a lease expressly says work must be done by the lessee. See 2 *Williams & Meyers*, *supra* note 2, § 503.1.

<sup>117</sup>For example, in *Schank* the lessee could have paid delay rentals to preserve its lease during the primary term.

<sup>118</sup>*Earp*, 27 P.2d at 866. See also 1 *Kuntz*, *supra* note 2, at 153-55.

### § 20.07 Relationship of Lessees as Cotenants of One Lease

Another scenario could have arisen from the Avery and Lou co-ownership. They could have leased to two oil companies under the same lease. This, however, is not a very common occurrence.<sup>119</sup> It is not uncommon, however, that partial working interests are assigned in an oil and gas lease. Therefore, this situation must be addressed. To a certain extent, the working interest owners are now cotenants and some of the general law of cotenancy applies. The wording of a particular lease, assignment, or joint operating agreement, however, may provide for differing results.

With this caveat firmly in mind, each co-owner of the lease generally can operate it pursuant to the majority rule of cotenancy development. For example, in *Celsius Energy Co. v. Mid America Petroleum Co.*,<sup>120</sup> a lease gave the lessee the right "to unitize the leased premises or any portion or portions thereof, . . . with any other lands." An assignee of 37.5% of the leasehold estate pooled its interest. Production occurred off the leased tract. The lessors claimed the pooling was unauthorized and the leases terminated. The Tenth Circuit held that partial interests may voluntarily pool unless language to the negative exists in the lease, which was not the case here.<sup>121</sup>

Another aspect of a co-owner's rights was emphasized in *Bellet v. Grynberg*.<sup>122</sup> First, the New Mexico court recognized that working interest owners without an operating agreement were cotenants. As a result, it held the producing

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<sup>119</sup>Avery and Lou could, however, have decided to act in concert and lease to one company. In such an instance of joint negotiation, one cotenant could not attempt to gain a secret or additional benefit from the oil company. All benefits would have to be shared despite the fact that the cotenants are not fiduciaries. *Howell v. Bach*, 580 S.W.2d 711 (Ky. Ct. App. 1978).

<sup>120</sup>894 F.2d 1238, 1239 (10th Cir. 1990).

<sup>121</sup>*Id.* (good faith and a geological basis for pooling were conceded). *But see* *Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.*, 794 S.W.2d 442 (Tex. App. 1990) (cannot pool lessor's working interest in lease).

<sup>122</sup>845 P.2d 784 (N.M. 1992).

cotenant could be reimbursed for speculative expenditures only out of production. As to other necessary and reasonable expenditures, the producing cotenant could receive an equitable lien on the other party's interest. The court went so far as foreseeing the possibility of a personal judgment against the non-operating working interests for these necessary costs.<sup>123</sup> This, of course, goes beyond normal cotenancy rules for recovery.

### § 20.08 Basic Contours of Partition: A Right or a Hardship?

One way to end the difficulties cotenancy presents for development disagreements is to seek partition.<sup>124</sup> There are two types of partition: voluntary and involuntary.<sup>125</sup> Voluntary partition is consummated by the parties deeding to each other. Involuntary is a creature of courts and statutes.

In voluntary partitions, parties often are more concerned about partitioning the surface than the minerals, which can create title problems. For example, in *Barfield v. Holland*,<sup>126</sup> voluntary deeds between co-owners of a large tract made the surface of Tracts A, B, and C owned individually, but the mineral interests remained in undivided ownership. Therefore, the surface and mineral estates were severed. When a grantee accepted a deed from each individual naming individual tracts, he only received the ownership of each individual in the particular tract conveyed, namely the respective surfaces and an undivided 1/3 interest in the

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<sup>123</sup>*Id.*

<sup>124</sup>Another way is to seek a receivership or trustee, discussed in 1 Kuntz, *supra* note 2, § 5.7; Outerbridge, *supra* note 2, at 20-46 - 20-56, and Smith, *supra* note 47, at 142-50.

<sup>125</sup>See Annotation, "Partition of Undivided Interest in Minerals (Including Oil and Gas) in Place," 173 *A.L.R.* 854 and Annotation, "Right to Partition in Kind of Mineral or Oil and Gas Land," 143 *A.L.R.* 1092.

<sup>126</sup>844 S.W.2d 759 (Tex. App. 1992).

minerals in each tract. The grantee remained a cotenant with the remaining mineral owners.<sup>127</sup>

Other items to note about voluntary partitions include that they may be rescinded for mutual mistake, but not if only one party was mistaken, unless the mistake was known to the other party or induced by that party.<sup>128</sup> Additionally, the concept of voluntary partition does not allow one co-tenant to convey a specific part of the property to a third party without the concurrence of the other co-owners.<sup>129</sup> The other cotenants could, however, ratify the conveyance if desired. Upon judicial partition in kind, so called "equitable partition" may come in to protect the purchaser by having the specified land set over to the conveying cotenant.<sup>130</sup>

Involuntary partition may be obtained by one co-owner through petition to the court. General rules applying to partition apply to partitions of mineral interests.<sup>131</sup>

### [1] Majority Views Partition as a Right

The owner of a concurrent interest in property may not desire it to be partitioned. The co-owner may fear being bought out at a low price or the loss of future speculative earnings. Tax consequences may also influence a desire not to change the status quo.<sup>132</sup> Nevertheless, in most jurisdictions, one co-owner's desire for a partition is a right and no defenses are available.<sup>133</sup> The objecting cotenant cannot defeat partition merely by showing a partition would be "inconvenient, injurious, or even ruinous to a party in

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<sup>127</sup>*Id.*

<sup>128</sup>*Zapetero v. Canales*, 730 S.W.2d 111 (Tex. App. 1987).

<sup>129</sup>*See Adams v. Yukon Gold Co.*, 251 F. 226 (9th Cir. 1918).

<sup>130</sup>*See 2 Williams & Meyers, supra note 2, § 507.*

<sup>131</sup>*See Hemingway, supra note 2, § 3.3; 1 Kuntz, supra note 2, §§ 6.1-6.6; 3 Summers, supra note 2, §§ 535-538, and 2 Williams & Meyers, supra note 2, §§ 506-507.*

<sup>132</sup>*See Moseley v. Hearrell*, 171 S.W.2d 337, 339 (Tex. 1943).

<sup>133</sup>*Id.* at 339 (equity cannot defeat right to partition).

interest.”<sup>134</sup> In order to avoid manifest hardship caused by trying to divide the indivisible, courts may partition the property by sale.<sup>135</sup>

## [2] Minority Allows Defenses to Partition

Other jurisdictions allow partition sometimes to be defeated on equitable grounds. Oklahoma is one such state. As it has explained, there should be no partition if partition would do any one of four things, namely: (1) defeat the purposes of the property's acquisition, (2) become an instrument of fraud, (3) violate testamentary prohibitions on partition which are upheld for a reasonable time, or (4) create inequitable hardship and oppression.<sup>136</sup> Oklahoma's solicitude is also revealed in a statute that requires a mineral interest owner show that co-owners are frustrating the petitioning cotenant's development objectives.<sup>137</sup> Nevertheless, the burden is on the defendant to show the defense of oppression in opposition to partition action.<sup>138</sup> In one instance, relief was denied because it was not fraud or oppression simply because the party objecting to the partition had paid adequate consideration for the interest and the party seeking partition had created the interest. The court also found no encroaching development or rapid increase in value or inability of parties to purchase at sale.<sup>139</sup> One state in addition to Oklahoma that allows some defenses for fraud or oppression is Kansas.<sup>140</sup>

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<sup>134</sup> *Schnitt v. McKellar*, 427 S.W.2d 202 (Ark. 1968).

<sup>135</sup> *Id.* at 209.

<sup>136</sup> *Rodkey v. Rees*, 527 P.2d 1150 (Okla. Ct. App. 1974).

<sup>137</sup> Okla. Stat. Ann. tit. 12, § 1501 (1993). The party seeking partition must also show that a compulsory pooling order would not remedy the difficulty.

<sup>138</sup> *Henson v. Bryant*, 330 P.2d 591, 593 (Okla. 1958).

<sup>139</sup> *Id.*

<sup>140</sup> See *Strait v. Fuller*, 334 P.2d 385, 390 (Kan. 1959) (may allege fraud or oppression in defense: partition of oil and gas leasehold estates sensitive). Arkansas and Mississippi may also take this view. *Schnitt v. McKellar*, 427 S.W.2d 202 (Ark. 1968) (alluding to the failure to allege fraud or oppression but possibly referring to

### [3] Partition in Kind Favored for Minerals

The general preference is to partition minerals in kind, that is, to award minerals in separate acreage.<sup>141</sup> The basic rationale is that with unknown and highly speculative mineral values, a present sale may yield little.<sup>142</sup> Therefore, it is said that partition in kind of oil and gas rights is proper where there has been no development on or near the property and there is no reason to believe that any part of the property is more or less valuable than any other part.<sup>143</sup> If there is known oil and gas value for the property, however, partition in kind would not be appropriate; partition by sale would be proper.<sup>144</sup> Similarly, if there was no way to determine relative values of known mineral lands without prohibitive cost, partition should be by sale.<sup>145</sup> An accounting will often accompany the partition. A producing cotenant will have to make a final accounting for net proceeds. This acknowledges that the hydrocarbon produced by one cotenant is rightly owned by that cotenant.<sup>146</sup>

Occasionally courts get the opportunity to be creative. For example, where surface and minerals were separately owned and the property had no proven oil value, and partition in kind was impossible because of the diversity of character or estates or interests owned, and because some interests were

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need to allege same to determine type of partition); *Stern v. Great Southern Land Co.*, 114 So. 739 (Miss. 1927).

<sup>141</sup>*Henson*, 330 P.2d at 593.

<sup>142</sup>*Phillips v. Phillips*, 104 N.W.2d 52, 56 (Neb. 1960).

<sup>143</sup>*Cox v. Lasley*, 639 P.2d 1219, 1221 (Okla. 1981) (fact that holder of fractional interest in minerals under land also held working interest under oil and gas lease to some lands did not destroy right to obtain partition of mineral interest); *but see Colonial Royalties Co. v. Hinds*, 216 P.2d 958 (Okla. 1948) (can partition by sale even if no development imminent if too difficult to partition in kind).

<sup>144</sup>*Fortney v. Tope*, 247 N.W. 751, 753 (Mich. 1933).

<sup>145</sup>*White v. Smyth*, 214 S.W.2d 967, 973 (Tex. 1948).

<sup>146</sup>*See Kuntz, supra note 2, § 13.03[2]* (notes in discussing *White v. Smyth* that the court did not subtract the value of the removed asphalt from the producing cotenant's share of proceeds of a partition by sale).



only speculative possibilities, the trial court properly ordered a sale of surface and minerals separately and distribution of proceeds ratably.<sup>147</sup> More intriguingly, when considering the alternative of partition in kind, there is some precedent for the idea of “checkerboarding.” To avoid the possibility of one cotenant being luckier in the division, a court has suggested not giving each party only one division or allotment, because many allotments may be the most equitable solution given oil’s peculiar characteristics.<sup>148</sup>

### § 20.09 Who Can Seek Partition

Generally, any co-owner not holding by tenancy by the entirety may begin the partition process. Nevertheless, there are five requirements for partition.<sup>149</sup> One is that no statute either forbids the action or has not been complied with.<sup>150</sup> For example, normally a partition action would be ineffective if all interest owners are not joined.<sup>151</sup> The second requirement is that there must be no valid agreement to not partition in place among the co-owners. These two requirements are relatively straight-forward.

The last three requirements are more theoretical. First, in order to seek partition, the petitioner must have a possessory estate. Next, the person seeking partition must own interests throughout the area to be partitioned. Finally, the estates to be partitioned must be of equal dignity. Equal dignity refers to the type or kind of estate, such as a mineral lease as

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<sup>147</sup> Coker v. Vierson, 41 P.2d 95 (Okla. 1935).

<sup>148</sup> Henderson v. Chesley, 292 S.W. 156, 156 (Tex. 1927). The remedy was adopted in Phillips v. Phillips, 104 N.W.2d 52 (Neb. 1960). It is a more feasible solution with a large tract and small number of co-owners than with a smaller tract and more co-owners because of spacing requirements for drilling that exist in most states.

<sup>149</sup> Hemingway, *supra* note 2, § 3.3.(B) lists four: joint ownership, possessory interest, equal dignity, and ownership throughout the tract.

<sup>150</sup> See Erisman & Dalton, *supra* note 2, at 7-20 n.89 (listing partition statutes of Western states).

<sup>151</sup> Cf. Mustang Drilling, Inc. v. Cobb, 815 S.W.2d 774 (Tex. App. 1991) (partition of a community property estate, not of particular land involved, and therefore was effective).

opposed to a mineral interest. A lessee therefore cannot force partition upon its lessor and the owner of the remaining undivided mineral interest.<sup>152</sup> A difference in quantity of estate owned does not impact rights to a partition; the owner of a 1/100 interest may force partition on the remaining owners.

### [1] Surface Owners May Seek Partition

The co-owners of the complete fee, both mineral and surface, may obviously seek partition. The co-owners may seek to partition both estates or partition the surface without disturbing the oil and gas interest other than requiring it to be held jointly by the parties as tenants in common.<sup>153</sup> The surface owner may also obtain partition as of right despite the presence of an oil and gas lease with wells being operated.<sup>154</sup>

### [2] Mineral Owners May Partition the Minerals

Severing minerals creates a separate estate. It may be partitioned even if the parties to the partition have no co-ownership of the surface.<sup>155</sup> Even Louisiana allows partition of a mineral servitude, which is Louisiana's analog of a mineral estate.<sup>156</sup> More particularly, courts have allowed partition of an oil and gas fee, which was classified as an interest in real estate.<sup>157</sup> Courts have differed on whether the presence of a possessory leasehold will foreclose a cotenant in the oil and gas estate from seeking partition.<sup>158</sup>

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<sup>152</sup> *Medina Oil Dev. Co. v. Murphy*, 233 S.W. 333 (Tex. Civ. App. 1921). See also *Kolb v. Morgan*, 854 S.W.2d 719 (Ark. 1993) (when minerals and surface interests are held in different ratios, neither a voluntary nor involuntary partition of the surface will be a partition of the minerals) and *Hemingway*, *supra* note 2, § 3.3.(B).

<sup>153</sup> *Wilson v. Hartman*, 545 P.2d 742 (Okla. 1976).

<sup>154</sup> *Erwin v. Hines*, 121 P.2d 612 (Okla. 1942).

<sup>155</sup> *Schnitt v. McKellar*, 427 S.W.2d 202 (Ark. 1968).

<sup>156</sup> La. Rev. Stat § 31:172 (1996); see *Campbell v. Pasternack Holding Co.*, 625 So. 2d 477 (La. 1993).

<sup>157</sup> *Holland v. Shaffer*, 178 P.2d 235, 241 (Kan. 1947).

<sup>158</sup> *3 Summers*, *supra* note 2, § 537. If the lease is possessory, then the mineral

In *Hoffman v. Sohio Petroleum Co.*,<sup>159</sup> in a jurisdiction where a lease was not possessory, mineral owners who executed a lease prior to partition could have the minerals partitioned, but would only be entitled to oil and gas under the land the partition set over to them unless the lease contained an entirety clause.

Additional caveats are raised about partitioning severed mineral interests because some courts have been protective of surface owners; if they owned the surface and an undivided interest in the minerals, it was thought that protection of the surface might have been one rationale for retaining a partial mineral interest. Nevertheless, the minerals can be partitioned when one of the mineral cotenants owns the surface, but maybe only at the petition of the surface owner. Earlier cases allowed concerns for surface protection to deny partition when sought by one who only owned undivided interests in minerals.<sup>160</sup>

### [3] Oil and Gas Lessees May Partition Lease

Subject to the discussion *infra* in § 20.10, oil and gas lease working interests generally may be partitioned.<sup>161</sup> For example, an operator could get partition when owners of undivided interests in oil and gas leases refused to pay their share of the expense of further development and operation and marketability of the oil was impaired because of clouds

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interest is not, therefore eliminating one of the prerequisites for partition, i.e., that the interest be possessory. Similarly, most jurisdictions will not let a future interest be partitioned; those that do, require the future interest to be vested, not contingent.

<sup>159</sup>292 P.2d 1107 (Kan. 1956).

<sup>160</sup>*Terteling Bros., Inc. v. Bennett*, 287 S.W.2d 607, 610 (Ky. 1956); *Dawson Daylight Coal Co. v. Beshear*, 287 S.W.2d 925 (Ky. 1956) (owners of severed minerals could not compel partition that included surface owner with unsevered minerals); *but see Brand v. Consolidated Coal Co.*, 76 N.E. 849, 850 (Ill. 1906) (no partition without consent of all cotenants even at petition of surface owner). See Annotation, "Right to Partition as Affected by Severance of Estate in Minerals From Estate in Surface by One or More Cotenants," 39 *A.L.R.* 741 (1925) and Smith, *supra* note 47, at 142.

<sup>161</sup>*De Mik v. Cargill*, 485 P.2d 229 (Okla. 1971).

on title.<sup>162</sup> Kansas, however, was a hold-out on whether an oil and gas lease could be partitioned. After early cases denied the right to partition an oil and gas lease classified as personal property, the Kansas courts allowed partition without the need to make special allegations.<sup>163</sup> Part of the controversy was whether or not the oil and gas lease was possessory, a prerequisite for partition. Oklahoma, which views an oil and gas lease as incorporeal and non-possessory, did not fall into this conceptual trap. Furthermore, in some jurisdictions that allow partition of the lease, lessors and royalty owners are not necessary parties to an action for partition of the lease by the lessees.<sup>164</sup>

#### [4] Overriding Royalties and Non-Participating Royalties Not Subject to Independent Partition

One of the primary prerequisites for partition makes it impossible for royalty interests generally to be partitioned. Only possessory interests are subject to partition. As the Oklahoma court explained in *De Mik v. Cargill*,<sup>165</sup> an overriding royalty is not real estate and therefore not subject to partition as of right. An overriding royalty only attaches to produced oil or gas and its owner has no right to possess the realty. Therefore, the royalty owner is not a tenant in common with the owners of the mineral fee or of the leasehold.<sup>166</sup>

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<sup>162</sup>*Sweeney v. Bay State Oil & Gas Co.*, 133 P.2d 538 (Okla. 1943).

<sup>163</sup>*Strait v. Fuller*, 334 P.2d 385, 389 (Kan. 1959). Arkansas may still require allegations of facts requiring equitable relief. *Pasteur v. Niswanger*, 290 S.W.2d 852 (Ark. 1956).

<sup>164</sup>*Texas Oil & Gas Corp. v. Ostrom*, 638 S.W.2d 231, 234 (Tex. Civ. App. 1982, error ref'd n.r.e.). *But see Celt Oil, Inc. v. Jackson*, 469 So. 2d 261 (La. Ct. App. 1985) (lessors indispensable parties when their lessee seeks partition against their cotenant).

<sup>165</sup>485 P.2d 229 (Okla. 1971).

<sup>166</sup>*Id.* at 233-34. *See also Muslow v. Gerber Energy Corp.*, 697 P.2d 1269, 1275 (Kan. 1985) (emphasizing need for possessory interest to seek partition). Other cases holding that royalties are not subject to partition include *Douglas v. Butcher*, 272 S.W.2d 553 (Tex. Civ. App. 1954, error ref'd n.r.e.). Therefore, partition would not be useful to remove a dormant royalty from land that was rendering it unleaseable.

Partition actions, however, may affect royalty interests. If the royalty was appurtenant to all the lands to be partitioned, the royalty can remain attached to the original lands and could burden a partition sale.<sup>167</sup> Conversely, partition will affect a royalty interest granted on one co-owner's interest, but that royalty will attach only to those lands granted to the specific co-owner in severalty, with an increase in size to compensate for the lesser areal extent.<sup>168</sup>

### § 20.10 Enforceability and Identification of Agreements Not to Partition

Because partition is deemed a right, agreements not to partition are only enforceable if they are reasonable in time.<sup>169</sup> With mineral co-owners, especially among those who share working interests in leases, whether or not an agreement not to partition could be implied from a management arrangement is a frequent and important question.

Courts do not view a simple covenant that one co-owner would have exclusive management and control and the other would contribute to expenses as an agreement not to partition.<sup>170</sup> But the existence of a true operating agreement in which "parties contract for the drilling of wells and such drilling is either made the consideration for the transfer of a mineral estate or is necessary to extend or perpetuate a

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Smith, *supra* note 47, at 141-42.

<sup>167</sup>Belgam Oil Co., Inc. v. Wirt Franklin Petrol. Corp., 209 S.W.2d 376 (Tex. Civ. App. 1948).

<sup>168</sup>2 Williams & Meyers, *supra* note 2, § 506.5. See also Annotation, "Right to Partition of Overriding Royalty Interest in Oil and Gas Leasehold," 58 A.L.R.3d 1052.

<sup>169</sup>*Cf.* Roberts v. Jones, 30 N.E.2d 392 (Mass. 1940) (preferential right to purchase that would bind subsequent purchasers is an unreasonable restraint on alienation and partition).

<sup>170</sup>Komarek v. Perrine, 382 P.2d 748, 751-52 (Okla. 1963) (remedy for such a breach of management duties is damages; preferential right to purchase clause not sufficient waiver). See also Home-Stake Production Co. v. Tri-State Pipe Co., 415 P.2d 377 (Kan. 1966) and Moseley v. Hearrell, 171 S.W.2d 337 (Tex. 1943) (cotenancy and oral agreement for one cotenant to operate not mining partnership).

lease, [then] it must be inferred that the parties to the drilling agreement did not intend for the estate to be partitioned.<sup>171</sup> That is, there can be no partition until after the contemplated work would be completed.<sup>172</sup>

Provisions of operating agreements other than drilling requirements present additional questions. *Thomas v. Witte*<sup>173</sup> involved the partitioning of one oil lease of a unitized group of oil properties when they were all covered by an operating agreement presently in force. The court noted that the right to partition is subject to waiver and to estoppel and similar equitable defenses.<sup>174</sup> The court found that partition could not be had without the consent of all the parties if to do so would violate the prior agreement. This operating agreement referred to "joint lands," the need for one operator, and had a preferential right to purchase provision. It also stated the agreement would not be a partnership, but the agreement would run with the joint lands until terminated. The court found an implied waiver of the right to partition.<sup>175</sup> Obviously, express waivers of the right to partition for the time necessary and reasonable to perform the joint operations would most likely be enforced and are more reliable than seeking an implied waiver if one participant seeks partition.<sup>176</sup>

Courts have also found waivers of the right to partition in situations other than in what resembles a common JOA. For example, one cotenant may appropriate special management rights. In one such case, a cotenant had an exclusive execu-

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<sup>171</sup> 382 P.2d at 751. See also *Long v. Hitzelberger*, 602 S.W.2d 321, 323 (Tex. Civ. App. 1980) (could partition when drilling completed).

<sup>172</sup> *Warner v. Winn*, 191 S.W.2d 747 (Tex. Civ. App. 1945) (additional covenant to manage leases after obligatory wells drilled not a waiver of partition rights).

<sup>173</sup> 29 Cal. Rptr. 412 (Cal. Ct. App. 1963).

<sup>174</sup> *Id.* at 415.

<sup>175</sup> *Id.* at 417. See also *Sibley v. Hill*, 331 S.W.2d 227 (Tex. Civ. App. 1960) (preferential right to purchase in joint operating agreement, provision indicating desire to continue cotenancy and operational status during life of leases indicated absolute right of partition contracted away).

<sup>176</sup> Such waivers appear in most JOAs. See *Kuntz*, *supra* note 2, § 13.04[5][a].

tive right in the form of a power of attorney contained in a deed; it was considered a power coupled with an interest and could not be revoked unilaterally by a partition action.<sup>177</sup> In another instance, a grantor reserved an undivided 1/2 interest in minerals and the right to designate minerals under half of the tract in the event of dispute. The provision was held neither to violate the rule against perpetuities nor restrain rights of alienation or partition; it was simply a contract on how to partition.<sup>178</sup>

### § 20.11 Nature of the Relationship Between Mineral Cotenants

A fiduciary is one who has a “duty, created by his undertaking to act primarily for another’s benefit in matters connected with the undertaking.”<sup>179</sup> Absent a confidential relationship with its cotenants or lessors, one cotenant is not a fiduciary of the other in the mineral arena.<sup>180</sup> Nor is the relationship one of principal and agent, whereby one cotenant could bind other co-owners in dealings with third parties.<sup>181</sup>

The results of this status are several. One cotenant need not disclose information to another cotenant about the property’s value.<sup>182</sup> Further, one cotenant may purchase the interest of the other and it will be considered an arm’s-length deal.<sup>183</sup>

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<sup>177</sup> *Odstrcil v. McGlaun*, 230 S.W.2d 353, 354 (Tex. Civ. App. 1950) (lease issued by executive in contravention of power was void to co-tenant’s interest).

<sup>178</sup> *Robertson v. Speer*, 185 So. 2d 730 (Fla. Ct. App. 1966).

<sup>179</sup> *Black’s Law Dictionary* 625 (6th ed. 1990).

<sup>180</sup> *Zimmerman v. Texaco, Inc.*, 409 S.W.2d 607 (Tex. Civ. App. 1966). See generally 1 Kuntz, *supra* note 2, § 5.5.

<sup>181</sup> *Earp v. Mid-Continent Petrol. Corp.*, 27 P.2d 855, 859 (Okla. 1933); *Tungsten Products, Inc. v. Kimmel*, 105 P.2d 822 (Wash. 1940).

<sup>182</sup> *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976 (5th Cir. 1996). But see *Pure Oil Co. v. Byrnes*, 57 N.E.2d 356 (Ill. 1944) (cotenant with special knowledge concerning value of concurrently owned property should reveal same to cotenant before cotenant sells to a third party, from whom cotenant then purchases).

<sup>183</sup> *Neill v. Shamburg*, 27 A. 992 (Pa. 1893). See also *Anderson v. T.G. Owen & Son, Inc.*, 97 So. 2d 369 (Miss. 1957) (cotenant may purchase at judicial sale if lien is only on cotenant’s interest).

The acquisition of one cotenant's interest by another need not be shared with the remaining cotenants.<sup>184</sup> However, if one cotenant redeems at a tax sale or buys out an adverse, hostile interest, the remaining cotenants would be able to share upon contribution under the theory that the purchasing cotenant benefitted the property as a whole.<sup>185</sup>

In one aspect, however, fiduciary language and rules apply to the concurrent relationship. In majority jurisdictions, the statute of limitations will not foreclose an accounting.<sup>186</sup> In minority jurisdictions, however, where one co-owner technically cannot produce individually, the statute of limitations would impact the time for which the producing cotenant would have to account.<sup>187</sup>

Simple property or fiduciary law, however, may not answer all questions about the relationship between mineral co-owners. The management and development of admittedly co-owned property raises issues distinct from ownership of it.<sup>188</sup> Contractual law may be important in addition to the basic property law on accounting and partition.

### § 20.12 Joint Operation Agreements and Cotenancy

Joint operating agreements are executed in two settings and the setting may dictate whether or not cotenancy rules will govern the participants to them. The first setting is when

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<sup>184</sup> *But see* *Rex Oil Refining, Inc. v. Shirvan*, 443 P.2d 82 (Okla. 1967) (cotenant to share interest acquired in 80 acres adjoining and unitized with concurrently owned property on the theory that it would be inequitable to allow one cotenant to get a greatly increased share of 160-acre unit).

<sup>185</sup> *Myers v. Parkins*, 412 P.2d 136 (Okla. 1965). *But see* *Wilcox Oil Co. v. Schott*, 327 P.2d 471 (Okla. 1958) (non-producing mineral interests are not separately taxed so undivided mineral interest owner may buy at tax sale free of other cotenants); *Smith v. Anderson*, 57 Cal. Rptr. 774 (Cal. Ct. App. 1967) (principle that tax payment inures to benefit of all cotenants inapplicable if interests separately taxed).

<sup>186</sup> *Ludey v. Pure Oil Co.*, 11 P.2d 102 (Okla. 1931); *Andretta v. West*, 415 S.W.2d 638 (Tex. 1967).

<sup>187</sup> *Sommers v. Bennett*, 69 S.E. 690 (W. Va. 1910) (remedy is one of damages).

<sup>188</sup> *Riddle v. Simmons*, 589 So. 2d 89 (La. Ct. App. 1991) (parol evidence of management agreement would not violate statute requiring conveyances of immovables to be in writing).



working interest owners in a specific well or leasehold execute a JOA. The second use of a JOA is to govern operation of tracts that various oil and gas companies own in severalty.

In the first situation, working interest owners in a well are cotenants and each can market the product and be free of conversion liability. The remedy for cotenants seeking share of sales (outside of any statute) is an equitable accounting between co-owners or court recognition of industry practice in the form of balancing in kind.<sup>189</sup> Naturally, the terms of the JOA can contractually modify these cotenancy rights.<sup>190</sup> The second usage of a JOA, which involves tracts owned in severalty, is more problematical.

The Oklahoma courts examined it in *Tenneco Oil Co. v. District Court*<sup>191</sup> and found that a voluntary unitization agreement that led to the creation of a unit by the Corporation Commission and its order of approval did not create a cotenancy between the several leaseholders. There was no cross conveyance of interests by use of words such as "grant, bargain, [or] convey."<sup>192</sup> The court found the JOA to be merely a plan to unitize their several tracts for the purpose of getting the most recovery, preventing waste, and protecting

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<sup>189</sup> *Anderson v. Dyco Petroleum Corp.*, 782 P.2d 1367, 1371 (Okla. 1989). The *Anderson* case also interprets *Teel v. Public Service Co. of Okla.*, 767 P.2d 391 (Okla. 1985). According to *Anderson's* reading of *Teel*, conversion occurs when: (1) co-owning working interest owners have an operating agreement saying one owner can market, and (2) the purchaser is aware that one of the working interest owners not a party to a division order has revoked the operator's right to market, and the purchaser considers itself buying the non-consenting owner's gas but does not account to them. 782 P.2d at 1371-72. These cases have been criticized as not distinguishing true cotenancy from cotenancy-like situations and therefore make operating agreements too much like common law cotenancies. See *Martin*, *supra* note 2, at 13-16 to 13-19. See also *Heiman v. Atlantic Richfield Co.*, 891 P.2d 1252, 1257-58 (Okla. 1995) (before statutory remedy, pre-depletion cash-balancing not required for each well but could be equitably ordered even if JOA silent).

<sup>190</sup> See *Penn*, *supra* note 2, § 18.02[3] (JOAs typically provide procedures for non-consent operations, marketing, and accounting procedures; the latter will be included whether or not a gas balancing agreement is part of the JOA).

<sup>191</sup> 465 P.2d 468, 469-70 (Okla. 1970).

<sup>192</sup> *Id.* at 470. But see *Texas' cross conveyance theory in pooling*, discussed in 5 *Summers*, *supra* note 2, § 956 (might be applicable in other situations).

correlative rights. Therefore, no partition was available because there was no cotenancy.<sup>193</sup>

In addition to the unavailability of partition in absence of a cotenancy, signatories to a JOA also may have no cash balancing or accounting rights.<sup>194</sup> This is important if parties to a JOA have not produced according to their respective shares. Generally, there are three ways to bring the underproduced party into balance:<sup>195</sup> (1) balancing in kind, which normally refers to volume of hydrocarbon produced;<sup>196</sup> (2) periodic cash balancing to catch up the underproduced during the well's life;<sup>197</sup> and (3) cash balancing on depletion of the reservoir. If no cotenancy is created by a unit agreement, then of the three methods, balancing in kind is the preferred method of balancing rights.<sup>198</sup> Balancing in kind means that each party may produce gas, with the understanding that the non-producing party's gas is "still in the ground" and the non-developer's remedy is to produce. With the preference for balancing in kind, a simple inability to market will not suffice to order cash balancing when not nearing depletion.<sup>199</sup> There-

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<sup>193</sup>*Id.* See also Martin, *supra* note 2, at 13-12 to 13-13 (most JOAs actively reject creation of a partnership or cotenancy in the leases but are contracts relating to property rights and grant rights to take in kind).

<sup>194</sup>Technically, a co-owner also does not have cash balancing rights, but rather has a right to an accounting for profits. This distinction eliminates some cash balancing problems when parties sell at different prices. The co-owner is accounted to simply on the basis of the overproduced party's receipts minus costs. Kuntz, *supra* note 2, at 13-24, § 13.04[5][c].

<sup>195</sup>One location of such a summary is *Beren v. Harper Oil Co.*, 546 P.2d 1356, 1359 (Okla. Ct. App. 1976, *as corrected on limited grant of cert.*).

<sup>196</sup>Professor Kuntz has suggested that in times of price fluctuation, courts should have the discretion to balance on value of the gas produced, not merely its volume. Kuntz, *supra* note 2, at 13-23, § 13.04[5].

<sup>197</sup>This resembles the right a co-owner has to file periodic accounting suits.

<sup>198</sup>*Doheny v. Wexpro Co.*, 974 F.2d 130 (10th Cir. 1992). See Martin, *supra* note 2, at 13-29 to 13-33.

<sup>199</sup>*Pogo Producing Co. v. Shell Offshore, Inc.*, 898 F.2d 1064, 1067 (5th Cir. 1990). See also the discussion in *Taylor v. Woodpecker Corp.*, 562 So. 2d 888 (La. 1990) (statute authorizing unit operator to sell gas of unleased interest owners who have not otherwise disposed of their gas and obligating the unit owner to pay the

fore, care should be taken in drawing JOAs to meet the needs of market vagaries.

Often, an express gas balancing agreement is added to a JOA to deal with who has what rights to produce and how to remedy a situation where one party produces more than the other. A gas balancing agreement may be contrasted with general cotenancy rules:

A gas balancing agreement deals with gas volumes, not dollars, and prevents a demand for cash balancing on a current basis as would be required under the rules of cotenancy. However, while cash balancing may be demanded at any time in the absence of a gas balancing agreement, it is seldom done. When a market is obtained by the underproduced party owning 25 percent of the working interest, that party is entitled to 25 percent of the production on a current basis. However, there is no rule under the laws of cotenancy which permits such party to get into balance by requiring that the owners of the other 75 percent reduce their current sales to accomplish the balancing.<sup>200</sup>

The gas balancing agreement generally addresses the problem of how to balance takes and delineates when cash accounting will be appropriate.<sup>201</sup> In short, the cotenant exchanges the right to an immediate share of net proceeds for a right to call upon the overproduced party to restrict production. Each cotenant, however, still has the theoretical right to produce all the hydrocarbons, subject to contractual obligations.

### § 20.13 Compulsory Units and Cotenancy

Forced pooling is important in examining concurrent ownership for two reasons. The first is that it could remedy some problems about development if the statutes allow force pooling of undivided interests in tracts, not merely pooling of tracts owned in severalty. Most state statutes do allow such compul-

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proceeds to them may be sole remedy).

<sup>200</sup> Penn, *supra* note 2, § 18.03[3].

<sup>201</sup> See generally Kuntz, *supra* note 2; Martin, *supra* note 2; Penn, *supra* note 2; and Smith, *supra* note 2.

sory pooling.<sup>202</sup> If the co-owners can make use of these statutes, the relevant commission would apprise costs and avert some of the risks of developing individually. To do so, however, will modify the availability of partition as a remedy.<sup>203</sup> The second question concerning compulsory pooling and cotenancy is whether the pooling itself creates a cotenancy with all attendant common law rights. It generally does not.<sup>204</sup> There is, however, some analogy to cotenancy in how conservation agencies manage a compulsory unit.

Naturally, a conservation commission may unitize and review the reasonableness of drilling costs charged a non-operator. In a state where the statute does not specify how the operator may collect, a court must proceed according to equity. Louisiana found that by analogy to cotenancy law, a non-operating owner or lessee, who does not consent to operations within a compulsory unit, has no liability for costs except out of that party's share of proceeds.<sup>205</sup>

There are differences between common law cotenancy and what a commission may do. E.g., some commissions can apply a statutory or discretionary non-consent penalty to a nonparticipating interest owner in pooling orders. In *Bennion v. ANR Production Co.*,<sup>206</sup> the Utah Supreme Court found such a

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<sup>202</sup> See Anderson & Cuda, *supra* note 2, at 16-14 to 16-18; Outerbridge, *supra* note 2, at 20-16, identified 22 state statutes as expressly covering separately owned interests in all or part of the spacing unit: Arkansas, Colorado, Idaho, Illinois, Iowa, Kentucky, Missouri, Montana, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, and Wyoming (current as of 1979).

<sup>203</sup> Oscar E. Swan & Joseph E. Hallock, "The Comparisons, Contrasts, and Effects of Compulsory Pooling Statutes," 28 *Rocky Mt. Min. L. Inst.* 911, 916-17 (1983) ("partition of drilling units into separate smaller tracts would defeat the whole purpose of their establishment"). Although the co-owners of tracts within the unit might still seek partition, the commission unit would remain.

<sup>204</sup> *Schulte v. Apache Corp.*, 814 P.2d 469, 471 (Okla. 1991) (forced pooling alone does not create a cotenancy). *Accord* *Wakefield v. State*, 306 P.2d 305 (Okla. 1957). See Martin, *supra* note 2, at 13-14 to 13-16.

<sup>205</sup> *Davis Oil Co. v. Steamboat Petroleum Co.*, 583 So. 2d 1139 (La. 1991).

<sup>206</sup> 819 P.2d 343 (Utah 1991) (175% non-consent penalty, which meant the non-consenting party received no revenues until 175% of the drilling costs were

penalty constitutional. It merely adjusts costs and does not “take” property; the nonparticipating owner still has its mineral interest and a right to royalty. With normal cotenancy, the developing cotenant can only recover reasonable costs out of proceeds.

Another difference between cotenancy and compulsory pooling is that a non-consenting party may elect to convert to a royalty interest and an unleased mineral owner is often treated partly as a lessor and partly as a working interest owner. In *Fife v. Thompson*,<sup>207</sup> a case arising in Arkansas, the lessee of the owner of 7/8 of the minerals was found able to develop and then was required to account. Interestingly, despite the case not being subject to the Oil and Gas Commission rules because the discovery was made before January 1, 1937, the accounting was nevertheless done according to its provisions: that is, costs were only charged to 7/8 of the unleased interest (an undivided 1/8) and a 1/8 of 1/8 royalty was granted.<sup>208</sup>

A final problem in a compulsory unit is how to “balance” production; cotenants would simply “account” in cash. In the absence of a gas balancing agreement, courts seem to prefer balancing in kind unless it would create waste, preclude an owner from recovering the owner’s just and equitable share, or infringes on the correlative rights of another owner by limiting the owner’s liberty to enjoy rights or causes damages to them.<sup>209</sup> Obviously, careful drafting of gas balancing agreements may be a priority.<sup>210</sup> With a totally recalcitrant co-

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recovered).

<sup>207</sup> 708 S.W.2d 611 (Ark. 1986).

<sup>208</sup> *Id.* Provisions such as these have been criticized as providing a “further discouragement to development without all co-owners consent” because the non-consenting owner gets greater benefits than at common law. Smith, *supra* note 47, at 133.

<sup>209</sup> *Hunt Oil Co. v. Batchelor*, 644 So. 2d 191 (La. 1994), overruling *Hunt Oil Co. v. Batchelor*, 633 So. 2d 259 (La. Ct. App. 1993). See also *Amoco Production Co. v. Thompson*, 566 So. 2d 138, 146 (La. Ct. App. 1990), *writ denied*, 571 So. 2d 627 (La. 1990) (cash accounting because of a lack of market as ordered by the Commission was not arbitrary and capricious). See Martin, *supra* note 2, at 13-33 to 13-41.

<sup>210</sup> See § 20.12, *supra*, and see generally Kuntz, *supra* note 2; Martin, *supra* note

owner, however, the availability of commission cost supervision and risk penalties may make a compulsory unit advisable for the active participant that intends marketing.

### § 20.14 Cotenancy Contrasted with Other Mineral Revenue Sharing Devices

One unity is basic to both a joint tenancy and a tenancy in common: each co-owner has a right to possess the total property. Therefore, without a concurrent right of possession, the cotenancy relationship does not arise.<sup>211</sup> Life tenants and those holding the remainder, therefore, are not cotenants because their rights of possession are not concurrent.<sup>212</sup> Those with no possessory rights generally cannot be cotenants. A right to share in the net profits of the land, such as a royalty, does not create a cotenancy with the mineral owner.<sup>213</sup> Similarly, jointly holding overriding royalties will not create for the holders all the attributes of a cotenancy.<sup>214</sup> There is one exception to the general rule.

If a party has an interest with all the attributes of a mineral estate except for the executive right being held exclusively by another, the holder of the undivided interest in the minerals will be a cotenant. In *Bullard v. Broadwell*,<sup>215</sup> the owner of a non-executive 1/3 undivided mineral interest was found to be a cotenant and entitled to 1/3 of value of mineral minus costs when the executive developed directly, rather than leasing. The non-executive was not limited to 1/3 of the customary royal-

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2; Penn, *supra* note 2; and Smith, *supra* note 2.

<sup>211</sup>Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App. 1947, error ref'd). See generally Knight, *supra* note 2, at 227-30. The purported cotenants must have the right to possess the same thing. Stoud v. Guffey, 3 S.W.2d 592 (Tex. Civ. App. 1927), *aff'd on other grounds*, 16 S.W.2d 527 (Tex. Com. App. 1929) (holder of valid oil lease is not cotenant with holder of valid gas lease).

<sup>212</sup>Cline v. Henry, 239 S.W.2d 205 (Tex. Ct. App. 1951, error ref'd n.r.e.).

<sup>213</sup>Kumberg v. Kumberg, 659 P.2d 823 (Kan. 1983).

<sup>214</sup>MacDonald v. Follet, 180 S.W.2d 334, 337 (Tex. 1944).

<sup>215</sup>588 S.W.2d 398 (Tex. Civ. App. 1979).

ty.<sup>216</sup> The holding underscores the purpose of a non-executive mineral interest: it is to share the proceeds of a mineral estate without having the problems of co-owner concurrence in development.

### § 20.15 Conclusion

Multiple ownership of minerals increases the difficulties of development. Not only may co-owners be unable to agree on development, but the possibility increases that they may be unlocatable or subject to a disability that makes them incapable of contracting.<sup>217</sup> The majority of jurisdictions alleviate the problem by allowing each co-owner to individually develop. Nevertheless, the vagaries of accounting make reliance on common law remedies somewhat precarious if substantial undivided interests are outstanding. Some statutory devices such as compulsory pooling and receivership could assist, but they have problems in and of themselves. Therefore, concurrent ownership will continue to be a bane of mineral developers.

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<sup>216</sup>*Id.* at 399.

<sup>217</sup>*See* Smith, *supra* note 47, at 130.