



Undivided Interests in Surface Ownership

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Introduction

- What are co-tenancies?
- Creation of co-tenancies
- Rights and obligations of co-tenants
- Adverse possession
- Partition

What is a
co-tenancy?

- Co-tenancy is co-ownership of separate, undivided interests in land
- One fee simple estate with multiple owners

What is a
co-tenancy



What is a
co-tenancy?

- Outside community property context, two types:
 - Tenancy in common
 - Joint tenancy
- Texas law disfavors joint tenancies

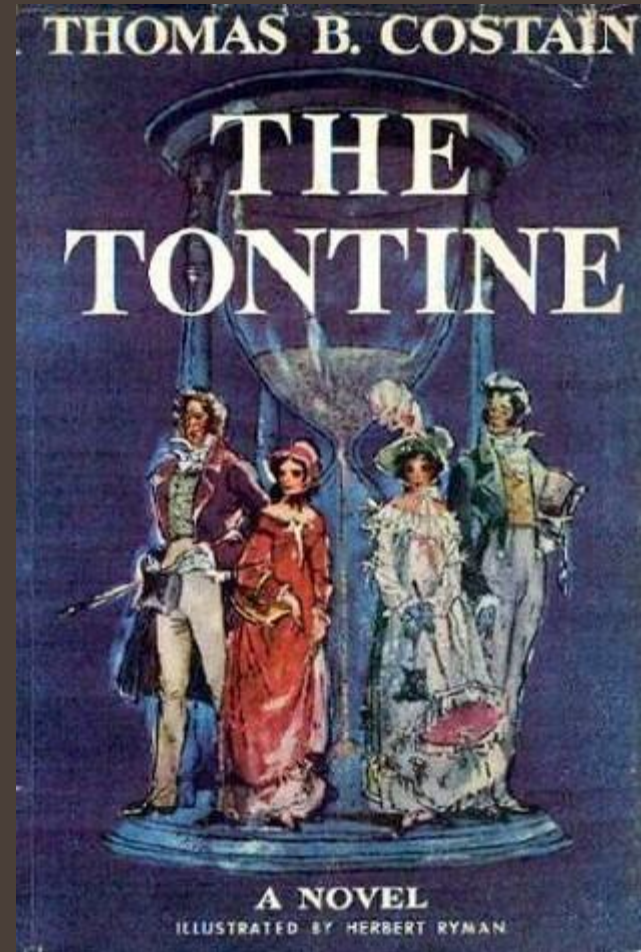
Joint tenancy vs. tenancy in common

- Under common law, co-tenancies were joint tenancies and required four unities:
 - Time
 - Title
 - Interest
 - Possession
- Tenancies in common only require the unity of possession

Joint tenancy vs. tenancy in common

- An interest in a joint tenancy “survives” to the remaining joint tenants (jus accrescendi)
- An interest in a tenancy in common descends to the heirs and beneficiaries of the deceased tenant

Joint tenancy
vs. tenancy in
common



Joint tenancy vs. tenancy in common

- An interest in a tenancy in common may be assigned
- Assigning an interest in joint tenancy destroys the joint tenancy as the unities of time and title are destroyed

Joint tenancy vs. tenancy in common

- In 1848, Texas abolished the joint tenancy
- In 1939 we brought it back
- Can create a joint tenancy by specific language- intent must be clear, no extrinsic evidence allowed

Joint tenancy vs. tenancy in common

- Consider the following:

There is hereby reserved and excepted from this conveyance for Grantor's and the survivor of Grantors, a reservation until the survivor's death, of an undivided one-half (1/2) of the royalty interest in all the oil, gas and other minerals. Grantor and Grantor's successors shall not participate in making a lease, but will be entitled to one-half of any bonus. This reservation will continue until the death of the last survivor

Joint tenancy vs. tenancy in common

- Does this language create a joint tenancy in life estate?
- Does this language create a tenancy in common in life estate pur autre vie?
- Word "Survivor"
- Word "Successor"
- Case is pending in the 13th Court of Appeals

Rights and Obligations of Co-tenants

- Each co-tenant legally owns the “entire” property and is entitled to use of the “entire” property
- Right to possess and occupy
- Co-tenants do not owe any fiduciary or quasi-fiduciary duties to other co-tenants
- This is a recipe for conflict

Rights and Obligations of Co-tenants



Rights and Obligations of Co-tenants

- How are conflicts to be addressed?



- Common law offers some rules, which are less than ideal in practice

Care and Preservation

- Each co-tenant has a duty to reasonably care for and maintain the common property
- This includes payment of taxes, liens and other encumbrances, insurance and expenses related to the reasonable preservation of the property

Care and Preservation

- If one co-tenant incurs necessary expenses beyond its pro-rata ownership interest, that co-tenant is entitled to contribution and has an equitable lien
- May recover interest on sums advanced
- No limitations period

Care and Preservation

- Can use subrogation in cases of tax payments
- In practice, there is not a thriving market for co-tenant interests in surface property
- Contribution usually obtained in partition through owelty and equitable balancing

Care and Preservation

- If a co-tenant expends money for “unnecessary” care and preservation or for improvements, other co-tenants are not obligated to pay their pro-rata share



Improvements

- Any co-tenant has the right to construct improvements on the common property
 - Cannot negatively impact the rights of other co-tenants
- Non-joining cotenants are not obligated to contribute
- Any improvement that becomes part of the realty will be subject to joint ownership - however, equities will be balanced in partition
- Beware: Fact Intensive!!!!

Improvements



Improvements

- Upon partition, the co-tenant who paid for improvements will be entitled to such improvements (if possible in kind) or compensation for enhanced market value of property
- NOT value of improvements themselves

Improvements



Waste

- If a co-tenant commits waste and decreases value of common property, must account to other co-tenants for such waste
- Consider the following:
 - Co-tenants own property with home
 - One co-tenant sells home for \$1,000.00 when valued at \$50,000.00
 - Third parties come in and remove the home
 - Is injunctive relief available?

Assignments and Liens

- Any co-tenant may sell their interest in the co-tenancy to a third party
 - Only conveys such co-tenant's undivided interest
 - A deed purporting to convey the entire estate is good as between the grantor and grantee, but not as to the other co-tenants

Assignments and Liens

- Any co-tenant can encumber their interest by mortgage or other lien, but such encumbrance will not attach to non-joining co-tenants
 - Foreclosure sale will only apply to undivided co-tenant interest
- However, one co-tenant can bind the entire estate if necessary to preserve estate

Rents and Income

- Any co-tenant may economically develop the property by:
 - Cutting timber
 - Removing and selling surface minerals
 - Selling water
 - Leasing the property (hunting, grazing, commercial, etc.)

So long as it is reasonable and does not constitute waste or interfere with the rights of other co-tenants

Rents and Income

- “To say that one tenant in common must have the consent of all his co-tenants to use the common estate would, in many instances, be practically a denial of any benefit to him from such estate; we take it that one tenant in common has a right to use and enjoy the common estate within due bounds”

Rents and Income

- What constitutes “reasonable use” and “waste” may change over time



Rents and Income

- If any co-tenant receives rents and/or income from development, must account to the other co-tenants after deducting reasonable expenses (NET profits)
- “Where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses.”
- Beware: Fact Intensive!!!!

Rents and Income



Rents and Income

- Consider:
 - Co-tenant client owns 90% undivided interest in 10 acre tract
 - Other 10% owned by private equity group
 - 10% owner wants to build a gas station on the property, over the protests of client
 - Can the 10% owner be stopped?
 - What happens when gas station is built?

Rents and Income

- What happens when co-tenant develops property for themselves but does not sell anything to third parties?
- Or when co-tenant is in possession (lives in a co-owned house, land, etc.) but the other co-tenants are out of possession?
- Does the co-tenant owe rent or an accounting to the other co-tenants?
- NO! Each co-tenant can use the land for themselves rent free

Rents and Income

- HOWEVER, since each co-tenant entitled to possession, if demand has been made for equal possession and refused, co-tenant in possession must pay rent to other co-tenants.
 - Mom and Dad pass away and house left to 4 kids.
 - 3 of the kids have their own house, so youngest son lives in co-owned house
 - Does not pay rent, unless he refuses to allow another co-tenant to live there. Refusal to one is refusal to all - must pay rent to ALL cotenants.
- Remedy is RENT for a suit to recover possession

Rents and Income

- What happens when two or more co-tenants each want to live on the property or improve the same area and the property is not big enough for all of them?
- Will the court force them to live together?



Rents and Income

- No - this would be terrible public policy
- Remedy for ouster is Rent
- Give great power to the first party in possession...
- However, threat of partition works miracles

Easements

- What happens when one co-tenant grants an easement, but the other co-tenants do not?



Easements

- General rule is that ALL co-tenants must join in an easement for it to be effective
- However, easement may bind entire estate through
 - Ratification
 - Estoppel
 - Adverse possession
- What is the remedy if, for example, pipeline laid in easement only granted by one co-tenant?
 - Injunctive relief? Probably not
 - Co-tenant accounting from pipeline company? Probably not

Easements

- One co-tenant cannot dedicate road easement without consent of other co-tenants
- However, one co-tenant can convey their undivided interest to the county for access purposes...

Adverse Possession

- Traditional adverse possession requires possession that is
 - Open
 - Continuous
 - Exclusive
 - Adverse/Hostile
 - Notorious
- If all co-tenants are entitled to exclusive possession, how can it be known if the possession is adverse and hostile?

Adverse Possession

- Possession by a co-tenant is presumed to be permissive
- To start the clock, adversely possessing co-tenant must clearly repudiate and oust the other co-tenants
- Repudiation must be “brought home” to the other co-tenants by actual or constructive knowledge

Adverse Possession

- What constitutes “actual” repudiation?
 - Refusal to allow possession by other co-tenants
 - Refusal to account to other co-tenants
- What constitutes “constructive” repudiation?
 - Change in use of property or character of possession

Adverse Possession



Adverse Possession

- If adverse occupancy and claim of title is “so long continued, open, notorious, exclusive, and inconsistent with the existence of title in others, except the occupant” and there has been “nonassertion of claim” by the other title holders, that can give rise to an inference of constructive repudiation
- “Nonassertion of claim” means the absence of any overt act of ownership
- Payment of taxes is an overt act of ownership

Adverse Possession

- How long is long enough?
 - 4 years not long enough
 - 24 years long enough
- Once repudiation is shown, adverse possessor must still wait for the statutory period to run
- May take 35+ years to adversely possess co-tenant interests
- Beware: Fact Intensive!!!!

Adverse Possession



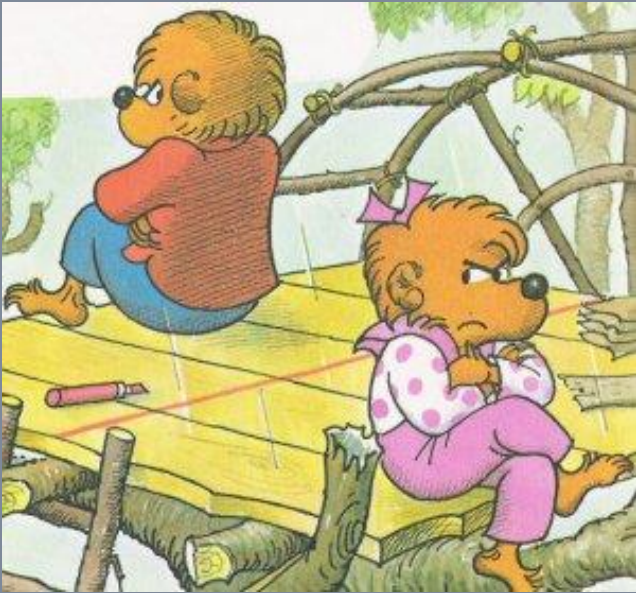
Special Issues

- No fiduciary duties owed between co-tenants BUT
- Consider
 - Four Co-tenants own surface estate
 - Three Co-tenants grant exclusive right to enter into water agreements to other co-tenant, reserving their pro-rata share of profits
 - Co-tenant with “executive” rights refuses to lease water, as he wants his tanks to remain full
 - Governed by contract? Oil and gas law?

Special Issues

- Able owns two tracts of land, 100% of west tract and 50% of east tract- other 50% owned by Baker
- Baker has given Able “executive” rights over surface minerals and groundwater on east tract
- Developer comes to Able with deal - only wants to develop one tract
- Able leases west tract, as his ownership (and profits) is bigger
- Has Able done anything wrong?

Partition



- Partition is a continuous and absolute right of every co-tenant
- The way “out” of a co-tenancy
- Right of partition can be contracted away, expressly or implied
- Not subject to limitations

Partition

- Partition can be accomplished by:
 - Written agreement
 - Oral agreement (with subsequent action)
 - Judicial Partition
- A partition is not a “conveyance” so it does not need to satisfy statute of frauds
- ALL OWNERS must join for an agreed partition to be effective
- ALL OWNERS must be joined for a judicial partition to be effective

Partition

- Partition by agreement is the easiest way to partition- simply requires parties to agree as to how to divide property
 - Usually requires appraisal, survey and written partition agreement
 - Can become difficult where there are improvements or other development on property, or where there are other differences as to the property

Judicial Partition

- Process (Sections 756-771 of TRCP, Section 23 of TPC):
 - One or more co-tenants sue for partition
 - Must be a co-tenant with right of possession
 - Non-possessory interests cannot be partitioned (easements, royalties etc.)
 - Cannot acquire a “higher” estate in partition

Partition

- Court will first:
 - Determine ownership interest of each co-tenant
 - Determine the property that is to be partitioned
 - Determine if there are any equities that need to be balanced
 - Determine whether property can be partitioned in kind

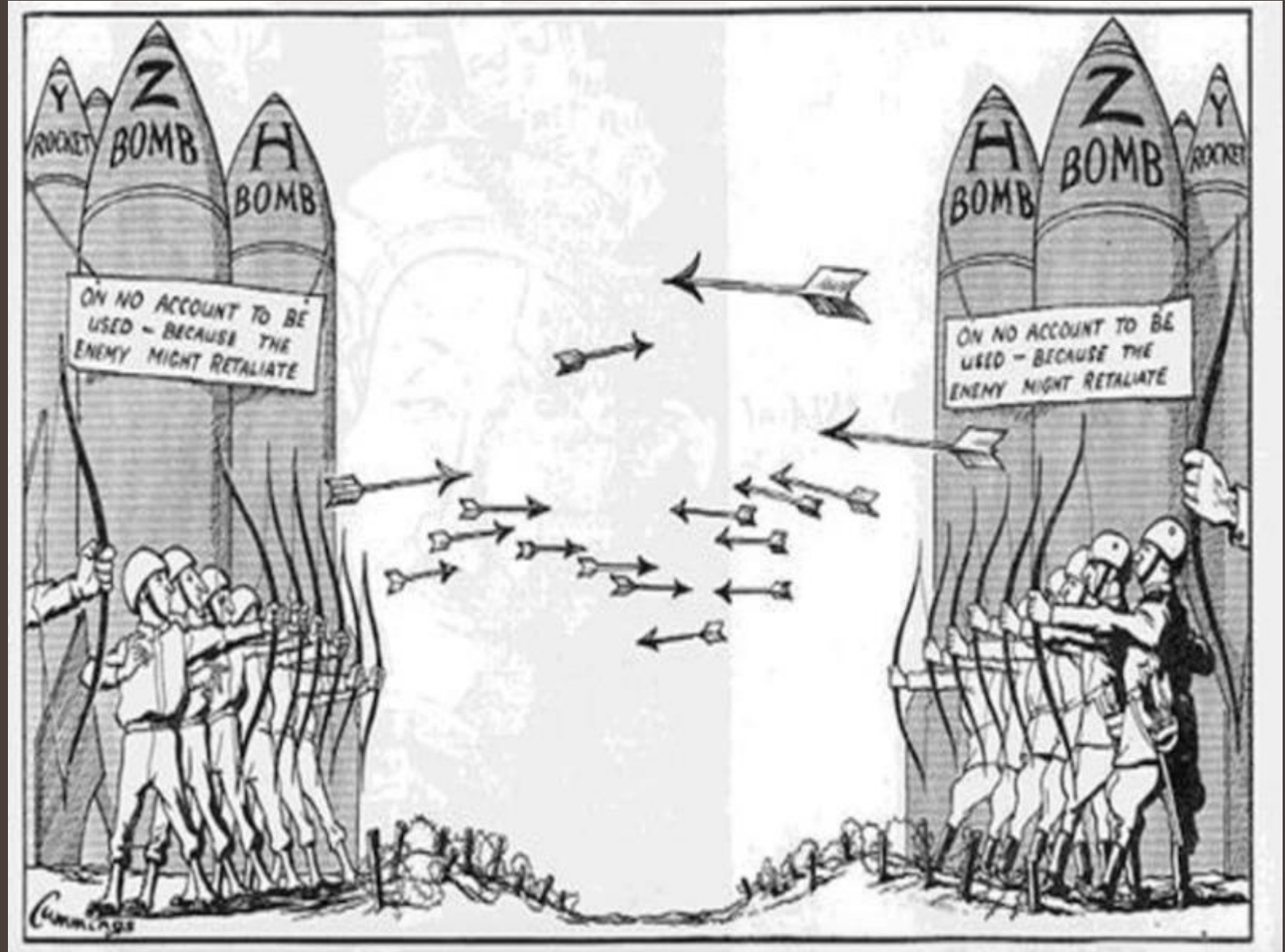
Partition

- Can the property be partitioned in kind?
Court takes into account:
 - Improvements
 - Uniformity of value
 - Size
 - Use
 - Geography
 - Other equities

Partition

- Determining whether property can be partitioned in-kind is a trial in and of itself
- Inability of property to be partitioned in kind can be used as leverage against co-tenants

Partition



Partition

- If property can be partitioned in kind, court enters a decree of partition
 - Describes interests of each co-tenant
 - Describes equities
- Case goes to three or more special commissioners who actually carry out the partition

Partition

- Based on the equities, commissioners will divide the property and take into consideration:
 - Improvements made
 - Taxes, insurance and other payments made
 - Rents paid/not paid
- Can give one co-tenant more or less property, or affix owelty liens to make up the difference

Partition

- If property not susceptible to partition in kind, court will order the property sold
- Money from sale will be divided up based on ownership interests and equities
- Judicial partition is fact intensive and expensive

When your
client asks for
a judicial
partition



Uniform Partition of Heirs' Property Act

- Adopted in 2017
 - If property is “heirs” property (20% or more of interests are held by relatives) Act will govern partition process
 - Allows co-tenants opportunity to “buy out” co-tenant who wishes to partition
 - If property goes to a sale, must be listed with a broker for FMV - not sheriff's sale
 - Goal is to protect “family” property

Equitable Partition

- What if one co-tenant purports to convey the entire property, or a section of the property free and clear of the co-tenancy?
- Conveyance is good as between the Grantor and Grantee, at least as to the co-tenant's interest

Equitable Partition

- However, in certain cases a conveyance by a co-tenant will convey the property free and clear of the co-tenancy
- When a portion of the property is conveyed that is not larger than the co-tenants interest in the co-tenancy and the rights of the other co-tenants are not unfairly diminished, court will order an equitable partition of the conveyed property

Equitable Partition

- Grantee must have “clean hands”
- Cannot sue for equitable partition if Grantee had knowledge of the record title - that is, they knew about the other undivided owners

Solutions

- All of these issues can be addressed by an agreement between the co-tenants as to:
 - Management
 - Possession
 - Use
 - Rents/income
 - Partition
- Can also put interests into entity for management purposes

Solutions

- An upfront agreement will save plenty of time and attorneys' fees later





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