

A Reprint from *Tierra Grande*


# CO TENANTS

BY JUDON FAMBROUGH

## NOT SO COZY A RELATIONSHIP

**T**exas real estate may be owned individually or jointly. Joint owners are called co-owners or cotenants, and the relationship is known as a cotenancy.

Texas law recognizes three forms of cotenancy: community property, joint tenants with the right of survivorship (JTWS), and tenants in common (TIC). This article focuses on TIC but touches on JTWS.

### Cotenant Rights

Co-ownership, regardless of the type, gives each cotenant the right to use, occupy and possess each part of the property, but not exclusively. Cotenants may not exclude other cotenants

from possessing, using or occupying the same part or parcel. This undivided right of possession forms the basis of the cotenancy relationship.

Cotenants may terminate the cotenancy at any time by partitioning, which changes co-ownership to sole ownership. Partitioning divides the property according to value, not area, and may occur voluntarily or judicially.

Voluntary partitioning requires an agreement among the cotenants to divide the property in a certain manner. After exchanging deeds, each former cotenant owns a certain parcel outright.

Judicial partitioning, on the other hand, is done by the court. If the court finds the property cannot be divided fairly and equally, it orders the property to be sold with the proceeds divided among the owners according to their undivided interests. Judicial partitioning is a time-consuming, expensive process.

Cotenants have the right to transfer their undivided interests to a third party without the other cotenants' consent. With the exception of a conveyance from an owner of a JTWS, a grantee receives the seller's identical, undivided interest in the property.

### Types of Cotenancies

TIC is, by far, the most frequently occurring type of cotenancy. Texas law presumes the formation of this cotenancy when the deed or will creating the interest lacks the word "survivorship." Language such as "to share and share alike" or "to share jointly" creates a TIC. Language such as "with all the

rights of such tenants at common law, including the right of survivorship” creates a JTWS.

The primary difference between the two hinges on the dispensation of the deceased’s interest at death. Under a TIC relationship, each cotenant controls (directly or indirectly) the distribution at death. If the cotenant dies with a will, the property goes to those designated in the will. If the cotenant dies without a will, the property goes to the next of kin according to the Texas Probate Code.

Under a JTWS relationship, the deceased’s interest goes automatically to the surviving cotenant(s) without the need of probate. The former owner cannot prevent this from occurring. The cotenant living the longest gets all the property. Obviously, the advantage goes to the youngest co-owner.

However, Texas law thwarts attempts to ensure the heirs of one cotenant get all the property. Assume, for example, an older co-owner in a JTWS relationship transfers his or her undivided interest to a much younger third party. The other cotenants object, but cannot stop the transfer because the interest is freely transferable. This seems to set the stage for the younger cotenant getting sole ownership of the property.

However, Texas law prevents this. The recipient (grantee) of an undivided interest from a cotenant in a JTWS relationship takes it as a TIC, not as a JTWS.

### Encumbering Residential Property by One Cotenant

As a general rule explained in the next section, one cotenant cannot bind another cotenant to a legal obligation without his or her consent. Beginning Sept. 1, 2011, a limited exception exists for preserving or improving residential property according to Chapter 64 of the Texas Property Code.

Starting Sept. 1, 2011, the new law empowers one cotenant to act on behalf of the other cotenants without their explicit permission to contract for the purpose of preserving or improving residential property and to encumber it with a deed of trust. However, the co-owner executing the documents is the



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sole obligor of the debt. None of the other cotenants are personally liable nor may they repudiate or disaffirm the contract or deed of trust.

However, several prerequisites must be met. The co-owner must have (1) occupied the residential property designed for not more than four families for the past five years, (2) received a residential homestead exemption on the property (which cannot exceed 10 acres) under Section 11.13 of the Texas Tax Code and (3) paid all the assessed property taxes for the preceding five years without delinquency and without receiving any contributions from the other cotenants.

As a final measure, the co-owner must file an affidavit with the county clerk in the real property records where the residential property is located affirming the facts listed above. In addition, two people with personal knowledge must file affidavits

swearing the cotenant occupied the residential property for the past five years. Finally, a certificate from the county tax assessor-collector must be filed affirming the fact that the cotenant has paid all the assessed taxes against the property for the preceding five year without delinquency.

Note. It is unclear if all the information regarding the filing of the affidavits and certificate may combined into one document and filed as one instrument.

### Legal Relationship, Shared Responsibilities

**A**lthough co-owners share the nonexclusive right to use and possess the property, the legal relationship ends there. No cotenant is a legal partner or agent of the other. Except as noted above, no cotenant has the authority to bind another cotenant to an agreement or a debt. No fiduciary duty exists among the cotenants unless an express agreement exists. However, cotenants do share some responsibilities.

Individually and collectively, cotenants have a duty to protect and preserve the property. A cotenant who expends funds for this purpose is entitled to reimbursement from the others for their proportional share. Equity gives the cotenant making the expenditures a lien on the property to enforce repayment.

Similarly, cotenants have a duty to preserve and protect the property from waste. Waste constitutes the unauthorized or wrongful destruction or severance of improvements, trees, minerals or other tangible property from the property. Waste does not include ordinary wear and tear. The party committing the waste becomes liable to the others for damages.

Cotenants are responsible for the payment of a common debt, such as the mortgage and property taxes. A cotenant paying a disproportionate share of these debts may recover the costs from the others. Again, equity holds each cotenant equally liable, and all are bound to contribute proportionately according to their undivided interest. This raises some questions.

Assume one cotenant pays all the property taxes for years and the others refuse to reimburse him or her. Rather than sue, the cotenant quits paying the taxes and purchases the property

at the tax foreclosure sale. Does this give the cotenant sole title to the land?

The answer is no. Texas law presumes a cotenant purchasing the property

at a tax sale does so for the benefit of all the cotenants. The purchaser simply reinstates the cotenancy relationship as it existed before the tax sale.

### Improvements

**C**otenants have the right to improve the property without the others’ consent as long as doing so does not injure or prejudice the others’ rights. Cotenants may agree in advance to share the costs. If one or more cotenants undertake an improvement without the others’ consent, the sharing of costs is contingent on the improvement being necessary and beneficial.

Consider this example. Three cotenants own an equal, undivided interest in rural property. They agree to build a new barn costing \$30,000. Each contributes \$10,000. No problems arise.

Now consider the same scenario except this time one cotenant builds the barn without the others' consent. The cotenant then asks the other two to contribute \$10,000 each. They refuse. The amount of their liability depends on whether the improvement was necessary and beneficial.

If the improvement was not necessary and beneficial, the others have no obligation or liability to contribute. If the property is subsequently partitioned, though, the cotenant shouldering the costs may recover the enhanced value to the land, not the amount expended.

If the improvement was necessary and beneficial, such as drilling a well to supply water for cattle, the other cotenants become liable for their proportional share of the total costs, not the enhancement. The classification of an improvement is critical in determining the recovery.

## Profits, Accounting

Sharing the rents and profits among the cotenants is not always required by law. When the cotenants agree in advance to an income-producing project, the allocation of costs, expenses and profits should be detailed. Problems arise when one or more cotenants initiate a project without informing and getting consent from the others.

In this situation, the courts draw a distinction between income produced from leasing the property to a third party and that earned by the self-efforts of the cotenant-in-possession of the property.

Clearly, if the property is leased to a third party, the duty to share the profits with and account to the other cotenants for the income and expenses is required. However, if the property is used by the cotenant-in-possession to produce income, the duty to share the profits with and account to the other cotenants depends on two things:

- Was there an agreement among the cotenants for the cotenant-in-possession to pay rent to the others or to share the profits of his or her labor or
- Has the cotenant-in-possession refused to allow the others to enter the property, effectively ousting them? (An ouster is defined as a notorious and unequivocal act by which one cotenant deprives another of the common and equal possession and enjoyment of the property.)

In the first situation, the tenant-in-possession would have a self-imposed duty to share profits and account to the other cotenants. In the second situation, the answer depends on how the other cotenants react to the ouster.

If the others do not complain, the law presumes they acquiesced to the unauthorized acts, entitling the cotenant-in-possession to all the proceeds. The only exception is when the unauthorized acts entail a waste, making the cotenant-in-possession liable to the others for the loss in value. However, ordinary depreciation to age and use is not a waste.

The law makes an exception for mineral cotenants. If one mineral cotenant leases the mineral property and the others do not, the oil company may enter and produce the minerals. However, the oil company must account to the mineral cotenants and share the profits once payout is reached.

To learn more about consenting and nonconsenting mineral cotenants, see *Rights and Responsibilities of Mineral Cotenants* (<http://recenter.tamu.edu/pdf/843.pdf>).

## Adverse Possession

Suppose two children, a brother and sister, inherit rural land. The brother lives on the property and uses it to earn a living. He does not account to his sister and retains all the profits. He pays all the property taxes. The sister never visits the property nor asks for an accounting. After ten years, can the brother assert adverse possession and assume ownership of the entire farm?

Texas statutes define adverse possession as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person" (Section 16.021, Texas Civil Practices and Remedies Code).

Because the brother has the right of possession as a cotenant, as does the sister, his use of the property is not inconsistent and hostile to the sister's rights and title. Therefore, the brother cannot claim adverse possession.

This does not mean that adverse possession cannot occur. One cotenant may claim adverse possession after clearly repudiating the other cotenants' title to the property. This occurs in one of two ways. The claimant may give notice to the others that he or she claims the land solely as his or her own. The claimant may also commit an act that gives unequivocal notoriety of an adverse claim. Mere possession of the land coupled with the payment of taxes does not form a basis for claiming adverse possession against another cotenant.



Repudiation of title may occur indirectly when one cotenant sells his or her undivided interest. If the deed purports to convey “all rights, title and interest” in the property, not just the grantor’s undivided interest, repudiation occurs. If the grantee enters the property and excludes the other cotenant(s) for a period of time, the grantee becomes the sole owner by adverse possession.

Adverse possession may also occur when one cotenant constructs a dwelling or business on the premises. If the cotenant excludes the others from accessing the premises, the cotenant may gain sole title to the area by adverse possession. To prevent this from happening, the other cotenant(s) may demand and collect rent for the occupied area. Otherwise, acquiescence may mature into adverse possession.

For more information on adverse possession, see the Center’s publications “Use It or Lose It” (<http://recenter.tamu.edu/tgrande/vol13-2/1776.html>) and “Fences and Adverse Possession” (<http://recenter.tamu.edu/pdf/1152.pdf>).

## Case Study

Ten cotenants own 55 acres outside of town. A developer purchases nine of the ten cotenants’ interest. With a loan from a bank, the development begins. The developer also grants a pipeline company an easement across the back of the property.

Where does this leave the nonconsenting cotenant? What options does he or she have under the circumstances?

First, the cotenant should check the recorded deeds signed by the other cotenants. Did they convey “all rights, title and interest to the property” or just their undivided share? Conveyance of all rights, title and interest serves as a foundation for repudiation of title and commencement of adverse possession.

Second, the person could do nothing, choose to be a non-consenting cotenant and demand an annual accounting from the developer. The outstanding 10 percent interest entitles the holdout to 10 percent of all profits generated by the project. It

is unclear if the person faces any out-of-pocket costs or liability for a loss.

Third, the cotenant could partition the property. The holdout is entitled to a parcel equal to 10 percent of the value of the entire 55 acres, not just a parcel equal to 5.5 acres. If the property cannot be physically divided because of platting or other reasons, the court will order the property sold with 10 percent of the proceeds going to the holdout.

Fourth, the person should inform the developer, builder, lender, title companies and any real estate personnel involved in the sale of the lots of his or her outstanding interest in the property. The person should demand a key from each homeowner or rent to avoid the appearance of adverse possession.

In this situation, Texas case law reduces the rent payments to coincide with the person’s undivided interest. For example, if the rental value for a residential lot is \$5,000 a year, the holdout would be entitled to an annual payment of 10 percent of that amount or \$500 per lot.

What about the pipeline? Because the holdout did not join in the conveyance, is the easement valid?

Probably not. Absent consent or subsequent ratification, the general rule is that one cotenant may not impose an easement on the property in favor of a third party. To avoid the appearance of consent or ratification, the person should send written notice to the pipeline company informing it of the outstanding interest and demanding removal of the pipeline. ♣

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## THE TAKEAWAY

Owning property as cotenants creates a unique relationship that may not be beneficial to all parties. Each cotenant must know his or her rights and responsibilities for the relationship to be successful.



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