THE LAW OF PROPERTY

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Class 12

Professor Robert T. Farley, JD/LLM

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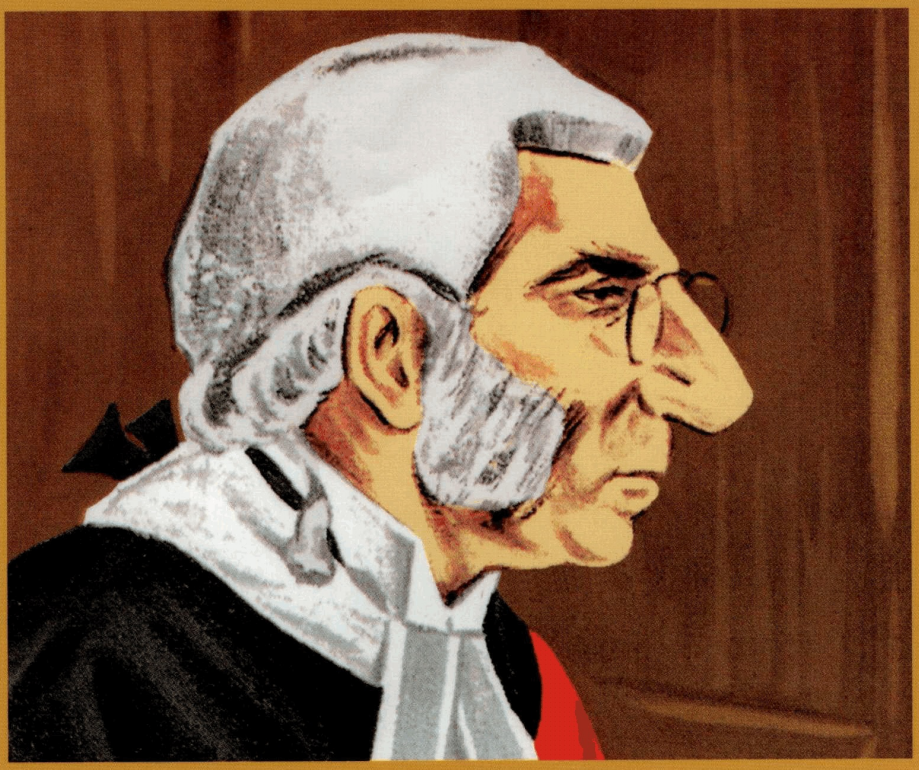

PROPERTY

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CHAPTER 4

CONCURRENT OWNERSHIP AND MARITAL INTERESTS

ChapterScope

This chapter examines various forms of concurrent ownership of property, marital property interests, and the rights and obligations of co-owners. Here are the most important points in this chapter.

- All types of property may be owned simultaneously by multiple people, a condition that invites conflict among co-owners. While co-owners are generally free to specify the terms of their relationship, law must provide some default rules that mediate conflict.
- The principal forms of concurrent ownership are tenancy in common, joint tenancy, and tenancy by the entirety.
  - Tenancy in common is the modern default position. Unless a grant indicates a contrary intention, tenancy in common results from a grant to two or more persons. Tenants in common own separate but undivided interests in the whole of the property.
  - Joint tenancy differs from tenancy in common in that each joint tenant has an undivided interest in a single unit. The consequence is that each joint tenant has a right of survivorship — when a joint tenant dies his or her interest dies with him and the remaining joint tenant or tenants own it all. When there are two joint tenants this is an effective way to avoid probate.
    - At common law a joint tenancy was possible only if the joint tenants had unity of interest, time, title, and possession. These requirements have been relaxed by statute. A corollary to the four unities was that the destruction of any unity severed the joint tenancy, producing a tenancy in common instead. Today, a conveyance by one joint tenant will sever the joint tenancy.
  - Tenancy by the entirety is a form of joint tenancy limited to married couples, but unlike the joint tenancy the survivorship right is indestructible — it may not be destroyed by the unilateral act of a single owner.
- Two different forms of marital property exist: Community property or separate property.
  - Community property, a civil law institution recognized in nine states, treats all property acquired during marriage (except gifts and inheritances) as owned by the marital community. Each marital partner has an equal interest in the property of the marital community.
  - Separate property, the form of marital property recognized by the common law, holds that property acquired during marriage is owned by the marital partner who acquired it. This "his-is-his" and "hers-is-hers" rule is tempered at divorce by equitable distribution laws that require courts to ignore title to achieve equity in property division, and at death by spousal elective share statutes that permit a surviving spouse to take some portion of the deceased spouse's property, even if the deceased spouse's will is to the contrary.

- Unmarried cohabitants may agree to share property but cannot by agreement acquire any of the status benefits of marriage. In Vermont and Hawaii, same-sex partners may obtain the status benefits of marriage by civil ceremony.
- Every co-owner except tenants by the entirety have the right at any time to demand partition of the property. Divorce is the effective method of partition for tenants by the entirety.
  - Partition is in-kind (physical division) unless that is impracticable or would not be in the best interests of *all* co-owners, in which case partition is by sale and division of the sale proceeds.
- Each co-owner is entitled to possession of the whole, but when one co-owner actually possesses the entire property courts disagree over whether the tenant-in-possession must pay fair rent to the tenants not in possession.
  - Most courts hold that unless the tenant-in-possession has ousted the other tenants there is no duty to pay rent. Ouster consists of either refusing a co-owner's demand to share possession or unequivocally denying that one's co-owner is really an owner.
  - Some courts hold that a co-owner in sole possession has an obligation to pay fair rent to the other co-owners regardless of whether there has been ouster.
- Co-owners must account to each other for the rents they have received from third parties. Co-owners are liable to each other for their proportionate share of the costs of ownership, but not for improvements. An improving co-owner can recover the value added by the improvement only upon partition or sale.
- Condominiums and cooperative apartment corporations are unique forms of co-ownership. Condominium owners have title to their unit and own the common areas of the development as tenants in common. Cooperative apartment owners actually own shares in the corporation that owns the building and lease their apartments from the corporation, thus making the shareholder-tenants extremely financially interdependent.

I. FORMS OF CONCURRENT OWNERSHIP

A. Introduction: When the same interest in property is owned by more than one person at the same time there is ***concurrent ownership.*** There are at least five forms of concurrent ownership recognized by the common law, only three of which are studied in the typical Property course: ***tenancy in common, joint tenancy,*** and ***tenancy by the entirety.*** Of the remaining two, ***co-parceny*** is extinct in the United States and ***tenancy in partnership*** is usually covered in courses on Business Associations. This chapter also covers marital interests, only some of which are forms of concurrent ownership.

B. Tenancy in common:

1. Nature of tenancy in common: Tenants in common own ***separate but undivided*** interests in the same interest in property. Conceptually, each tenant in common owns the entire property, but must necessarily share that ownership with the other tenants in common. Two people who own a sailboat as tenants in common each own a fraction of the entire boat, and they are each entitled to sail it, but they cannot prevent the other from doing so. Much of the law of concurrent

ownership is designed to mediate the friction that can arise from co-ownership of the same article. A tenancy in common interest may be alienated, devised, or inherited separately from the other tenancy in common interests. Unlike the joint tenancy, there are ***no survivorship rights*** among tenants in common.

Example: Tim conveys Roundhouse to Ezra and Geraldo, as tenants in common. If Ezra conveys his interest in Roundhouse to Newt, Geraldo and Newt are tenants in common. If Geraldo dies, devising his interest in Roundhouse to Maxine, Newt and Maxine are tenants in common.

2. **Presumption of tenancy in common:** By statute or judicial decision, a conveyance of real property to two or more persons who are not married to each other is ***presumed to convey a tenancy in common.*** That presumption is rebuttable. The best evidence rebutting it is a clear statement in the conveyance of the alternative form of co-ownership (e.g., joint tenancy). Property that passes by intestate succession to two or more heirs is always taken as tenants in common.

3. **Rights to possession:** Each tenant in common is entitled to possess the entire property. In practice, this means that a tenant in common can possess the entire property if ***no other cotenant objects.*** Tenants in common may, and often do, regulate their rights to the property by agreement among themselves. But if they do not, and disagreement erupts, their rights and obligations are governed by "default" rules of law. See section II, below.

4. **Uneven shares and different estates:** Tenants in common may own ***unequal shares*** and ***different estates.***

Example: Able, Baker, and Cassie own Blackacre, in equal shares, as tenants in common. Able conveys his interest to Baker. Baker and Cassie are still tenants in common, but Baker has a two-thirds share and Cassie a one-third share. Cassie conveys her interest in Blackacre to Sophie for life, then to Andrea and her heirs. Baker is now a tenant in common with Sophie (as to possession) and with Andrea (as to her remainder).

There is a rebuttable presumption that tenants in common have equal shares in the property. The best evidence rebutting this presumption is a clear statement in the conveyance creating the tenancy in common (e.g., "*O* conveys a two-thirds share to *A*, and one-third share to *B*, as tenants in common"), but evidence extrinsic to the conveyance (e.g., relative contributions of purchase cost or carrying costs) is germane to this issue.

C. Joint tenancy:

1. **Nature of joint tenancy:** Joint tenants own an undivided share in the same interest in either real or personal property, but the surviving joint tenant owns the entire estate. This ***right of survivorship*** is the hallmark of joint tenancy, setting it apart from tenancy in common. Any number of people may be joint tenants. Upon the death of one joint tenant, the share held by the remaining joint tenants increases proportionately.

Example: Alan, Betty, and Charles own equal undivided interests in Blackacre as joint tenants. Alan dies, leaving all his property by will to David. Betty and Charles now own equal undivided interests in Blackacre. Alan's will is ineffective to transfer his interest in Blackacre because the nature of joint tenancy is that his interest expires at his death. Charles then dies intestate, leaving Emmy as his heir. Betty now owns the entirety of Blackacre by herself. Charles's estate has no interest in Blackacre. When a joint tenant dies, his ***entire interest*** dies with him.

A joint tenancy may only be created by an inter vivos conveyance or a will. Property acquired by multiple heirs through intestate succession is taken as tenants in common.

a. The theory of joint tenancy: Common law conceived of joint tenants as bound together as a single owner. The common law's expression for this unwieldy concept was to say that each joint tenant owned the property *per my et per tout* — by the moiety (the half) and the whole. This summed up the inherent duality of the joint tenancy — multiple people own an equal interest in the entirety of the property. Each joint tenant owns it all. Thus, when a joint tenant dies, his interest dies because he was a mere participant with others in a single ownership entity. The dead joint tenant simply drops out of the ownership unit. No interest in property passes to the survivors, because they already own the entire property. There is just one less member of the ownership consortium. Significant consequences flow from the idea that no interest passes at death: (1) A ***joint tenancy is not subject to probate,*** an expensive, cumbersome, time-consuming judicial procedure to transfer a decedent's property; and (2) Creditors of a joint tenant must seize and sell the debtor's joint tenancy interests during the debtor's life because the joint tenant debtor's interest disappears at his death.

2. The four unities of joint tenancy: From the theory of the joint tenancy, common law judges derived the principle that the ***interests of joint tenants must be equal in every respect.*** Hence, the ***four unities*** of joint tenancy: ***all joint tenants*** must take their interests: (1) at the ***same time,*** (2) under the ***same instrument,*** (3) with the ***same interests,*** and (4) with the ***same right to possession of the entire property.*** At common law a joint tenancy ***could not be created without the four unities being satisfied.*** If the four unities were not satisfied, a tenancy in common resulted. This is still the law in many states, but many states have relaxed the rule to permit creation of a joint tenancy whenever there is sufficiently clear intention that a joint tenancy was intended.

a. Time: The joint tenants must receive their interests at the same moment in time.

Example: Oliver conveys Blackacre to "my son, Michael, and to my daughter, Eliza, if and when they marry, as joint tenants." This springing executory interest vests in interest and possession as each of Michael and Eliza marry. Obviously, they cannot marry each other and, unless they happen to marry in an exquisitely timed double ceremony their respective interests in Blackacre will vest at different times. When Michael marries Jane and, a year later, Eliza marries Roger, Eliza and Michael will own Blackacre as tenants in common, not as joint tenants.

b. Title: All joint tenants must receive their interests under the same instrument: a deed, a will, or a decree quieting title by joint adverse possession.

Example: Edward was the sole owner of Bower Cottage prior to his marriage to Andrea. As a marriage present, Edward conveyed Bower Cottage "to Andrea and Edward, as joint tenants." At common law this did ***not*** create a joint tenancy, because Edward's interest in Bower Cottage was created by a prior instrument. The deed from Edward to Edward and Andrea was construed as a nullity insofar as it purported to transfer Edward's interest, but did operate to convey half of Edward's interest to Andrea. Common law did not recognize transfers from oneself to oneself. Thus, Edward and Andrea would be tenants in common.

This example, which occurred with some frequency, proved to be a bothersome annoyance. The solution at common law was for Edward to convey to his lawyer (or some other trusted friend) who would promptly convey back to Edward and Andrea, as joint tenants. This "straw man" conveyance met the four unities requirement but was cumbersome and, in essence, an

empty formality. As a result, many states today have, by statute, provided that a person may create a joint tenancy by a conveyance from himself to himself and another, as joint tenants. Under such a statute Edward, in the example, would have created a joint tenancy between himself and Andrea. See ***Riddle v. Harmon,*** 102 Cal. App. 3d 524 (1980), discussed in section I.C.4, below.

c. **Interest:** Each joint tenant must have the identical interest in the property. This means two things: (1) each joint tenant must have the same share of the undivided whole, and (2) each joint tenant must have the same durational estate.

Example — Same share: George conveys "a two-thirds interest in Whitewall to Andrew, and a one-third interest in Whitewall to Bruce, as joint tenants." Andrew and Bruce take as tenants in common because the unity of equal interest is not present.

Example — Same durational estate: George conveys Whitewall to Andrew and his heirs, and to Bruce and his heirs so long as Whitewall's library remains intact, as joint tenants. Bruce and Andrew are tenants in common because Andrew has fee simple absolute and Bruce has fee simple determinable (George retaining a possibility of reverter as to half of Whitewall). But this requirement does ***not*** preclude holding a portion of an estate in joint tenancy and another portion in tenancy in common.

Example: Olivia conveys "a half interest in Tinderbox to Amy and Ben, as joint tenants, and a quarter interest in Tinderbox to Cameron, as a tenant in common." After this conveyance, Amy and Ben own an undivided interest as to half of Tinderbox in joint tenancy; Cameron owns a quarter undivided interest as a tenant in common, and Olivia continues to own a quarter undivided interest as a tenant in common. If Ben dies, Amy will be the sole owner of an undivided half interest in Tinderbox, as a tenant in common with Cameron and Olivia. *Remember:* The joint tenancy is considered a single ownership entity, so throughout this scenario the joint tenancy owned an undivided half interest in Tinderbox as a tenant in common with Cameron and Olivia. When Ben dies, Amy simply owns the entire interest formerly held by the joint tenancy, but the relationship of tenancy in common with respect to the other interests is not altered.

d. **Possession:** At creation of the joint tenancy, each joint tenant must have the right to possession of the whole property. After creation, joint tenants may agree among themselves to divide possession, or to deliver exclusive possession to one joint tenant. So long as the arrangement is consensual, it amounts to a voluntary waiver of a joint tenant's legal right to possess the whole. Generally, the law is willing to enforce the voluntary agreements of co-owners concerning their co-ownership.

3. **Creation of joint tenancy:** Common law presumed that any conveyance or devise to two or more persons (other than husband and wife) was in joint tenancy. This simplified the performance of feudal obligations, because only one entity — the joint tenancy — owed those obligations. Because we don't live in a world of feudal obligations, every American jurisdiction has reversed the presumption. Today, a tenancy in common is presumed, unless there is clear evidence of joint tenancy. At common law, husbands and wives were presumed to take as tenants by the entirety. Today, husbands and wives are presumed to take either as tenants by the entirety or as joint tenants.

a. **Evidence sufficient to create joint tenancy:** The modern presumption of tenancy in common can be overcome only by a clearly expressed intention in the grant itself. The best expression is "to *A* and *B*, as joint tenants with right of survivorship," although Michigan and Kentucky regard this clear expression as creating a joint life estate in *A* and *B*, with a contingent remainder in the survivor. See *Albro v. Allen*, 434 Mich. 271 (1990); *Sanderson v. Saxon*, 834 S.W. 2d 676 (Ky. 1992). The significance of the Michigan and Kentucky view is that the survivorship right cannot be destroyed by a joint tenant through a conveyance to a third party that severs the joint tenancy.

b. **Evidence insufficient to create joint tenancy:** The following common expressions are dangerous. Some courts regard them as adequate to create a joint tenancy; others do not.

Example: "To *A* and *B* as joint tenants." This is ordinarily adequate to create a joint tenancy but some states hold that failure to include the phrase "with right of survivorship" renders this usage inadequate to create a joint tenancy. But note that inclusion of that phrase in Michigan and Kentucky creates a joint life estate with contingent remainder in the survivor.

Example: "To *A* and *B* jointly." This is problematic, because the term "jointly" is often used colloquially to refer to any form of co-ownership.

Example: "To *A* and *B*, joined together." This probably produces a tenancy in common, because the term "joined together" is not a term of art, and is probably a lay reference to co-ownership.

Example: "To *A* and *B* as joint tenants, then to the survivor and her heirs." This is hopelessly ambiguous; a mixed message. The phrase "joint tenants" is clear enough, but when followed by the express conveyance of an interest "to the survivor and her heirs" the inference is reasonable that the grantor intended to create a remainder in the survivor. On the other hand, the "survivor and her heirs" language could be taken to mean nothing more than an empty restatement of the legal effect of a joint tenancy. This usage may result in a joint tenancy but is probably more apt to create a joint life estate or tenancy in common in *A* and *B*, followed by a remainder in the survivor. The latter result prevents either *A* or *B* from destroying the survivorship right by an inter vivos conveyance.

4. **Severance of joint tenancy:** A joint tenant may destroy the joint tenancy at anytime by severing the joint tenancy, usually by conveyance. A tenancy in common results. Because the "four unities" were necessary to create a joint tenancy at common law, the destruction of any one of those unities would operate to sever the joint tenancy. That rule is still alive, but many courts today prefer to rely on evidence of the intention of the conveying party.

a. **Conveyance:** If a joint tenant conveys his interest to a third party or to another joint tenancy, the joint tenancy is severed ***as to that interest.***

Example: Tom, Dick, and Harry are joint tenants. If Tom conveys his interest to Bill, the joint tenancy is severed ***as to that interest.*** Bill owns a one-third undivided interest as a tenant in common with Dick and Harry. Dick and Harry continue to be joint tenants with respect to their interests. If Dick then dies, Bill and Harry will be tenants in common, with Harry holding two-thirds and Bill one-third. If Tom had conveyed his interest to Harry, instead of to Bill, Harry would own a one-third interest (the interest acquired from Tom) as a tenant in common with Dick and a one-third interest in joint tenancy with Dick. If Harry

then died, Dick would own a two-thirds interest as a tenant in common with Harry's heirs or devisees.

A conveyance includes a contract to convey that is specifically enforceable, because the buyer under such a contract has equitable title to the property. Severance occurs at the moment such a contract is made.

★**i. Unilateral severance: Conveyance to self:** Common law regarded a conveyance of an interest held by a person to himself as an empty act, devoid of legal effect. Thus, to convert a joint tenancy into a tenancy in common, the joint tenant would have to employ a straw man, to whom the severing conveyance would be made and from whom a reconveyance would be made. In ***Riddle v. Harmon,*** 102 Cal. App. 3d 524 (1980), the California Court of Appeal held that Frances Riddle could validly sever the joint tenancy with her husband, Jack, by a conveyance from herself as joint tenant to herself as tenant in common with Jack. Frances's deed made plain that her intent was to sever the joint tenancy; the reasons for refusal to recognize a conveyance from self to self were archaic and rooted in livery of seisin; many other but more complex ways to unilaterally sever a joint tenancy existed; and California had already by statute permitted ***creation*** of a joint tenancy by a conveyance from "*A* to *A* and *B*, as joint tenants." ***Riddle v. Harmon*** takes a realistic view of severance and elevates the intent of the grantor to prominence. Note, however, the possibilities of some injustice occurring: (1) Jack probably never knew that the joint tenancy was severed; as a result his interest would pass at his death through intestacy or the residual clause of his will (dispositions that he might not have made had he known he owned a tenancy in common); and (2) An unscrupulous hypothetical Frances could sever the joint tenancy by executing a deed, not recording it, and telling a trusted but equally unscrupulous beneficiary of her will of the deed's existence, but then wait to see if Jack dies first, at which point the severing deed would secretly be destroyed; if Frances died first her devisee would produce the deed. California dealt with this dark possibility by requiring such conveyances to be recorded.

b. Mortgage: Jurisdictions differ as to whether a joint tenancy is severed by the act of one joint tenant mortgaging his interest. Resolution of this issue traditionally depended upon whether the jurisdiction adhered to the ***lien theory*** or the ***title theory*** of mortgages, but that distinction has mostly broken down for this purpose.

i. Title theory of mortgages: The title theory holds that a mortgage effects a transfer of legal title, subject to an equitable right of the mortgagor (the borrower) to reclaim title by paying off the loan secured by the mortgage ***(equity of redemption).*** This was the common law theory of mortgages. As a result, a mortgage by one joint tenant had the effect of severing a joint tenancy because the unity of interest is destroyed. The joint tenancy could not be restored by redemption because the unities of time and title would not be present. After the mortgage, the former joint tenants would become tenants in common and there would be, of course, no right of survivorship. See, e.g., *Stewart v. AmSouth Mortgage Co., Inc.,* 679 So. 2d 247 (Ala. App. 1995). This result has often been criticized as inconsistent with the mortgagor's intentions (who likely never considered, or even knew of, the magic four unities of the common law). Many (but by no means all) jurisdictions today modify the title theory to treat the title held by the mortgagee (the lender) as one held only for purposes of securing the loan, a view that effectively makes a title theory state into a lien theory state for purposes of resolving this issue of severance.

See, e.g., ***Harms v. Sprague,*** 105 Ill. 2d 215 (1984); *Brant v. Hargrove,* 129 Ariz. 475 (1981); *Hamel v. Gootkin,* 202 Cal. App. 2d 27 (1962).

ii. Lien theory of mortgages: The lien theory of mortgages holds that the mortgagee (lender) only has a lien against the property (an inchoate right to seize title if the loan is not paid). On this view, a mortgage by one joint tenant makes no alteration to title and thus does ***not*** sever the joint tenancy. But another problem crops up, one that divides lien theory states (and title theory states that treat mortgages as liens for this purpose): Upon death of the mortgaging joint tenant while the loan is unpaid, does the surviving joint tenant have an interest that is ***wholly unencumbered by mortgage,*** or an interest that is ***burdened by the mortgage?*** The prevailing answer is that the surviving joint tenant takes free and clear of the mortgage.

★**Example:** John and William Harms owned a farm as joint tenants. John mortgaged his interest to Carl and Mary Simmons in order to secure a loan made by them to John's friend, Charles Sprague. Later, John died while the loan was unpaid. In ***Harms v. Sprague,*** 105 Ill. 2d 215 (1984), the Illinois Supreme Court held that (1) there was no severance, and (2) William owned the farm entirely free of the mortgage to Carl and Mary Simmons. The court reasoned that the mortgage burdened only John's interest and that because John's interest died with him, leaving only the previously unencumbered interest of William as the surviving title, the mortgage had died with John. Accord: *People v. Nogarr,* 164 Cal. App. 2d 591 (1958); *Ogilvie v. Idaho Bank & Trust Co.,* 99 Ida. 361 (1978); *Irvin L. Young Foundation, Inc. v. Damrell,* 511 A. 2d 1069 (Me. 1986).

The majority view, exemplified by ***Harms v, Sprague,*** is criticized on the ground that it penalizes the unsophisticated lender (because a savvy lender will never lend to a single joint tenant on the strength of the joint tenancy interest as security for payment of the loan) and delivers a windfall to the surviving joint tenant. Consider the opposite result.

Example: Suppose that after John's death William took John's interest in the farm subject to the mortgage to Carl and Mary Simmons. This result would fully preserve William's survivorship rights and still preserve the Simmons' expectation that a half interest in the farm would continue to secure payment of their loan to Charles. After all, John always had the right to mortgage his interest, or even convey it outright (which would destroy William's survivorship right), so it does not seem unfair to William to allow him to take John's interest subject to the burden John placed upon it. Cf. Wis. Statutes §700.24.

c. Lease: At common law, if one joint tenant leased his interest the joint tenancy was severed. The unity of interest was destroyed, because the leasing joint tenant retained only a reversion in the property. The lease, however, was valid. Most jurisdictions today do ***not*** regard a joint tenancy as severed by one joint tenant's lease of his interest. The survivorship right continues but, as with mortgages, the problem is presented of whether the lease survives the death of the leasing joint tenant. Most jurisdictions say "no."

Example: Johnson and Tenhet were joint tenants. Without Tenhet's knowledge or consent, Johnson leased the entire parcel to Boswell for 10 years, then died 3 months later. Tenhet demanded that Boswell vacate. He refused, relying on his lease. The California Supreme Court held that (1) the lease did not sever the joint tenancy, and (2) the lease expired on the death of Johnson, the lessor. See *Tenhet v. Boswell,* 18 Cal. 3d 150 (1976).

As a practical matter, the *Tenhet v. Boswell* view requires a prospective lessee either (1) to examine title to be sure that the lessor is not a joint tenant, or (2) to insist that all joint tenants join in the lease. The opposite view, which rejects the idea that the lease expires with the lessor, allows the surviving joint tenant to take subject to the possessory interest of the lessee.

d. Agreement: A joint tenancy can be severed by agreement, so long as the intention is clearly manifested. This usually occurs in the context of marital dissolution.

Example: Betty and Aaron owned their residence as joint tenants. When they divorced they agreed that the house would be sold and the proceeds evenly divided between Betty and Aaron when (1) Betty remarried, or (2) their youngest child reached age 21, or (3) they agreed to sell. Before any of those events occurred, Betty died and Aaron claimed to own the entire house by virtue of the right of survivorship. The Colorado Supreme Court ruled that the agreement severed the joint tenancy because it clearly "evince[d] the intent to no longer hold the property in joint tenancy." Thus, because Betty was a tenant in common her half interest in the property passed to her children instead of to her ex-husband. See *Mann v. Bradley,* 188 Colo. 392 (1975). See also *Sondin v. Bernstein,* 126 111. App. 3d 703 (1984).

An agreement to sever can be inferred from the manner in which the parties deal with the property. See, e.g., *Thomas v. Johnson,* 12 Ill. App. 3d 302 (1973); *Mamalis v. Bornovas,* 112 N.H. 423 (1972); *Wardlow v. Pozzi,* 170 Cal. App. 2d 208 (1959). But this is dangerous; in order to preserve certainty in land titles many courts will not find severance based on agreement unless that agreement is absolutely clear. See, e.g., *Estate of Violi,* 65 N.Y. 2d 392 (1985). However, an agreement to permit one joint tenant to have exclusive possession of the property does not destroy a joint tenancy (even though it destroys the unity of possession), absent additional and specific evidence of intent to sever. See *Porter v. Porter,* 472 So. 2d 630 (Ala. 1985); *Tindall v. Yeats,* 392 Ill. 502 (1946). Perhaps the intentions of the parties should always govern.

e. Operation of law: Most severance issues begin with some voluntary act of a joint tenant that immediately implicates the four unities and thus, joint tenancy. But there are two recognized instances in which the law operates to sever a joint tenancy even in the absence of these voluntary acts.

i. Criminal homicide: If one joint tenant kills another joint tenant with criminal culpability, the usual result is severance of the joint tenancy by operation of law, thus turning the interests into tenancy in common. This can occur by statute, or by judicial conclusion that criminal homicide is "inconsistent with the continued existence of the joint tenancy" because it would benefit the wrongdoer. *Duncan v. Vassaur,* 550 P. 2d 929 (Okla. 1976). Accord: Uniform Probate Code §2-803.

ii. Simultaneous death: Under section 3 of the Uniform Simultaneous Death Act, applicable in most states, the simultaneous death of joint tenants (e.g., a plane crash) results in a division of the joint tenancy into separate shares.

5. Joint tenancy bank accounts: Litigation frequently results when a bank account is established in joint tenancy because there are a variety of reasons for creating such an account. A depositor might wish to make a *present gift* of an undivided interest in the account ("It's yours and mine together from now on"), or might wish to use the survivorship aspect as a *will substitute* — a "payable on death" or *POD account* ("It's mine until I die and then it's

yours"), or might wish to use joint ownership as a *convenience* to permit the other owner to manage the depositor's money, much like giving a person power of attorney ("It's mine but you can have access to it to pay my bills"). Because there is the possibility of very different intentions courts do not automatically honor the putative survivorship rights, but seek to ascertain the specific intentions of the depositor.

Example: Otto, a widower, opens a joint bank account with Ally, his niece, telling her "I want your name on this account so if I get sick you can get the money for me." No present gift was intended; this was a convenience account. *Franklin v. Anna Natl. Bank of Anna,* 140 Ill. App. 3d 533 (1986). See also *Allen v. Gordon,* 429 So. 2d 369 (Fla. App. 1983).

Example: Otto adds Ally to the signature card giving access to his safe deposit box, which contains $328,000 in cash and securities. The safe deposit box lease agreement stipulates that the contents of the box are owned in joint tenancy. Despite this, the lack of an additional specific written statement by Otto that he intended to make a present gift of the contents to Ally negated the lease agreement's stipulation of joint tenancy. The significant value of the contents influenced the result. As value increases, probably more and better evidence of a present gift is needed to prove joint tenancy. See *Newton County v. Davison,* 289 Ark. 109 (1986).

Generally, creditors of one joint tenant can reach only the portion of a joint tenancy bank account that equals the debtor's contribution to the account, but the burden of proving the proportion of contributions is on the joint depositors, on the theory that these facts are more likely to be known by the depositors than the creditor. See *Maloy v. Stuttgart Memorial Hospital,* 316 Ark. 447 (1994).

D. Tenancy by the entirety:

1. **Nature of tenancy by the entirety:** A tenancy by the entirety is a ***form of joint ownership available only to a husband and wife.*** Like the joint tenancy, each tenant by the entirety has a right of survivorship. In essence, this is the common law's special joint tenancy for marital partners. The usual four unities of joint tenancy are required for its creation, plus the requirement of marriage between the tenants. There are, however, significant differences from the joint tenancy. About half the states recognize tenancy by the entirety.

   a. **One person:** The common law presumed that upon marriage, a husband and wife merged into ***one legal person.*** The woman lost her legal identity and became the legal ward of her husband. Before marriage she was a ***feme sole;*** after marriage she was a ***feme covert.*** From the common law's perspective, marriage produced one person — the husband. Of course, we do not observe this disabling condition of married women today, but states that recognize tenancy by the entirety still observe the fiction that the tenancy by the entirety is owned by one person, with consequences that are discussed in the remainder of this section.

   b. **No severance:** A key attribute of the tenancy by the entirety is that it ***may not be severed.*** Unlike the joint tenancy, neither tenant acting alone can destroy the tenancy by the entirety. Thus, neither tenant may obtain partition (see II.B, below) nor can either spouse, acting alone, convey the entire estate. The right of survivorship is indestructible so long as the marriage remains intact.

2. **Creation:** At common law a conveyance to a husband and wife necessarily created a tenancy by the entirety. Because they were one person, legally speaking, they could share a tenancy in common or joint tenancy. It was all or nothing, and the "all" was tenancy by the entirety. No

American jurisdiction observes this rule today. A husband and wife may own property as joint tenants, tenants in common, or as tenants by the entirety. Some states recognize the civil law institution of the "marital community" as the owner of property, and in these ***community property*** states a husband and wife compose a marital community that owns most property acquired by them during marriage. See III.C, below. Tenancies by the entirety are not recognized in the community property states.

a. Presumptions concerning creation: Most states that recognize tenancies by the entirety observe a ***rebuttable presumption*** that a conveyance to a husband and wife creates a tenancy by the entirety. A minority of states recognizing the tenancy by the entirety presume (unless rebutted) that the ambiguous grant to a husband and wife creates a tenancy in common. Another minority of states recognizing tenancy by the entirety employ a rebuttable presumption that the ambiguous grant to a husband and wife creates a joint tenancy.

b. Failed attempts: An attempt to create a tenancy by the entirety in unmarried persons will fail everywhere. Most states treat this failed attempt as creating a tenancy in common, though a few hold that it creates a joint tenancy because a joint tenancy is closer to a tenancy by the entirety than a tenancy in common. Much may depend on the parties' intentions.

3. Operation of the tenancy by the entirety: The modern tenancy by the entirety functions differently from its common law predecessor.

a. Common law: The common law fiction that marriage produced one person, embodied by the husband, made the husband the master of the tenancy by the entirety. The husband had the right to exclusive possession as well as his survivorship right. Both of those rights could be alienated by the husband inter vivos, and so could be seized by the husband's creditors. The wife had only her survivorship right, which could not be alienated by her without her husband's consent (and thus could not be seized by her creditors).

Example: Harry and Wanda own Blackacre as tenants by the entirety. If Bank, Harry's creditor, seizes and acquires Harry's interest in Blackacre, Bank is entitled to exclusive possession of Blackacre during Harry's life. If Wanda predeceases Harry, Blackacre is owned solely by Bank. If Harry predeceases Wanda, Blackacre is owned solely by Wanda and Bank has no further interest. Wanda's creditors, however, may not seize her interest in Blackacre.

The pure common law tenancy by the entirety no longer exists in the United States.

b. Modern operation of the tenancy by the entirety: The modern tenancy by the entirety treats both spouses as equals. The principal source of this change has been the Married Women's Property Acts, adopted by every state in the mid-nineteenth century in order to eliminate the legal disabilities placed on married women by the common law. They did so by restoring to a married woman her separate legal identity which the common law took away from her on the occasion of her marriage. Courts then interpreted these acts, as applied to a tenancy by the entirety, to equalize the interests of husband and wife in the tenancy. But this could be done in one of two ways: Either (1) the ***woman acquired equal rights with the man to alienate her possession and survivorship rights,*** or (2) ***neither spouse was permitted to alienate their possession and survivorship rights.***

i. Equal right to alienate: Perhaps a half dozen states (including Alaska, Oregon, New York, and New Jersey) provide that either spouse may alienate their possession or survivorship rights in a tenancy by the entirety. The principal effect of this version of

equality, which gives the wife the same rights the husband had at common law, is to ***enable her creditors to seize her possessory interest*** in the tenancy but not the survivorship right. At common law the husband's possessory interest, of course, was always subject to seizure by his creditors.

Example: Todd and Heidi own Blackacre in tenancy by the entirety. Todd is indebted to Loanshark, who seizes Todd's interest in Blackacre in satisfaction of the debt. Loanshark and Heidi are now equally entitled to possession. Heidi continues to have her indestructible survivorship right and Loanshark now owns Todd's survivorship rights. Note that this estate, owned concurrently by two unmarried people, is functionally identical to a tenancy in common with the added twist of indestructible survivorship rights.

ii. **Neither spouse may alienate:** The majority of states recognizing tenancy by the entirety provide that neither spouse may alienate their possession or survivorship rights in a tenancy by the entirety. The principal effect of this version of equality, which places the husband on the same footing as the wife at common law with respect to a tenancy by the entirety, is that it ***prevents the creditors of either spouse from seizure of their interest*** in the tenancy.

★**Example:** Kokichi Endo inflicted personal injuries on Masako and Helen Sawada by his negligent operation of an auto. Kokichi owned a home in tenancy by the entirety with his wife, Ume. After the auto accident but before the Sawadas brought suit, Kokichi and Ume conveyed their home to their sons. This conveyance would be a fraud on Kokichi's creditors, including the Sawadas, if Kokichi's creditors were entitled to seize his interest in the tenancy by the entirety to satisfy their claims. In ***Sawada v. Endo,*** 57 Hawaii 608 (1977), the Hawaii Supreme Court held that property held in tenancy by the entirety may not be subjected to claims of creditors against only one spouse. The rationale for this view was partly the fiction of one person (the estate is owned by the marital couple, not the constituent partners), partly the view that contract creditors have ample opportunity to insist on both spouses pledging the property as security for extensions of credit, and partly the view that tort creditors of a single spouse ought not be permitted to seize a portion of the family residence with dangerous consequences to the innocent spouse. Given a conflict between creditors and the family unit, the Hawaii court preferred protecting the family unit.

iii. **Variations on the theme:** A few states recognizing tenancy by the entirety hold that creditors can seize the ***survivorship right*** of a spouse but ***not the possessory rights*** of either spouse. See. e.g. *Covington v. Murray,* 220 Tenn. 265 (1967); *Hoffman v. Newell,* 249 Ky. 270 (1932).

Example: Creditor obtains a judgment lien against Henry, owner with Willa of Blackacre in tenancy by the entirety. While both Willa and Henry are alive Creditor has no right to possession. If Willa predeceases Henry, Creditor may enforce the lien on Blackacre, owned now entirely by Henry. If Henry predeceases Willa, Creditor's lien is extinguished with respect to Blackacre. If Henry and Willa divorce, or Henry and Willa join together to convey Blackacre, Creditor can enforce the lien against Henry's share of Blackacre, because the tenancy by the entirety would have terminated.

iv. **Federal government claims:** There are a variety of ways in which the federal government can become a creditor of a person who owns property in tenancy by the entirety. If the

government's claim is by way of a tax lien, the government may seize the debtor spouse's interest as if it were a tenancy in common, regardless of the state law rules with respect to creditors' claims. Federal tax law displaces contrary state law. See *United States v. Craft*, 535 U.S. 274 (2002). If the government seeks civil forfeiture of property that has been used in criminal transactions (e.g., illegal drug dealing), *United States v. 1500 Lincoln Avenue*, 949 F.2d 73 (3d Cir. 1991), held that the government could only seize the debtor spouse's survivorship interest (rather than all or none of the property), because that compromise would best accomplish the twin goals of forfeiture of the guilty spouse's interest and protection of the interest of the innocent spouse. But if the property subject to civil forfeiture has itself not been used in the criminal transaction, at least one circuit has ruled that the government's interest in forfeiture is not sufficiently weighty to outweigh the innocent spouse's interest in retaining her property without the government becoming her co-owner. See *United States v. Lee*, 232 F.3d 556 (7th Cir. 2000).

v. **Bankruptcy:** After *Craft*, some creditors claimed that filing a federal bankruptcy petition by a single spouse operates to sever the debtor spouse's interest in any property held in tenancy by the entirety, thus rendering the debtor spouse's share subject to creditors' claims in bankruptcy. This position seems to be untenable with respect to bankruptcy debtors who elect the state law exemptions in bankruptcy, as 11 U.S.C. §522(b)(3)(B), enacted after *Craft* was decided, provides that "an individual debtor may exempt from property of the estate . . . any interest" the debtor may have in property owned "as a tenant by the entirety . . . to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law." Bankruptcy law thus appears to incorporate explicitly state law rules regarding creditors' claims in bankruptcy.

4. **Termination:** A tenancy by the entirety is terminated (1) by death of a spouse, (2) divorce, or (3) joint action of both spouses to convey the property held in tenancy by the entirety. Upon divorce, most states convert a tenancy by the entirety into a tenancy in common, but a few inexplicably convert it into a joint tenancy.

5. **Personal property:** Common law did not recognize a tenancy by the entirety in personal property because the husband, upon marriage, became the sole owner of his wife's personal property. Most states today that recognize tenancy by the entirety permit tenancies by the entirety in most forms of personal property. Some forms of personal property (e.g., deposit accounts) are not susceptible to tenancy by the entirety because it is impossible to maintain inviolate survivorship rights when either spouse can withdraw the deposited property at any time.

E. Partnerships and coparceny:

1. **Nature of partnership tenancy:** Tenancy in partnership is inextricably connected to the rights and obligation of business partners. The property is owned by the partnership and each partner has an interest in the property via their partnership interest. The details of partnership are covered in courses in Business Associations.

2. **Nature of coparceny:** Coparceny is extinct. The English common law system of primogeniture made the first-born son the sole heir. If a decedent had no sons, his daughters inherited as coparcenors, an estate that was a bit like tenancy in common. Because primogeniture never took root in America, coparceny never had occasion to develop. Good riddance.

II. RIGHTS AND OBLIGATIONS OF CONCURRENT OWNERS

A. Introduction: In general, the rights and obligations of co-owners are the same regardless of the type of concurrent ownership. The exceptions, of course, are the rights and duties ***inherent in the type of concurrent ownership,*** e.g., the right of survivorship that forms part of the joint tenancy and tenancy by the entirety. Those exceptional issues have been discussed in section I, above.

B. Partition: A joint tenant or a tenant in common may demand ***partition*** of the property at any time and for any reason, or for no reason at all. A tenant by the entirety may not demand partition — the effective remedy is divorce. Absent agreement among the parties, partition is accomplished by a suit in equity. The court will order ***either*** (1) ***physical division*** of the property, or (2) ***sale and division of the sale proceeds.*** Any other claims among the parties (e.g., for an accounting or for rent — see II.C and D, below) will also be resolved in the same proceeding.

1. Partition in kind: Physical division of the property (called ***partition in kind***) is the preferred method. Courts will order partition in kind unless a party can prove either (1) that physical partition is ***impossible*** or ***extremely impractical,*** or (2) that physical partition is ***not in the*** **best interest *of* all parties.** See, e.g., ***Delfino v. Vealencis,*** 181 Conn. 533 (1980). Evidence germane to the "best interest" prong includes the economic costs (or gain) involved in physical partition, but also the more subjective costs imposed on a tenant in possession by ordering partition by sale. Compare the following examples.

★**Example:** Helen Vealencis owned 20.5 acres in Bristol, Connecticut as a tenant in common with Angelo and William Delfino. Helen lived on a portion of the property and operated a garbage hauling business from there. The Delfinos wished to develop the property into single-family residences and so demanded partition by sale even though the property was capable of partition in kind. Although the evidence suggested that the total value of the property would be maximized by sale and development, the Connecticut Supreme Court held that it was not in the best interest of ***all parties*** (including Helen) to sell the entire property. The value to Helen of continued possession (secured by physical partition) was sufficient to convince the court that partition in kind should be ordered. ***Delfino v. Vealencis,*** 181 Conn. 533 (1980).

Example: Karl Hendrickson and his twin sons lived on and farmed a 160-acre farm, in which they owned a one-third interest as tenants in common with the Baumans, a group of relatives who owned fractional shares ranging from one-twelfth to two-ninths. The Baumans sought and obtained partition by sale under a statute authorizing partition by sale if physical partition could not be accomplished without "great prejudice to the owners." The South Dakota Supreme Court gave little weight to the value of continued possession to Karl and his sons, relying almost entirely on the conclusion that division of the farm into parcels ranging in size from 13.33 acres to 53.33 acres would "materially depreciate its value, both as to salability and . . . use for agricultural purposes." The court did not even consider the possibility that the Baumans could unite to sell their 106.67-acre block after physical partition. *Johnson v. Hendrickson,* 71 S.D. 392 (1946).

When implementing partition in kind courts strive to divide property so that the value of each divided parcel (as a fraction of the value of the entire property) is equal to the ownership share of the recipient. If not, the recipient of the disproportionately valuable parcel is obligated to pay *owelty* — enough cash to the other tenant(s) to equalize values.

Example: Ed and Louise own Blackacre as tenants in common. Louise has a two-thirds interest; Ed owns a one-third interest. The value of Blackacre is $120,000. If, after partition

in kind, Ed's parcel is worth $50,000 and Louise's is worth $70,000, Ed will owe Louise $10,000 cash to equalize their proportionate shares.

2. **Partition by sale:** Even though partition by sale is not favored by courts it is probably the most common method of partition. This is because it is impractical or impossible physically to divide most real property in America: houses, condominiums, office buildings, warehouses, and retail stores. Rural undeveloped land is the most likely candidate for physical division. After a partition by sale the net proceeds are divided among the co-owners in proportion to their ownership interests. In the absence of express evidence in title of unequal shares, courts employ a rebuttable presumption that each co-owner is entitled to an equal share of the proceeds.

3. **Agreement not to partition:** Though courts often say that "partition between cotenants is an absolute right," an agreement between cotenants not to partition is ***enforceable*** if (1) it ***clearly manifests the parties' intent not to partition,*** and (2) its ***duration is limited to a reasonable period of time.***

   Example: Marion and Alexandra, husband and wife, separated and entered into an agreement by which they promised not to "do or permit anything [to be done] to defeat the common tenancy" of Marion and Alexandra in certain properties for the remainder of their joint lives. A New Jersey appellate court found this to be a sufficiently clear expression of their intent not to partition. Its duration was reasonably limited because it would expire upon the death of either party, and both Marion and Alexandra were of "advanced age" (apparently about 60 when they entered into the agreement). *Michalski v. Michalski,* 50 N.J. Super. 454 (1958).

   Because partition is inherently equitable, a nonpartition agreement (even if otherwise enforceable) will be enforced only if it is "fair and equitable." Changed circumstances are especially relevant to this inquiry.

   Example: In their 1949 nonpartition agreement, Marion and Alexandra promised to treat each other "with kindness and respect" and agreed that they would continue to reside together in their home. By 1951 they were not living together in the home and had embarked on a continuous bout of civil and criminal litigation against each other. In 1958 a New Jersey appellate court ruled that "the circumstances have so changed that it would be inequitable to deny partition. The intent of the parties has been entirely destroyed." *Michalski v. Michalski,* 50 N.J. Super. 454 (1958).

C. **Rents, profits, and possession:** Each co-owner has the right to possess the entire property and no co-owner may exclude his fellow co-owners. If co-owners cannot agree on how they share possession, the "default" rules discussed here apply.

   1. **Exclusive possession by one co-owner:** Because each co-owner has a right to possess all of the property, exclusive possession by one co-owner is presumptively valid. If it is pursuant to agreement of all co-owners it is conclusively valid. If not by agreement, the cotenant in exclusive possession has the following obligations to his cotenants.

      a. **Rental value of exclusive possession:** Jurisdictions split on the question of whether the cotenant in exclusive possession is liable to his cotenants for their share of the fair rental value of his exclusive possession. Here are the two views on this question.

         i. **No liability absent ouster or special duty:** The ***majority rule*** is that a cotenant in exclusive possession has no liability for her share of the rental value of possession unless: (1) the other cotenants have been ***ousted,*** or (2) the cotenant in possession owes a

fiduciary duty to the other cotenants, or (3) the cotenant in possession has ***agreed to pay rent.*** This rule is premised on the fact that each cotenant is entitled to possession. The exceptions reflect instances in which the cotenant in possession has voluntarily assumed a duty to his cotenants (by agreement to pay rent or by acting as a fiduciary) or has prevented his cotenants from exercising their equal right to possession (***ouster***). The corollary to this rule is that the cotenant validly in exclusive possession is obligated to pay the "carrying costs" of the property (e.g., mortgage payments, taxes, utilities, maintenance) up to the fair rental value of the property. Any excess costs must be shared ratably by all cotenants. ***Ouster*** occurs if the tenant in exclusive possession ***either:*** (1) actually ***prevents or bars physical entry by a cotenant,*** or (2) ***denies the cotenant's claim to title.*** The former can occur by such things as changing the locks; the latter can occur by express statements denying that the cotenant out of possession has any valid claim of ownership of the property.

★**Example:** Spiller and Mackereth owned a commercial building as tenants in common. Spiller took possession of the entire building and used it as a warehouse. Mackereth demanded that he vacate half the building or pay rent. Spiller did nothing and Mackereth sued for the rental value of half the building. In ***Spiller v. Mackereth,*** 334 So. 2d 859 (Ala. 1976), the Alabama Supreme Court reversed an award of rent, reasoning that Spiller had neither denied that Mackereth was an owner of the building nor prevented Mackereth from actually moving in and taking possession. Mackereth's demand that Spiller vacate or pay rent was insufficient to trigger ouster; she needed to prove that she "actually sought to occupy the building but was prevented from moving in by Spiller."

ii. **Liability for rent:** The ***minority rule*** is that the cotenant in exclusive possession is liable to cotenants out of possession for their share of the fair rental value of the occupied premises, ***unless there has been an agreement among the parties to excuse the tenant in possession from this obligation.*** On this view, there is no need to show ouster, or agreement to pay rent, or the presence of a fiduciary obligation to the cotenants out of possession. Instead, the burden is on the cotenant in possession to prove the existence of an agreement excusing him from the obligation to pay rent. This rule is designed to induce agreements among the parties by placing the burden on the tenant in possession (the one who is gaining the economic value of occupancy) to pay or prove an agreement not to pay. But this rule also undercuts the general principle that a cotenant is entitled to possess the whole.

2. **Rents from third parties:** A cotenant who receives rents on the property from a third party is obligated to account to his cotenants for those rents. If the rents or other income received by a cotenant are greater than the cotenant's share, he is obligated to pay the excess to the other cotenants.

Example: Anne and Clarke own Blackacre as equal cotenants. A portion of Blackacre is rented to Ajax for $500/month and the remainder is rented to Hector for $700/month. If Clarke receives Hector's rent and Anne receives the rent from Ajax, both must account to each other for the rents they received, and Clarke must pay $100/month to Anne.

This duty to account is a continuing one and may be enforced at any time during the cotenancy, upon partition, or within the period of the statute of limitations following expiration of the cotenancy.

3. **Profits from the land:** The normal rules regarding possession apply to exclusive possession for farming, animal husbandry, or other agricultural uses, but if a cotenant permanently removes an asset from the land he must account to his cotenants for this reduction in value. If minerals are removed, the cotenant must pay to the other cotenants their proportionate share of the value of the removed minerals. Other natural resources, like standing timber, may be removed by a cotenant without payment to other cotenants so long as the cotenant does not cut more than her share of the total timber. Some states require the consent of all cotenants to the cutting of timber.

D. Accounting for the costs of ownership: Subject to the exceptions set forth in II.C, above, and others discussed here, each cotenant is liable for his proportionate share of the costs of ownership — mostly mortgage payments, taxes, repairs, and maintenance.

1. **Mortgage payments:** Mortgage payments consist of ***principal*** and ***interest.*** A cotenant's payment of a disproportionate share of these items is treated differently.

   a. **Interest:** Each cotenant is obligated to pay his proportionate share of mortgage interest. A cotenant who pays more than his share can force the other cotenants to reimburse him for their share immediately, upon partition, or within the limitations period following the end of the cotenancy.

   b. **Principal:** Each cotenant is obligated to pay his proportionate share of the mortgage principal, but the cotenant who pays more than his share of the mortgage principal has additional remedies. The paying cotenant succeeds to the mortgagee's (lender's) rights, called ***subrogation.*** The paying cotenant can enforce all the rights and powers of the mortgagee against his cotenants who fail to pay their share of the principal, including foreclosure sale.

2. **Taxes:** Each cotenant is obligated to pay his proportionate share of the taxes, and a cotenant who pays more than his share can recover the excess from his fellow cotenants at any time during the tenancy, upon partition, or within the limitations period after cessation of cotenancy.

3. **Repairs:** A cotenant has no obligation to repair his property. If he wishes to let it fall into ruin, that is his choice. The law will not generally compel prudent and responsible behavior toward one's own affairs. Accordingly, a cotenant who voluntarily repairs the property may not force his cotenants to reimburse him for their share of the repairs, but the repairing cotenant can recover those excess repair costs in two situations.

   a. **Accounting for rents:** If a repairing cotenant is under a duty to account to his fellow cotenants for rent (whether received from third parties or for the reasonable rental value of exclusive occupancy) the repairing cotenant may deduct from the rents due the other cotenants their share of the repair costs incurred by the repairing cotenant.

   b. **Partition:** Upon partition, a repairing cotenant is entitled to be reimbursed for the repair costs in excess of her share. If partition is by sale, this will occur by a cash reimbursement from the sale proceeds before pro rata distribution to all cotenants. If partition is in kind, the repairing cotenant will either receive cash reimbursement from the other cotenants before physical division or the repairing cotenant will receive a larger parcel, representing reimbursement in kind.

4. **Improvements:** No cotenant has a duty to improve property. Indeed, cotenants may disagree about what constitutes an improvement, or what improvements are optimal. Accordingly, an improving cotenant may not recover from her fellow cotenants their pro rata share of the cost of the improvements. Upon partition, or if the improving cotenant is under a duty to account to cotenants for rent, the improving cotenant is entitled to ***recover only the* value added *by the improvement*, not the cost *of the improvement*.** If the improvement adds no value, there is no recovery. If the value added is less than the cost of the improvement, the improver is only entitled to her fellow cotenants' share of the added value.

E. Adverse possession: Cotenants can occupy adversely to their fellow cotenants, but it takes more than mere possession to do so, because every cotenant is entitled to be in possession. A cotenant must give his cotenants ***absolutely clear and unequivocal notice that he* claims exclusive and sole title** in order for adverse possession to begin. Nothing less will do.

F. Implied fiduciaries: In general, cotenants have no fiduciary duties to each other. A cotenant can, of course, voluntarily assume such a duty and a fiduciary duty will be implied when one cotenant acts to gain an advantage of *title* over his fellow cotenants.

Example: Bert and Ernie own Blackacre as cotenants. They fail to pay the property taxes and Blackacre is sold by the government at a tax foreclosure sale. Bert buys Blackacre at that sale for a fraction of its fair market value. Bert is not the sole owner of Blackacre. He will be held to a fiduciary obligation toward Ernie, and Ernie has the right to pay his share of the purchase price to Bert in order to redeem his cotenancy. See, e.g., *Massey v. Prothero,* 664 P. 2d 1176 (Utah 1983). The same principle applies to mortgage foreclosure sales. See, e.g., *Barr v. Eason,* 292 Ark. 106 (1987).

★G. *Swartzbaugh v. Sampson:* A case study: This case provides an illuminating study of the options available to a cotenant who is unhappy with the actions of her fellow cotenant. John and Lola Swartzbaugh owned in joint tenancy a 60-acre walnut orchard. John leased 4 acres to Sam Sampson, a boxing promoter, who constructed a boxing pavilion on the site. Lola did not join in the lease; indeed, she objected vehemently to the boxing pavilion. Lola sought to cancel the lease made by John, and in ***Swartzbaugh v. Sampson,*** 11 Cal. App. 2d 451 (1936), the California court of appeal denied her claim, reasoning that a lease by a single joint tenant to a third party "is not a nullity but is a valid . . . contract in so far as the interest of the lessor in the joint property is concerned." Consider the possibilities open to Lola Swartzbaugh after this ruling, keeping in mind that her objective is to eliminate the presence of Sam and his objectionable pugilists. (1) She could appear at the pavilion and demand that Sam let her into possession. He would probably invite her in to watch the fights and, if he did not she would simply have triggered ouster, thus causing Sam to be liable to her for half the fair rental value of the premises. In that event, Sam's ability to deduct the rent paid Lola from what he had agreed to pay John might depend on how clearly Sam understood he was leasing only John's interest. If he knew that to be the case (which seems to be so) he is not entitled to any deduction. (2) Lola could acquiesce in the lease and demand and receive half the rents received by John from Sam. (3) Lola could partition the leasehold, which would probably result in a partition by sale (because it would be impossible to physically divide the pavilion). But who would buy the leasehold, and for how much? In any case, the proceeds of sale would be used first to reimburse Sam for his "improvement" (Is it an improvement? Should the value of the destroyed walnut trees be deducted from the value of the improvement?) and the balance of the proceeds would be divided between Sam and Lola, leaving the buyer with a leasehold and the obligation to pay rent to John. (4) Lola could hope for John's death, which

would terminate Sam's leasehold because Sam had leased only John's interest and John's interest would expire at his death (he owned the land as a joint tenant with Lola). None of these options are particularly desirable in terms of removing Sam, and the last is more of a bitter and cynical hope than an option.

III. MARITAL INTERESTS

A. Introduction: Many of the property issues involved in the law governing the property of married people are covered in other courses dealing with marital dissolution, family, and related issues. These issues are discussed here only to the extent relevant to a first-year Property course.

B. The common law system: The pure common law system of marital property no longer exists in any relevant jurisdiction, but knowledge of its structure will help you in understanding the many current versions of marital property.

1. **Femmes sole and femmes covert:** A single woman (a ***femme sole***) had power to use, dispose, and possess her own property. While that sounds axiomatic, a married woman (a ***femme covert***) had almost none of those rights. Common law said husband and wife were one, but the husband was the One. The severity of these rules were evaded by the very wealthy through the creation of elaborate marriage settlements, usually involving trusts, that were designed to enable a married woman to control her property through a compliant trustee.

2. **Husband *über alles:*** With the marriage vow the common law bestowed **jure uxoris** on the husband: the right to possess, use, or convey all of his wife's property except her clothes and jewelry for the duration of the marriage. Even her earnings were his. In the hands of an honorable and capable husband in a happy marriage, *jure uxoris* preserved or increased the value of the wife's property. In the hands of a rogue, *jure uxoris* was license to steal. Like the dodo, *jure uxoris* is extinct.

3. **Wife's rights:** A wife had no legal control of her property, but had some inchoate property rights:

   a. **Support:** A wife had the right of ***support*** from her husband. Thus, in the event of divorce, the husband was obliged to continue support by paying ***alimony*** to her.

   b. **Dower:** On death of her husband, a wife had the ***right of dower.*** Dower was the right to a ***life estate*** in one-third of each and every ***possessory freehold estate*** the husband enjoyed at ***any point during the marriage*** which was ***capable of inheritance by children born of the marriage.*** This was a valuable right for a widow of a wealthy landowner or freeholding tradesman in seventeenth- or eighteenth-century England, but was useless to those without land ownership.

      i. **Each freehold ever possessed:** The dower right attached to every freehold the husband possessed that was capable of inheritance by children of the marriage. Thus dower did ***not*** attach to the husband's life estates, leaseholds, personal property, equitable interests, future interests, or any possessory freehold held in tenancy by the entirety with the wife or in joint tenancy, whether with the wife or a third party. The common law's gift to the bride was a dower right in all the inheritable freeholds her husband possessed at the moment of the ceremony, ***and*** to every additional such freehold he possessed in the future during their marriage. But, as seen from the list of property to

which dower did not attach, it was an easy matter for a husband to acquire property in a manner that avoided dower.

ii. **Scope and release of dower:** The inchoate dower right, once attached, could only be removed by divorce or with the wife's consent.

Example: During George I's reign, Harry owns Blackacre in fee simple while married to Molly. Harry mortgages Blackacre, then defaults on the mortgage, and Bank buys it at foreclosure sale. Bank conveys Blackacre to Zelmo. Harry dies. Molly is entitled to a life estate in one-third of Blackacre. Zelmo must turn over to Molly possession of one-third of Blackacre or one-third of the rents and profits from Blackacre.

Example: Suppose Harry paid off the mortgage, then conveyed Blackacre to Arnie without Molly signing anything. Upon Harry's death Molly is entitled to dower in Blackacre because she never released her dower.

Example: Molly and Harry divorce. Molly's inchoate dower rights are irrevocably extinguished. But if Molly and Harry simply separate and remain legally married, Molly's inchoate dower rights are unaffected.

iii. **Operation of dower:** A physical third of all properties subject to dower that were capable of physical division was set aside for the wife's life estate. If a property was not susceptible to division the wife received a third of the rents or profits from the land for the remainder of her life.

iv. **Defeasible fees:** Most jurisdictions hold that a dower interest in a defeasible fee ends if the limiting condition occurs, reasoning that the dower interest is derived from the husband's title, which was defeasible. A few reject this logic and hold that dower is indefeasible, a conclusion permitting a widow to flout limiting conditions during her lifetime. In most states the issue will not arise because dower is no longer recognized.

v. **Abolition:** Fewer than ten states continue to observe dower. In most dower has been abolished by statute, usually replaced by an analogous right usually known as the ***spousal elective share,*** which entitles a surviving spouse to take a specified portion of the decedent's probate estate even if the decedent spouse left a lesser share by will to the surviving spouse. See section III.C.2, below. Some states that observe dower have made the widow's share more generous: a fee simple interest in one-third or even one-half of dower lands.

4. **Curtesy:** Common law gave a husband who survived his wife a right similar to dower, called ***curtesy.*** Curtesy attached to ***all possessory interests in land*** of the wife, ***including equitable possessory interests.*** Thus, while the marriage settlement trust avoided *jure uxoris,* it did not evade curtesy. But curtesy only attached if ***issue were born to the marriage.*** Once a child was born, even if it later died, curtesy attached. Curtesy no longer exists in the United States.

C. **The modern (mostly statutory) "common law" system:** Every common law marital property jurisdiction (as distinguished from community property states, see III.D, below) has altered the common law system substantially. Statutes vary considerably, but set forth below are the major themes of these statutory alterations.

1. **Rights on divorce:** Almost every jurisdiction has adopted some form of an ***equitable distribution*** statute, designed to produce an equitable (usually equal) division of the marital property subject to the statute. Differences occur, however, in the way the states define what marital property is subject to equitable distribution. Some include *all property owned by either spouse,* whenever and however acquired; others limit equitable distribution to *property acquired during marriage,* no matter how; and some limit equitable distribution to *property acquired by the earnings of the marital partners.* Some kinds of personal property, like clothing and jewelry, are often exempted.

   a. **Professional skills and credentials:** A major issue is whether professional degrees and skills acquired during marriage are subject to equitable distribution. What happens when one spouse supports another while he or she obtains a professional degree or some similar enhancement of earnings power? Courts divide three ways.

      i. **Not property:** Some states hold that professional degrees and skills are not property, but simply personal accomplishments that may or may not produce property, and thus not subject to equitable distribution.

      ★**Example:** After Dennis and Anne Graham married she continued to work as an airline flight attendant and Dennis mostly pursued his education, earning a B.S. and an M.B.A. Shortly after he had embarked on his business career the marriage foundered. A Colorado trial court awarded Anne about $33,000, representing 40 percent of the estimated future earnings value inherent in Dennis's M.B.A. In ***In re Marriage of Graham,*** 190 Colo. 429 (1978), the Colorado Supreme Court reversed, concluding that Dennis's M.B.A. was not "property" because it could not be transferred or inherited but was simply "an intellectual achievement." Granted that, why wasn't the increased earnings of Dennis attributable to his "intellectual achievement" property?

      ii. **Property subject to equitable distribution:** Other states, particularly New York, treat professional degrees and enhanced professional skills as property subject to equitable distribution.

      ★**Example:** After a 17-year marriage, Frederica von Stade, the celebrated opera diva, and her husband divorced. At the beginning of the marriage to her voice teacher, von Stade was young and unknown, performing minor roles with New York's Metropolitan Opera. By the time the marriage ended she was an opera superstar, earning over $600,000 annually. A New York trial court ruled that the "enhanced value" of her career and her celebrity status were not marital property subject to equitable distribution, but in ***Elkus v. Elkus,*** 169 App. Div. 2d 134 (1991), New York's appellate court reversed, ruling that the contributions to her career and *career potential* made by her husband (in the form of voice instruction and domestic duties) entitled him to share in the increased earnings power acquired by von Stade during their marriage. See also *O'Brien v. O'Brien,* 66 N.Y. 2d 576 (1985) (increased earnings power attributable to medical degree acquired during marriage). Note that because professional degrees and skills cannot be divided and conveyed, the New York position requires the degree holder to pay a lump sum now or a portion of future earnings to satisfy equitable distribution.

      iii. **Restitution:** Some states take the middling course of requiring the degree-enhanced spouse to reimburse the supporting spouse for the financial support (***"reimbursement alimony"***). See, e.g., *Mahoney v. Mahoney,* 91 N.J. 488 (1982).

2. **Rights on death:** In place of dower, most states give the surviving spouse the right to receive in fee simple a fraction (anywhere from one-quarter to one-half) of all property owned by the deceased spouse at his or her death. This is called an ***elective share*** because a surviving spouse may elect this share or to take under the deceased spouse's will, ***but can't have both.*** Some states recognizing dower give a surviving spouse the further election of whether to take dower or a statutory elective share. In a few states the spousal elective share is much like dower, being as little as a life estate in one-third of the decedent spouse's probate estate. One common law state, Georgia, has no elective share.

   a. **Difference between dower and elective share:** The elective share applies to **all property *of the deceased spouse* owned at his or her death.** Thus the elective share is broader than dower ("***all*** property," not just freehold realty) and narrower ("only property owned at spouse's death").

   b. **Avoidance of the elective share:** A spouse sometimes tries to avoid the elective share by transferring all his property to a trust, retaining an income interest for life, and vesting a remainder in someone other than the spouse.

      Example: Oscar, married to Hilda, conveys all his property to his brother Sam, as trustee, under directions to pay to Oscar for life the income and such principal as necessary to support Oscar, then to distribute the principal outright and free of trust to Minnie, Oscar's paramour. (Oscar's will, which disposes of only the incidental property of Oscar that was not placed in trust, leaves everything to Minnie.)

      This works in all states to defeat the elective share if the trust is irrevocable and created before the marriage. It works in many states to defeat the elective share if the trust is irrevocable and created after the marriage (because the settlor spouse owns no property at death) but is more problematic if the trust is revocable. Some states treat a revocable trust just like an irrevocable one, so long as the assets are conveyed to the trust prior to death. Others refuse to recognize a revocable trust for this purpose and some refuse to recognize the trust if the settlor's intent was to defeat the elective share. Still other states focus on how much real control the settlor retained over the trust assets — the more control retained, the more likely that the surviving spouse's elective share will reach the trust assets.

3. **Antenuptial agreements and spousal contracts**

   a. **Antenuptial agreements:** Agreements made between prospective spouses prior to marriage purporting to govern property division upon divorce were not generally enforceable at common law. Jurisdictions today split on their validity. The emerging standard is that such agreements are enforceable if (1) the parties' assets and earnings power have been fully revealed to each other, and (2) the substantive terms of the agreement are not unconscionable. See, e.g., Uniform Marital Property Act §10(g); Uniform Premarital Agreement Act §6.

   b. **Spousal contracts:** In community property states, spouses may agree to transmute separate property into community property and to divide community property into separate property. It is an open question, however, whether agreements between spouses in a common law state to hold their property as community property will be enforced. In some states a contract between spouses by which one spouse agrees to care for another in return for property to be received at the death of the invalid spouse is not enforceable for want of consideration, because spouses are obliged to care for one another. See, e.g., *Borelli v. Brusseau,* 12 Cal. App. 4th 647 (1993).

D. Community property:

1. **Origins and concept:** The civil law of Spain and France recognizes marriage as creating a "marital community" of husband and wife, and treats that community, rather than its constituent members, as the owner of most property acquired during marriage. The fundamental premise of community property is that each spouse is an equal partner in marriage, and that each spouse has an equal claim to the material possessions that are derived from the efforts of either spouse during marriage. By contrast, the pure common law system presumed that the wife was and should be economically dependent on her husband, and imposed a correlative obligation of lifetime support on the husband. The modern common law system is far more equitable and produces results that often are not dramatically different from community property. Community property came to America through French and Spanish colonization and was absorbed into the United States along with formerly French or Spanish territory. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are the only states recognizing community property. This discussion of community property is cursory, adequate for the survey course in Property but not detailed enough for a separate course in Community Property.

   a. **Uniform Marital Property Act:** The Uniform Marital Property Act (UMPA), proposed in 1983, is based on community law principles and, for all practical purposes, is a community property regime. Wisconsin is the only state to have adopted the UMPA. The UMPA defines ***marital property*** to include all property acquired during marriage except through gift, devise, or inheritance. Everything else is ***individual property.***

2. **Definition of community property:** American community property systems define community property as the **earnings during marriage** of either spouse and **all property acquired from such earnings.** This definition ***excludes*** property acquired ***before marriage*** or acquired during marriage ***by gift, devise, or inheritance.*** Such property is **separate property** and is owned solely by that spouse. The character of property — separate or community — may ***not be changed except by*** **agreement of both spouses.** When it is difficult to determine the character of property, courts apply a **rebuttable presumption *that the property is* community property.**

   a. **Tracing, not title:** Once property becomes community in character, it retains that character even if it is exchanged for other property and ***regardless of its title.*** If its original source can be ***traced to community property*** it is community property, absent agreement of both spouses to change its character.

      Example: Irene, married to Al, lives in a community property state. She deposits one of her paychecks in a deposit account owned solely by Irene. She then uses the money in the deposit account to purchase a painting, which she trades for a vacation home, taking title in her name alone. Because the source of this chain of assets — deposit account to painting to second home — was Irene's earnings during marriage, each of these assets is community property. Title in Irene's name doesn't matter if the property's source can be traced to community funds. The vacation home is community property and Al has an equal interest in it.

   b. **Commingling of separate and community property:** The tracing rule applies to commingled property as well. If the sources of commingled property can be identified accurately as separate or community funds, the commingled property will be divided into separate and community portions. If it is ***impossible to trace*** the sources of commingled funds, the entire property will be ***presumed to be community property.*** In the absence of

accurate records, commingled property will, in practice, become community property. A variation on this principle occurs when a partially paid-for asset is brought to a marriage and the remainder of the purchase price is paid with community funds. There are three approaches to this problem.

i. **Inception of right:** This approach (followed by Texas) holds that the character of the property is determined at the inception of the legal right to the property.

ii. **Time of vesting:** This approach holds that the character of the property is determined when title passes.

iii. **Pro-rata apportionment:** This approach (followed by California and Washington) holds that the percentage of the purchase price paid prior to marriage establishes the portion of the property that is separate, and the percentage of the purchase price paid with community funds establishes the community interest in the property.

Example: Al enters into an installment sale contract to purchase a building lot for $45,000. He pays a total of $15,000 under the contract, then marries Jane. The remaining $30,000 is paid with the combined earnings of Al and Jane, at which point Al and Jane divorce. The lot is worth $120,000. Who owns the lot?

- In Texas, an ***inception of right*** state, the lot is Al's separate property (because Al acquired a contract right in the property before marriage), but the community is entitled to return of $30,000 plus interest (but Al is entitled to half this sum). Ignoring interest, Jane gets $15,000; Al gets $105,000. See *McCurdy v. McCurdy,* 372 S.W. 2d 381 (Tex. Civ. App. 1963).
- In a ***time of vesting*** state, the lot is community property because title did not pass until the payments were completely made. Al and Jane each get $60,000 out of the lot.
- In California or Washington, ***pro-rata apportionment*** states, one-third of the lot is Al's separate property, and two-thirds is community property. Al's share is $80,000 (consisting of $40,000 separate property and his equal $40,000 share of the community property). Jane's share is $40,000, one-half of the community's two-thirds interest in the lot. See, e.g., *Estate of Gulstine,* 166 Wash. 325 (1932).

c. **Agreement transmuting the character of property:** So long as both spouses are fully informed about the consequences of their actions, an agreement to transmute community property into separate property or separate property into community property will be enforced.

d. **Income from separate property:** The general rule is that income earned from separate property retains its character as separate property. Three states (Texas, Louisiana, and Idaho) hold that income earned from separate property is community property.

e. **Pensions:** Vested pension rights are community property because they are the fruits of earnings. The status of nonvested pension rights is less clear. California and Nevada treat such rights as community property. See *In re Marriage of Brown,* 15 Cal. 3d 838 (1976); *Gemma v. Gemma,* 105 Nev. 458 (1989).

f. **Personal injury damages:** The portion of personal injury damage awards that is compensation for ***pain and suffering*** is ***separate property,*** but the portion that is compensation for

lost earnings is ***community property.*** See, e.g., *Rogers v. Yellowstone Park Co.,* 97 Idaho 14 (1974).

g. **Increased value of separate property from community efforts:** A spouse may devote time and energy to the management of his or her separate property. The community is entitled to share in the value added to the separate property by those efforts. The amount of the community's share depends on whether the increased value of the separate property is primarily attributable to the ***spouse's personal effort*** or to the ***capital investment.*** If the spouse's personal effort produced the increased value, the increment is community property (after deduction of a fair rate return on the separate capital investment).

Example: Hugo owned an art gallery and then married Alice. Hugo's capital investment in the gallery at the time of marriage was $100,000. During the marriage the art gallery prospered because of Hugo's unerring eye for art that would be highly in demand. As a result, when Hugo and Alice divorced after 10 years of marriage, the gallery was worth $500,000. The increment ($400,000) is due primarily to Hugo's personal efforts, but first Hugo must receive a reasonable rate of return on his separate capital investment of $100,000. Assume 6 percent annually is a reasonable rate of return. Ignoring compounding, Hugo would be entitled to receive (as his separate property) 6 percent of $100,000 (or $6,000) multiplied by 10 years ($60,000). The remainder of the increment ($340,000) is community property (of which Hugo and Alice are each entitled to half).

If the increased value is due to the capital investment, the community's share is simply the value of the spouse's services; the remainder is separate property.

Example: Suppose when Hugo married Alice he also had a $100,000 portfolio of stocks and bonds. Hugo hired Lou to manage the portfolio, paying Lou from his separate property. Hugo took no active role in managing the portfolio. Ten years later, when Hugo and Alice divorce, the portfolio is worth $500,000. The community's share of this increase is the value of Hugo's services, which appears to be practically nil. Call it $10,000, of which half belongs to Hugo. The remainder of the increment ($390,000) is Hugo's separate property.

Some courts hold that the community is entitled to share in the increased value of separate property attributable to inflation in the proportion that the community has contributed to acquisition cost. See, e.g., *In re Marriage of Elam,* 97 Wn. 2d 811 (1982).

3. **Management of community property:** Husband and wife have equal management powers. Either spouse, acting alone, may sell, lease, or otherwise deal with community property. Of course, neither spouse acting alone may convey their ***interest in the community*** to a stranger. And, as a practical matter, both spouses will be required to join in a conveyance of real property held as community property. However, the equal management rule permits either spouse to invest or otherwise deal with deposit or investment accounts. Each spouse has a fiduciary duty toward the other spouse in the management of community affairs. States differ with respect to gifts: some hold that gifts of community property may not be made by a single spouse, others hold that only gifts defrauding a spouse may be set aside, and still others hold that either spouse may make "reasonable" gifts from community funds. The exception to the equal management rule is that each spouse is the sole manager of any business carried on by the spouse, even if the business itself is a community asset.

4. **Rights upon divorce:** At divorce, each spouse is entitled to half of the community property and, of course, all of their separate property.

5. **Rights upon death:** Upon death of one spouse, the one-half interest of the decedent spouse in the community property is disposed of according to the decedent spouse's will. In the absence of a will, it descends by intestate succession.

   Example: Donald, married to Marla and residing in a community property state dies, devising all his property to Babette. Babette takes a half interest, as a tenant in common with Marla, in all the former community property. If Donald died intestate, survived by Marla and Zoe, their child, Zoe would take Donald's half interest in the former community property, as a tenant in common with Marla.

6. **Creditors' rights:** In general, debts incurred during marriage are presumed to be community obligations and the community's assets are liable for their satisfaction. Debts incurred by a spouse prior to marriage are separate obligations and only that spouse's separate property is exposed to the creditor. The extent to which separate creditors may reach community property is in disarray.

E. "Quasi-marital" property: Unmarried cohabitants

1. **Common law marriage:** Common law recognized a de facto marriage between a man and woman if they were cohabitants, agreed between themselves to be husband and wife, and thereafter represented to the public that they were husband and wife. The status thus acquired was indistinguishable from ceremonial marriage. Common law marriage is still recognized in only 11 states and Washington, D.C. Section 6.02 of the American Law Institute's Principles of Family Dissolution endorses a common law marriage approach to the problem of any cohabiting couple, whether of the same or opposite sexes. So long as they share a primary residence and exhibit other traits of a couple sharing life together, upon separation during life their property will be divided under marital property principles.

2. **Contracts:** Unmarried cohabitants may create ***express contracts*** to govern their property upon death or termination of the relationship in a fashion similar to that delivered by law to married couples. Such agreements are generally enforceable. See, e.g., *Cook v. Cook,* 142 Ariz. 573 (1984). This extends to contracts ***implied from the parties' conduct.*** See, e.g., *Marvin v. Marvin,* 18 Cal. 3d 660 (1976). *Marvin* involved an unmarried heterosexual couple but the principle has been applied to same-sex couples. See *Whorton v. Dillingham,* 202 Cal. App. 3d 447 (1988). The *Marvin* rule is not invariable. In *Hewitt v. Hewitt,* 77 Ill. 2d 49 (1979), Illinois refused to enforce such contracts (whether express or implied) on the ground that they were an attempt to create by contract the doctrine of common law marriage, which had been eliminated by statute: "The policy of the Act gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will . . . .[P]ublic policy disfavors private contractual alternatives to marriage." New York recognizes only express contracts. See *Morone v. Morone,* 50 N.Y. 2d 481 (1980).

★3. **Same-sex couples:** Even where enforceable, a contract cannot create the status benefits of marriage, such as the right to spousal benefits under social security, or the right to file a joint tax return, or the right to take the marital deduction for federal estate tax purposes, or the right to inherit from one's spouse. The rights and obligations of the marital state are entirely dependent on legislation, and only Massachusetts permits same-sex couples to marry. In ***Goodridge v. Department of Public Health***, 440 Mass. 309 (2003), the Massachusetts S.J.C. relied on the Massachusetts Constitution's due process and equality provisions to conclude that same-sex

couples must be permitted to marry. Although the S.J.C. applied only minimal, or rational-basis scrutiny, it rejected three rationales offered by the state to support the limitation of marriage to opposite-sex couples. According to the S.J.C., marriage is about commitment, not the "begetting of children," so the argument that marriage "provides a favorable setting for procreation" was beside the point. While the court recognized that protecting the welfare of children is of paramount importance, it concluded that limiting marriage to heterosexual couples "cannot plausibly further this policy." Finally, the court stated that a same-sex marriage ban was not rationally related to the goal of conserving scarce resources that are expended upon married couples.

a. **Marriage substitutes:** Several states provide substitutes for marriage. Vermont permits couples to unite in civil union, a status that confers the "same benefits, protections, and responsibilities" as marriage. California confers on registered "domestic partners" (a term that includes same-sex and opposite-sex couples) virtually all the status benefits and obligations of marriage. Hawaii and New Jersey have more limited substitutes. Hawaii permits same-sex couples to register as "reciprocal beneficiaries," a status that confers inheritance rights upon the survivor. New Jersey permits same-sex and opposite-sex domestic partners age 62 or older to register as such and obtain certain health care and retirement benefits but not inheritance rights.

b. **DOMA and interstate migration:** The federal Defense of Marriage Act (DOMA) provides that marriage is limited to opposite sex partners, thus depriving same-sex married partners of various federal tax and welfare benefits. DOMA also stipulates that no state must recognize a same-sex marriage that is valid in the state in which it was contracted. While some 35 states have acted to prohibit recognition of such marriages, DOMA does not compel any state to do so. Apart from recognition of Massachusetts same-sex marriages, a number of related questions remain unanswered. May a Massachusetts same-sex married couple acquire property as tenants by the entirety in a state that does not recognize their marriage? If such a couple moves to a state that does not recognize their marriage, how may they dissolve their union?

c. **What determines sex?** States are divided over the knotty question of whether sex is chromosomally determined at birth, or whether sex is a matter of outward genital appearance. The issue is most acute with respect to post-operative transsexuals but can also affect people with a variety of intersex disorders. One of the most common is Klinefelter Syndrome, in which a person is born with the combination of XXY chromosomes. Some of these people have "androgen insensitivity syndrome" or "gonadal dysgenesis," conditions that produce external female genitalia. In a state that determines sex on the basis of chromosomal alignment, is such a person male or female?

IV. CONDOMINIUMS AND COOPERATIVES

A. Introduction: Strictly speaking, neither condominiums nor cooperatives are true forms of concurrent ownership, but they combine sole ownership with concurrent ownership in unique ways.

B. Condominiums: The condominium consists of (1) fee ownership (or long-term leasehold) of an individual unit (usually defined to include the interior perimeter surfaces of the unit) and related auxiliary space (e.g., parking or storage spaces), and (2) a fractional or percentage tenancy in

common interest with all other condominium owners of the common areas (walls, roof, foundation, grounds, stairs, elevators, etc.).

1. **Creatures of statutes:** Every state has enacted legislation governing the creation and administration of condominiums. These statutes vary. The description here is a typical composite.

2. **Creation:** The owner wishing to establish a condominium development usually does so by recording a master deed or declaration stating that intent.

3. **Owner's association:** Once the condominium units are sold the owners are members of an association empowered to elect a board of directors to run the association, usually by hiring a manager or making important decisions about repair, maintenance or improvement of common areas, and promulgating rules for the use of owners' units and common areas. These rules can be very restrictive (e.g., no pets, no laundry lines, no loud noise, no prickly plants) but are generally enforceable if they are reasonable. See, e.g., ***Nahrstedt v. Lakeside Village Condominium Association,*** 8 Cal. 4th 361 (1994), discussed in section VII.B of Chapter 9.

4. **Conveyance and financing of units:** Because each condominium unit is a separate freehold estate, each unit is conveyed by deed (like any other real property). Purchase of condominiums is conducted like any other realty transaction, in that the buyer is likely to obtain a loan secured by a mortgage on the borrower's individual unit.

5. **Responsibility for common areas:** Pursuant to condominium by-laws, each condominium owner is responsible for his or her proportionate share of the cost of maintaining or improving common areas. Owners are also jointly and severally liable for injuries resulting from failure adequately to maintain the common areas.

6. **No right to partition:** Even though each owner is a tenant in common with respect to the common areas, the governing statutes deny to owners any right to partition this tenancy in common.

7. **Restrictions on condominium conversion:** Many municipalities have legislated to limit the ability of owners of rental housing to convert such units to condominiums. These laws are designed to preserve rental housing, but probably serve more to drive up the price of condominiums. Nonetheless, such ordinances are usually valid exercises of municipal authority.

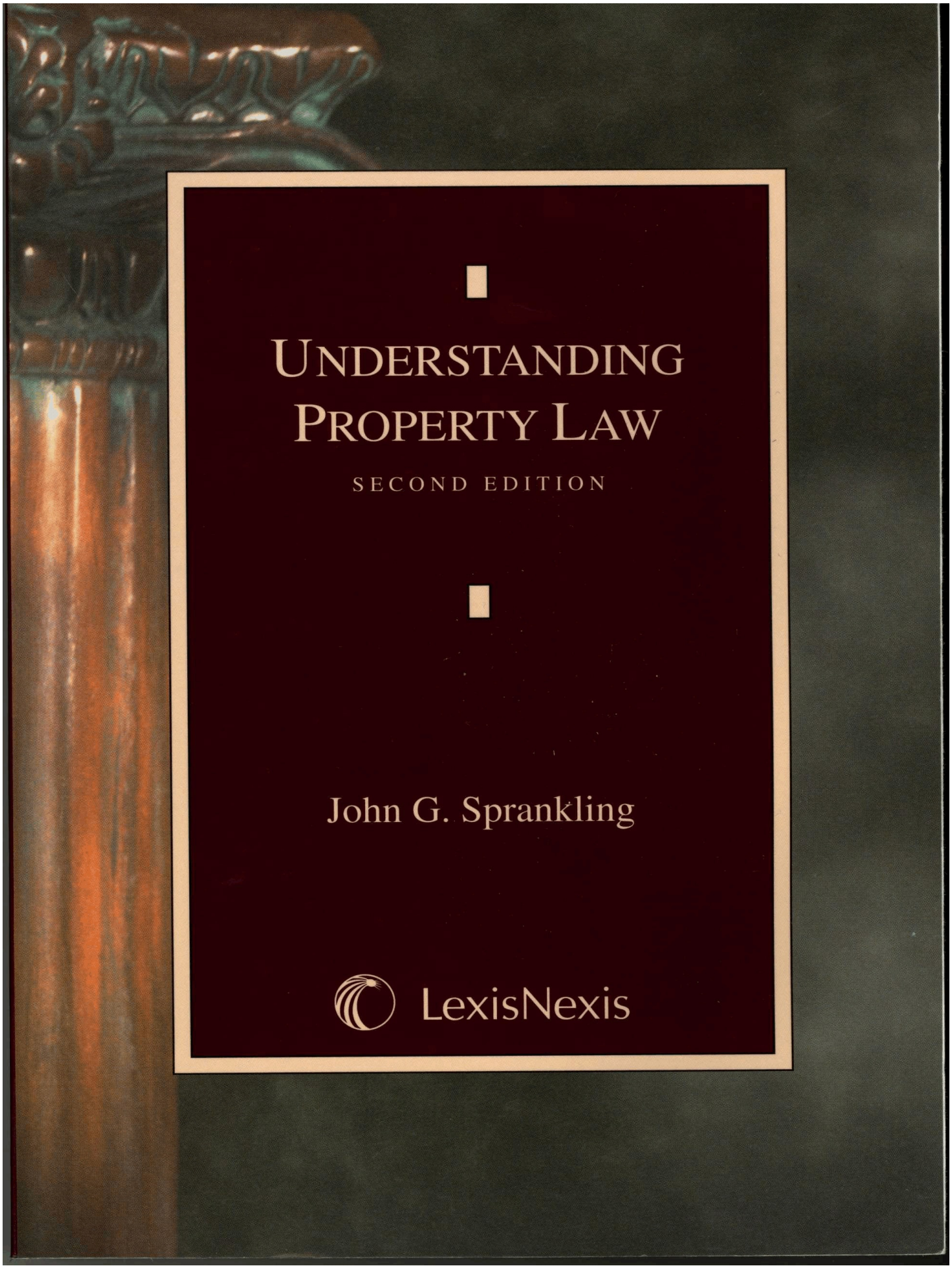
C. **Cooperatives:** A cooperative apartment building is owned by a corporation. To acquire an apartment one must purchase the capital shares of the corporation that represent the value of the apartment and enter into a lease with the corporation for occupancy of the apartment. Each cooperative apartment owner is part owner (by virtue of owning shares in the corporate building owner) and tenant (by virtue of the lease).

1. **Financial operation:** The corporation will, of course, have a board of directors elected by the tenant-shareholders. Lease rentals are set to reflect the operational costs of the building. Because the corporation is the sole owner of the freehold, any mortgage loan will be the corporation's obligation, but a proportionate share of the mortgage expenses will be passed on to each tenant under the leases. Mortgage lenders insist on clauses in each lease subordinating the tenant's interest to that of the mortgage lender. The effect of these clauses is that, in the event of default and foreclosure, the mortgage lender is entitled to occupancy of the entire building and the tenants have no further occupancy right or ownership interest.

2. **Transfer restrictions:** Given the high interdependence of tenant-shareholders, restrictions are typically placed on transfer of both stock and lease in order to be sure that any transferee is financially and otherwise capable of discharging the obligations of ownership and tenancy. These restrictions are typically valid. New York goes so far as to hold that consent to transfer may be withheld for any reason, though most jurisdictions hold that consent may not be withheld unreasonably.
3. **Limited liability:** Because the corporation is the sole owner of the building, any tort liability accruing from ownership is the corporation's responsibility. The liability of tenant-shareholders is limited to their capital investment in the corporation.

Exam Tips on CONCURRENT OWNERSHIP AND MARITAL INTERESTS

- An easy issue to include in an exam is an ambiguous conveyance that may be one of several different types of co-ownership. Be attentive to any facts that may indicate the intent of the grantees. This issue can easily be combined with a later conveyance by one co-owner, thus producing multiple possibilities of resulting ownership. Cover all bases.
- Whenever you spot co-owners there are multiple rights and responsibilities of the co-owners. Check them all to see which are relevant to your problem Also, consider the possibilities for future action. Partition is always an option.
- Marital property issues crop up whenever you have married couples. Pay attention to whether the state is a community or separate property state. Be alert to the problems that can occur when couples migrate from one type of state to the other. Property is not a course in family law but be sensitive to the emphasis your professor places on these issues; there is enough material in Dukeminier and Krier to create marital property issues.
- What counts as property for purposes of division of marital property at divorce varies from state to state. This is often governed by statute so be particularly attentive to statutes that may be included in your exam.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 10

CONCURRENT OWNERSHIP

SYNOPSIS

§ 10.01 The Nature of Concurrent Ownership

A present estate in real or personal property can be simultaneously owned by two or more persons, each holding the right to concurrent

possession.[1] Three basic types of concurrent estates are generally recognized: the tenancy in common, the joint tenancy, and the tenancy by the entirety. Suppose O conveys fee simple absolute in Greenacre to A and B "as tenants in common." A and B now own the concurrent estate called tenancy in common; it provides them with equal rights to simultaneously use and enjoy all of Greenacre.

The rules governing concurrent estates attempt to reconcile three often-conflicting policies that underlie American property law: autonomy, efficiency, and equity. From the standpoint of the law and economics movement, communal ownership is inherently inefficient and does not maximize the productive use of property.[2] Judge Richard Posner asserts that cotenants such as A and B "are formally in much the same position as the inhabitants of a society that does not recognize property rights."[3] He observes, for example, that if A spends his own money to repair buildings on the common property, B will share in the enhanced value stemming from the repairs, but—despite the equities of the situation—has no obligation to compensate A. Ultimately, A can escape the cotenancy through partition, but at the expense of disregarding O's autonomy to dispose of his property as he wishes.

§ 10.02 Types of Concurrent Estates

[A] Tenancy in Common

[1] Characteristics

The simplest concurrent estate—and the most frequently encountered—is the *tenancy in common*. Each co-owner of this estate holds an undivided, fractional share in the entire parcel of land; and each is entitled to simultaneous possession and enjoyment of the whole parcel. This "unity of possession" is the hallmark of the tenancy in common.

Suppose again that A and B are tenants in common in fee simple absolute in Greenacre, a 100-acre farm; A holds a 75% undivided interest and B holds the remaining 25% interest. B is entitled to possession of all 100 acres, and so is A. Their respective fractional ownership shares are quite different, but each has an equal right to possession of the whole parcel. Rather than viewing B, for instance, as effectively owning 25 acres, the law views B as owning an undivided share of the entire 100-acre tract. Notably, the other

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[1] *See generally* Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015 (1979); Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 Marq. L. Rev. 423 (2001); N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 Iowa L. Rev. 582 (1966); Evelyn A. Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. Rev. 331; John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. Rev. 35.

[2] *See* Robert C. Ellickson, *Property In Land*, 102 Yale L.J. 1315, 1338–39 (1993).

[3] Richard A. Posner, Economic Analysis of Law 74 (6th ed. 2003).

key unities required for a valid joint tenancy or tenancy by the entirety—time, title, and interest—are irrelevant to the tenancy in common. A and B can be tenants in common even if they acquired their interests at different times and by different instruments, and even though the fractional size of their shares is different.

Use of the tenancy in common has expanded in recent decades with the advent of the condominium (*see* Chapter 35). If K "owns" a condominium unit, she actually holds two related sets of rights. She owns title to her individual unit, which includes the air space within the unit (as bounded by the floor, ceiling, and common walls) and may also extend part way inside the exterior or common walls. In addition, a condominium owner such as K is normally also a tenant in common in the remaining parts of the building structure and in the underlying land.

Tenants in common do not have a right of survivorship, unlike joint tenants or tenants by the entirety. Thus, if A and B are tenants in common in Greenacre and A dies, A's tenancy in common interest will pass to his devisees or heirs, not to B.

[2] Creation

Today any conveyance or devise to two or more unmarried persons (e.g., "to A and B") is presumed to create a tenancy in common, absent clear language expressing an intent to create a joint tenancy.[4] This rule stems from state statutes that repudiate the traditional English preference for the joint tenancy. Under early English common law, a conveyance or devise[5] was presumed to create a joint tenancy (absent express language to the contrary), probably because its right of survivorship tended to vest ownership in one person, rather than in many; this process facilitated the collection of feudal services and incidents.

A tenancy in common may also arise involuntarily. The leading example is intestate succession. Suppose D, holding fee simple absolute in Blueacre, dies intestate and leaves three children—E, F, and G—as her only surviving relatives. Under these circumstances, the laws governing intestate succession will award each child a one-third interest in Blueacre as a tenant in common with the others. Similarly, a tenancy in common will arise when (a) severance ends a joint tenancy or (b) divorce ends a tenancy by the entirety.

[3] Transferability

A tenant in common has the right to sell, mortgage, lease, or otherwise transfer all or part of his interest without the consent of other co-tenants; and such a transfer does not end the tenancy in common.[6] Unlike the joint

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[4] *See* Gagnon v. Pronovost, 71 A.2d 747 (N.H. 1949) (grant to A and B "and to the survivors of them" held to create a tenancy in common).

[5] The devise of an estate in land was possible in England only after 1540, when the Statute of Wills was enacted. 32 Hen. VIII, ch. 1 (1540).

[6] *See* Kresha v. Kresha, 371 N.W.2d 280 (Neb. 1985) (tenant in common may lease his interest without cotenant's consent).

tenancy and tenancy by the entirety, the tenancy in common does not include a right of survivorship. Accordingly, a co-tenant may devise his interest or allow it to descend by intestate succession.

[B] Joint Tenancy

[1] Characteristics

The *joint tenancy* differs from the tenancy in common in that each joint tenant has a right of survivorship. Suppose C and D are joint tenants in fee simple absolute in Redacre. While C and D are both alive, each has an equal, undivided right to simultaneous possession and use of Redacre. But each has the right to sole ownership of Redacre if the other dies first. Thus, for example, if C dies, D now holds fee simple absolute in Redacre.

The right of survivorship stems from the common law's schizophrenic vision of a joint tenancy, expressed in archaic French as "per my et per tout."[7] Joint tenants were seen as both (a) a unit that owned the entire estate and (b) individuals who each owned an undivided fractional share (or *moiety*) in the estate. Since joint tenant D already owned the entire estate, C's death was not seen as creating any new rights in D. Rather, the death merely withdrew C's interest from the estate, leaving D as the only remaining owner.

What if D murders C? As a matter of public policy, the murderer cannot profit from the crime; the murder severs the joint tenancy. D receives only a one-half interest as a tenant in common, and the remaining interest passes to C's devisees or heirs other than D.[8]

What if C and D die simultaneously, for example, in an auto accident? Here the joint tenancy is treated like a tenancy in common, with no right of survivorship. C and D are each deemed to own a half interest in the property that passes to their respective heirs or devisees.[9]

[2] Creation

Consistent with its vision of joint tenants as a unit, English common law required four *unities* in order to create (and continue) a valid joint tenancy: time, title, interest, and possession. The joint tenants had to acquire title at the same *time*; they had to acquire *title* by the same deed or will, or by joint adverse possession; each *interest* had to be identical, meaning each joint tenant owned the same fractional interest in the same estate; and each joint tenant had to have an equal right to *possession* of the entire parcel. For example, if O conveys a "one-half undivided share in Greenacre as a joint tenant" to E on Monday, and then conveys a similar interest to F on Tuesday, E and F are not joint tenants because the unities of time and title are missing; E and F acquired their interests at different times and by different deeds. Instead, E and F are tenants in common.

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[7] Meaning, "by the share and by the whole."

[8] Unif. Probate Code § 2-803(c)(2); Duncan v. Vassaur, 550 P.2d 929 (Okla. 1979).

[9] Unif. Simultaneous Death Act § 4.

The modern standard for creating a joint tenancy differs markedly from the common law model. At common law, the joint tenancy was the law's "default" setting; absent clear contrary language, any concurrent estate was presumed to be a joint tenancy as long as the four unities were present. By contrast, today in most states a concurrent estate is considered a tenancy in common unless the intent to create another estate is clearly expressed.[10] The rationale for rejection of the English rule is straightforward. The original reason for favoring the joint tenancy ended with feudalism. Moreover, recognizing a right of survivorship in ambiguous cases may be inequitable, as where, for example, a merchant has extended credit in reliance on the deceased customer's apparent property rights.

Predictably, states vary widely on the phrasing that manifests the requisite intent to create a joint tenancy. In most jurisdictions, language such as "to E and F as joint tenants" or "to E and F as joint tenants with right of survivorship" will suffice.[11] On the other hand, phrases like "to E and F jointly" may be insufficient.[12]

Moreover, while many states still require the traditional four unities, some states have eroded this standard. For example, at common law an owner could not create a joint tenancy by conveying to herself and others, because the unities of time and title were absent. Of course, this requirement could be—and commonly was—circumvented by the use of a "straw man." A, owning fee simple absolute, would convey her entire interest to B, who would then convey to A and C as joint tenants with right of survivorship. A number of states now permit an owner to create a joint tenancy through a direct conveyance,[13] presumably because the common law bar could be routinely avoided through a sham transaction.

[3] Transferability

In contrast to the relatively free alienability of a tenancy in common interest, a joint tenancy interest is virtually inalienable. Due to the right of survivorship, a joint tenant's interest ends upon death, so the interest cannot be devised or descend by intestate succession. Similarly, any inter vivos conveyance of a joint tenancy interest will break the unities of time and title, severing the joint tenancy; thus, the grantee receives merely a

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[10] *See In re* Estate of Michael, 218 A.2d 338 (Pa. 1966). *But see In re* Estate of Vadney, 634 N.E.2d 976 (N.Y. 1994) (court reforms deed to add right of survivorship omitted by scrivener's error).

[11] *See* Palmer v. Flint, 161 A.2d 837 (Me. 1960) (conveyance to A and B "as joint tenants, and not as tenants in common, to them and their assigns and to the survivor, and the heirs and assigns of the survivor forever" created a joint tenancy); *see also* Downing v. Downing, 606 A.2d 208 (Md. Ct. App. 1992) (conveyance to A and B "as joint tenants" was sufficient). *But see* Smith v. Cutler, 623 S.E.2d 644 (S.C. 2005) (conveyance to A and B "for and during their joint lives and upon the death of either of them, then to the survivor of them" created tenancy in common for life, with remainder in fee to survivor).

[12] *See* James v. Taylor, 969 S.W.2d 672 (Ark. Ct. App. 1998) (conveyance to A, B, and C "jointly and severally" created tenancy in common).

[13] *See* Cal. Civ. Code § 683(a); Miller v. Riegler, 419 S.W.2d 599 (Ark. 1967) (joint tenancy in stocks). *But see* Hass v. Hass, 21 N.W.2d 398 (Wis. 1946).

tenancy in common interest. The authorities are split as to whether a lease, mortgage, or other transfer of a lesser interest will sever a joint tenancy (*see* § 10.04[A][2]).

[4] Contemporary Relevance of the Joint Tenancy in Land

The joint tenancy in land has been extensively used in recent years as a tool to avoid the cost and delay of probate proceedings.[14] In particular, most married couples hold title to their family residences as joint tenants, presumably as a result of decades of well-intentioned (but simplistic) advice from real estate brokers and bank officers.[15]

Suppose H and W, a married couple about to purchase Greenacre jointly, want to ensure that the survivor obtains sole title. They could take title as tenants in common, and execute mirror-image wills that devise the interest of the first dying spouse to the surviving spouse. But if H now dies first, W's right to sole possession of Greenacre will not receive legal recognition until the probate of H's will is completed and H's 50% interest in Greenacre is distributed to W under judicial supervision; further, the inclusion of Greenacre in H's estate will increase the cost of the procedure. Instead, H and W might take title as joint tenants; when H eventually dies, W automatically becomes the sole owner without the need for H's interest to pass through probate.[16]

[5] Special Rules for Joint Bank Accounts

Bank accounts are often held in joint tenancy. One study discovered that 81% of all savings accounts reviewed were—at least in theory—jointly owned.[17] Yet even if the formal agreement with the bank appears to create a "joint account" or "joint and survivorship account," the account holders may not have intended the legal consequences that accompany a true joint tenancy. Depositor D might open a joint account with her son S so that S can handle her financial affairs; or D might plan to use the account as a will substitute, intending that S have no rights in the account proceeds until D's death.

Accordingly, the nature of a joint account turns on the intent of the parties, not the terms of the agreement with the bank. In applying this principle, many states follow two helpful principles contained in the Uniform Probate Code. First, during the lifetime of the account holders, the amount on deposit is presumed to belong to each party in proportion

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[14] For discussion of the benefits of joint tenancies, see Regis W. Campfield, *Estate Planning for Joint Tenancies*, 1974 Duke L.J. 669, 671–73.

[15] For example, one author noted that 85% of deeds recorded by married couples in California created joint tenancies. Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 928 (1983).

[16] However, there is a risk in most states that one cotenant could defraud the other by secretly executing a severance deed. *See* § 10.04[A][1].

[17] N. William Hines, *Personal Property Joint Tenancies: More Law, Fact, and Fancy*, 54 Minn. L. Rev. 509, 574 (1970).

to his or her contribution to the account, absent clear and convincing evidence of a contrary intent.[18] In effect, during life the account is treated like a tenancy in common, each party owning a fractional share based on actual contributions. Second, the amount remaining on deposit at the death of an account holder belongs to the surviving party or parties, unless the terms of the account specify otherwise.[19] The law presumes the parties intended the right of survivorship that characterizes a joint tenancy.

[C] Tenancy by the Entirety

[1] Characteristics

The *tenancy by the entirety*—now abolished in many states—is a medieval relic.[20] Historically, the law viewed a husband and wife as a single legal unit controlled by the husband. Under this logic, a married couple could not hold title as tenants in common or joint tenants because a wife had no existence as a legal person. Thus, at common law, every conveyance or devise to a husband and wife was deemed to create a tenancy by the entirety that vested title in the spouses as a unit, without any individual shares.[21] A valid tenancy by the entirety required the four unities of time, title, interest, and possession, plus the fifth unity of a valid marriage.

Like the joint tenancy, the tenancy by the entirety provides a right of survivorship. But a tenancy by the entirety is a far more durable estate because it can be terminated[22] only by divorce of the couple, death of one spouse, or the agreement of both spouses. One spouse cannot unilaterally break the required unities and thereby transform the estate into a tenancy in common. However, if one spouse murders the other, the tenancy by the entirety is severed and the murderer cannot enforce the right of survivorship.[23]

Originally, this estate gave the husband exclusive possession of the land and the sole right to the rents and profits it produced.[24] The husband could transfer this possessory right to a third party over his wife's objection, but could not defeat the wife's right of survivorship. In most jurisdictions, therefore, the husband's creditors could levy on property held in tenancy

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[18] Unif. Probate Code § 6-211.

[19] Unif. Probate Code § 6-212. *Cf.* Seman v. Lewis, 830 P.2d 1294 (Mont. 1992); Wright v. Bloom, 635 N.E.2d 31 (Ohio 1994).

[20] *See generally* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. Rev. 35.

[21] Thus, they held "per tout et non per my," that is, "by the whole and not by shares."

[22] There is a split of authority on whether a tenancy by the entirety continues after the property is destroyed or sold. *See, e.g.*, Hawthorne v. Hawthorne, 192 N.E.2d 20 (N.Y. 1963) (estate did not attach to fire insurance proceeds after destruction of dwelling).

[23] Estate of Grund v. Grund, 648 N.E.2d 1182 (Ind. Ct. App. 1995).

[24] The common law view persisted with remarkable vigor, even in states such as Massachusetts. *See, e.g.*, D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976) (state law giving husband sole control over family home owned in tenancy by the entirety did not constitute gender discrimination that violated the wife's rights to due process or equal protection).

by the entirety to satisfy his debts. As one court admitted, "[i]t is possible that a wife might receive no benefits at all from land held by the entireties if she predeceases her husband."[25] The later Married Women's Property Acts (*see* § 11.03[B]) largely redressed this imbalance by vesting control equally in both spouses.

[2] Creation

The tenancy by the entirety is recognized in about half of the states. Many of these states still follow the common law presumption that any conveyance or devise to a married couple creates a tenancy by the entirety. In other jurisdictions that recognize the estate, however, the intent to create a tenancy by the entirety must be clearly expressed (e.g., "to A and B as tenants by the entirety").

Moreover, most jurisdictions still require the traditional five unities: time, title, interest, possession, and marriage. The principal exception to this rule permits one spouse to create a tenancy by the entirety by a direct conveyance to both spouses, even though the unities of time and title are absent. If W, married to H, holds fee simple absolute in Blueacre as her sole property, she can create a tenancy by the entirety by conveying "to W and H as tenants by the entirety."

What if a grantor attempts to create a tenancy by the entirety in two unmarried persons? Some states consider the resulting estate to be a joint tenancy, reasoning that it best approximates the grantor's intent. Other states apply the default standard, construing the estate as a tenancy in common.

[3] Transferability

The dominant characteristic of the estate is that neither spouse possesses a separate share; rather, the couple as a unit owns the entire estate. Thus, under traditional theory, the consent of both spouses was required to convey the estate. But, given his historical control, the husband could transfer his right of survivorship and the right to lifetime possession (including rights to future income), subject to the wife's right of survivorship.

However, the Married Women's Property Acts (*see* § 11.03[B])—adopted in all common law marital property states—have eliminated the husband's right of exclusive control. Under these statutes, either spouse has the power to manage and control marital property, including property held in tenancy by the entirety.[26]

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[25] Dearman v. Bruns, 181 S.E.2d 809, 811 (N.C. Ct. App. 1971).

[26] Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650 (Mass. 1993) (husband can mortgage property).

[4] Rights of Creditors

[a] A Shield Against Creditors?

Does the modern tenancy by the entirety shield property from creditors' claims? As a potential source of debtor protection, the estate has enjoyed an undeserved reprieve from extinction in some states.

The legal muddle stems from judicial efforts to reconcile tenancy by the entirety theory with the provisions of the Married Women's Property Acts. The basic theme of these Acts is equality: each spouse owns, manages, and controls his or her separate property, which is subject to the claims of that spouse's creditors. For example, if H and W are married, H's wages (and all property acquired with those wages) are his separate property; H's creditors can levy on H's property, but not on W's property.

Before these reform statutes, the rights of creditors in tenancy by the entirety property were relatively clear. Because the husband controlled the property, creditors could levy on it to satisfy his debts; as a practical matter, the husband's debts were family debts, since the wife was deemed incompetent to contract. After the Married Women's Property Acts, however, states still recognizing the estate wrestled with a dilemma. If a wife is now entitled to the equal use and enjoyment of tenancy by the entirety property, how can that property be subject to the claims of her husband's creditors without her consent? Conversely, how can the wife's creditors levy on tenancy by the entirety property over the husband's objection? Most states resolve this dilemma by concluding that the creditor of an individual spouse cannot reach tenancy by the entirety property. Some states allow creditors to execute on the right of survivorship of the debtor spouse only,[27] while others permit creditors to sell the debtor spouse's interest subject to the non-debtor spouse's right of survivorship.

[b] Majority Approach: *Sawada v. Endo*

The Hawaii Supreme Court's decision in *Sawada v. Endo*[28] illustrates the majority view. There, the plaintiff Sawadas sued to cancel a fraudulent conveyance in order to collect on a personal injury judgment. Defendant Endo asserted that at the time of the conveyance, the property was held in tenancy by the entirety, and thus not subject to execution by creditors.

The court reasoned that the effect of the Married Women's Property Acts was to convert the tenancy by the entirety into a "unity of equals and not of unequals as at common law."[29] Accordingly, neither spouse owned a separate interest that could be conveyed to, or reached by, creditors. The court noted that this result protected the integrity of the family unit by ensuring that real property was available as housing and as security for educational and other expenses. Unfairness to creditors was avoided, the

[27] United States v. 1500 Lincoln Ave., 949 F.2d 73 (3d Cir. 1991); United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990).

[28] 561 P.2d 1291 (Haw. 1977).

[29] *Id.* at 1295.

court observed, because they (a) were charged with notice of a spouse's limited estate in deciding whether to extend credit, or (b) never relied on the asset in the first place.

[c] Reflections on the *Sawada* Approach

The majority approach, as exemplified by *Sawada*, may be criticized on several grounds.[30] Initially, one may ask whether state legislatures—bent on achieving gender equality between spouses—actually intended to curtail or frustrate creditors' rights. Certainly this result is not compelled by the common law tradition. Indeed, perhaps a more logical outcome would be to conclude that the equality resulting from Married Women's Property Acts subjects tenancy by the entirety property to claims of creditors against either spouse.[31]

The "family asset protection" rationale underpinning *Sawada* is overbroad. The majority rule insulates all property held in tenancy by the entirety from creditors, far beyond the amount required for family housing or support. For example, assume H and W hold title to a $5,000,000 beachfront estate and a $20,000,000 shopping center in tenancy by the entirety. Under the majority approach, neither asset can be reached by creditors. A more narrowly tailored doctrine—such as the homestead protection available in many states to insulate the ordinary family home from creditors—would be preferable.[32] In any event, why should certain property owners be exempt from creditors' claims, when wage earners too poor to own land are subject to wage garnishment for their debts?

Finally, the *Sawada* court may underestimate the impact on creditors. Victims of tortious conduct like the Sawadas obviously cannot protect themselves in advance by evaluating the creditworthiness of future tortfeasors. And to suggest that the Sawadas or other involuntary creditors cannot recover because the property "was not a basis of credit" (i.e., was not relied upon in deciding to extend credit) is disingenuous. The court seemingly vests tortfeasors with de facto immunity from suit as long as their assets are held in tenancy by the entirety.

[5] Requiem for the Tenancy by the Entirety?

The tenancy by the entirety may be slowly withering away. Once the law finally acknowledged that married women were legally capable of owning property, the archaic rationale for the estate vanished. Many states have abolished the tenancy by the entirety and England—where the estate originated—banned it altogether in 1925.

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30 For an excellent pre-*Sawada* critique of the majority rule, see Richard G. Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. Indus. & Com. L. Rev. 197, 205–07 (1959).

31 *See* King v. Greene, 153 A.2d 49 (N.J. 1959) (sheriff's deed following execution sale against tenancy by the entirety property to satisfy wife's debt effectively conveyed, inter alia, wife's right of survivorship).

32 The nature of any homestead protections varies widely among states. California, for example, provides exemptions ranging from $50,000 to $150,000, depending on age, income, disability, and other factors. Cal. Civ. Proc. Code § 704.730.

Certainly, the estate's new popularity as a debt avoidance device has temporarily arrested its decline in some states. But as the resultant creditor unfairness becomes more apparent, the demise will continue. In the interim, the patchwork of widely varying state approaches will undoubtedly provoke both confusion and injustice.

One interesting example is the problematic impact of this estate on the national battle against drug trafficking operations. Under federal law, property used to sell illegal drugs, or acquired with proceeds from such sales, is subject to civil forfeiture by government agencies; yet property owned by an "innocent" owner cannot be seized.[33] If property is held in joint tenancy or tenancy in common, the concurrent interest of the guilty spouse can be readily seized; the innocent spouse becomes either a cotenant with the government or receives half of the sales proceeds. But what if the property is held in tenancy by the entirety? Most courts conclude that only the survivorship right of the guilty spouse—whose value is speculative and uncertain—can be forfeited.[34] Accordingly, the innocent spouse is entitled to lifetime use of the property, together with a right of survivorship. This disparity may tend to encourage drug dealers to relocate to states that recognize the tenancy by the entirety.[35]

§ 10.03 Rights and Duties of Cotenants

[A] Relationship Between Cotenants

The precise relationship between cotenants defies easy definition.[36] In some respects, the law treats them as relatively independent actors; for example, one cotenant cannot contract on behalf of other cotenants.

In other respects, the law seems to impose stringent duties. Cases and textbooks often recite that cotenants who receive their interests from a common source at the same time (e.g., from a single deed or will) owe fiduciary duties to each other; this universe would include all joint tenants and most tenants in common. Yet the assertion that a broad fiduciary relationship exists among most cotenants—like partners or trustees—is an overstatement. Most of the decisions making this claim arise in one situation: where a cotenant has acquired sole title to the cotenancy property through a foreclosure, tax sale, or other involuntary sale.[37] In that

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[33] 21 U.S.C. § 881(a).

[34] *See, e.g.*, United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990).

[35] *See also* United States v. Craft, 535 U.S. 274 (2002) (holding that federal tax lien attached to debtor/husband's interest in land held in tenancy by the entirety, pursuant to Internal Revenue Code, even though state law would prevent private creditor from attaching husband's interest).

[36] *See* Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015 (1979).

[37] Also, when a cotenant in possession attempts to claim sole title by adverse possession, many courts justify use of a more rigorous adverse possession standard by characterizing the cotenant as a fiduciary.

specialized context, the acquiring cotenant is often deemed to hold title as a de facto trustee for the benefit of the other cotenants, as long as they promptly pay their proportionate share of the acquisition price.[38]

However, most decisions hold that—unlike a fiduciary—a cotenant has little or no obligation to affirmatively safeguard the rights of other cotenants, e.g., by repairing a leaky roof or purchasing casualty insurance. Moreover, unlike a fiduciary, a cotenant is normally entitled to exclusive use of the cotenancy property without any duty to compensate other cotenants.

[B] Right to Possession

In theory, each cotenant has an equal right to possession and enjoyment of the whole property, regardless of the size of his or her fractional share.[39] Accordingly, under the majority rule, even a cotenant in exclusive possession of the property is not liable to the other cotenants for rent.[40] If A, B, and C are all tenants in common in Blueacre, and A holds sole possession of the land, in most jurisdictions A is not required to pay rent or other compensation to B or C.

Yet the basic precept that each cotenant has an equal right to possession is little more than a legal fiction. How can multiple cotenants each utilize the entire property simultaneously? Suppose again that A, B, and C are cotenants in Blueacre; A is standing on the property, occupying a particular square foot of land. In hyperbole that defies the laws of physics, the common law rule permits B and C to simultaneously occupy the same square foot of ground. Clearly, the respective possessory rights of A, B, and C conflict; three people cannot stand in the same place.[41]

The common law recognized one major exception to the rule that a cotenant had no duty to pay rent: ouster. *Ouster* occurs when a cotenant in possession refuses the request of another cotenant to share possession of the land.[42] For example, assume cotenant A holds sole possession of

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[38] Laura v. Christian, 537 P.2d 1389 (N.M. 1975) (cotenant pays off mortgage obligation to avoid pending foreclosure sale); Massey v. Prothero, 664 P.2d 1176 (Utah 1983) (cotenant purchases at tax sale).

[39] Thus, if one cotenant leases his interest, the lessee is similarly entitled to an equal right to possession of the whole property. Schwartzbaugh v. Sampson, 54 P.2d 73 (Cal. Ct. App. 1936); Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

[40] *See* Martin v. Martin, 878 S.W.2d 30 (Ky. Ct. App. 1994). *But see* Lerman v. Levine, 541 A.2d 523 (Conn. App. Ct. 1988) (applying minority rule that cotenant in possession is obligated to pay rent to other cotenant, even without ouster).

[41] Mastbaum v. Mastbaum, 9 A.2d 51, 55 (N.J. Ch. 1939) ("Two men cannot plow the same furrow.").

[42] Ouster is also established when a cotenant in exclusive possession of the common property claims to hold sole title to the property, adverse and hostile to the rights of other cotenants. *See, e.g.*, Estate of Hughes, 7 Cal. Rptr. 2d 742 (Ct. App. 1992). In addition, some states recognize the special doctrine of "constructive ouster" in the context of divorce proceedings; when mutual antagonism makes it impracticable for spouses to share the family home while a divorce is pending, the spouse who leaves the home is entitled to partial rent from the remaining spouse. *See, e.g.*, Olivas v. Olivas, 780 P.2d 640 (N.M. Ct. App. 1989).

Blueacre; B appears at the front gate to Blueacre and demands that A unlock the gate to allow him to enter and use the land; if A rejects this demand, he has ousted B. As an ousted cotenant, B is entitled to recover his pro rata share of Blueacre's fair rental value from A. On the other hand, if B simply demands that A pay him rent, no ouster occurs when A refuses, because B has failed to demand shared possession.[43]

Professor Evelyn Lewis notes that the majority "no rent liability" rule originated in an agrarian age when property owners typically lived and worked on family farms.[44] The majority rule arguably made sense in that context because ordinary owners had an immediate economic use for cotenancy property; also, the rule tended to encourage the productive use of land. But today, Lewis argues, the rule imposes unjust economic burdens on cotenants who are unlikely to have a personal use for the cotenancy property. At a minimum, she suggests that a cotenant using cotenancy property as a personal residence should be required to pay rent under limited circumstances, e.g., when persons who are already living elsewhere acquire cotenancy interests by devise or intestate succession.

[C] Right to Rents and Profits

Each cotenant is entitled to a pro rata share of rents received from a third person for use of the land.[45] For example, if A, B, and C each own equal shares as tenants in common in Blueacre, and A receives $30,000 in rental income from X for use of the property, B and C are each entitled to $10,000 from A. If A refuses to pay, they may bring an *accounting* action against him to force payment.

Similarly, if a cotenant exploits natural resources on the cotenancy property such as minerals or timber, each cotenant is entitled to a pro rata share of the resulting net profits. In *White v. Smyth*,[46] a tenant in common holding a one-ninth interest mined and sold valuable rock asphalt from the property. When the other cotenants sued for compensation in an accounting action, the defendant asserted that he had removed less than one-ninth of the asphalt, and thus had only taken his fair share, just as he might have done through partition. The Texas Supreme Court ruled that the defendant could not effect a de facto partition through self-help and, accordingly, that each cotenant owned a share in the mined asphalt. The defendant was ordered to pay eight-ninths of his net profits to his cotenants.[47]

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[43] Spiller v. Mackereth, 334 So. 2d 859 (Ala. 1976).

[44] Evelyn A. Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. Rev. 331.

[45] Goergen v. Maar, 153 N.Y.S.2d 826 (App. Div. 1956).

[46] 214 S.W.2d 967 (Tex. 1948).

[47] *But see* Threatt v. Rushing, 361 So. 2d 329 (Miss. 1978) (cotenant may not cut timber without consent of other cotenants).

[D] Liability for Mortgage and Tax Payments

As a general rule, all cotenants are obligated to pay their proportionate share of mortgage, tax, assessments, and other payments that could give rise to a lien against the property if unpaid.[48] Such payments are considered necessary to prevent the estate from being lost by foreclosure. If one cotenant pays more than a pro rata share, he or she may recover the excess in a *contribution* action.[49] For example, suppose K and L are tenants in common in Greenacre, each owning a one-half share. If Greenacre is subject to a mortgage requiring a payment of $2,000 per month, and K is forced to cover these costs for one year ($24,000) because L refuses to pay, K is entitled to recover half of his payments ($12,000) from L.[50]

However, in most states, a special rule applies to the cotenant in sole possession of the property: the cotenant cannot recover for these payments unless they exceed the reasonable rental value of the property.[51] Thus, if the fair rental value of Greenacre is $30,000 per year, and K held sole possession of Greenacre during the year, K cannot recover any part of his mortgage payments from L.[52]

[E] Liability for Repair and Improvement Costs

Under the majority rule, a cotenant who pays for repairs or improvements to the common property is not entitled to contribution from the other cotenants, absent a prior agreement. Thus, if D, a joint tenant in a home known as Whiteacre, pays $15,000 to repair the leaky roof, he cannot sue his cotenants E and F to recover their $10,000 pro rata share. Why not? Cotenants exercising their business judgment may disagree over the necessity, character, extent, and cost of repairs and improvements.[53] If the law permitted contribution actions for such expenditures, courts might be forced to adjudicate multiple lawsuits between the same cotenants over comparatively minor disagreements, consuming undue time, energy, and money.

To break such stalemates, the law provides the remedy of *partition*. Any cotenant who cannot agree with another can permanently end the relationship. Upon partition, a cotenant like D will receive a credit for the excess cost of reasonable repairs he has borne.[54] Improvements are treated

[48] Laura v. Christian, 537 P.2d 1389 (N.M. 1975).

[49] Alternatively, the cotenant may use the excess payment as a credit in an accounting or partition action. For example, if K has received $40,000 in rents from Greenacre, and L sues for an accounting, L will receive only $8,000 ($20,000, representing L's half share of the rents, less the $12,000 credit for payments K made on L's behalf).

[50] A cotenant's failure to pay his pro rata share is normally not considered an abandonment of his interest in the property. Cummings v. Anderson, 614 P.2d 1283 (Wash. 1980).

[51] *See, e.g.*, Barrow v. Barrow, 527 So. 2d 1373 (Fla. 1988); *see also* Esteves v. Esteves, 775 A.2d 163 (N.J. Super. Ct. App. Div. 2001).

[52] *But see* Yakavonis v. Tilton, 968 P.2d 908 (Wash. Ct. App. 1998) (contra).

[53] Posner characterizes this relationship as an example of "the familiar bilateral-monopoly problem." Richard A. Posner, Economic Analysis of Law 74 (6th ed. 2003).

[54] Such repair costs may also be used as a credit in an accounting action brought against the cotenant.

similarly; when partitioning the property, the court will either assign the improved portion of the property to the improving cotenant if feasible, or award that cotenant a credit for the added property value produced by the improvement.

[F] Liability for Waste

In theory, a cotenant is liable for waste when he or she uses the common property in an unreasonable manner that causes permanent injury, under much the same standards that govern life tenants and other owners of present estates accompanied by future interests (*see* § 9.09). Yet the weight of authority treats certain acts by a cotenant that would normally constitute waste—such as extraction of minerals or cutting of timber—simply as sources of income (like rents from third parties) for which he must account to the other cotenants.[55] While such acts are often judicially characterized as "waste," the traditional penalties for waste are not imposed.

§ 10.04 Termination of Concurrent Estates

[A] Severance of Joint Tenancy

[1] Conveyance of Joint Tenant's Entire Interest

In general, a joint tenant has the absolute right to end or "sever" the joint tenancy without the consent (or sometimes even the knowledge) of the other cotenants.[56] The procedure is simple: the joint tenant merely conveys his interest to a third person.[57] For example, if A and B are joint tenants in Greenacre, and B conveys his estate to C, the unities of time and title are broken. This severs the joint tenancy, leaving A and C as tenants in common.

But can B convert the joint tenancy into a tenancy in common without losing his interest in Greenacre? The formal response of English law was "no." B could not convey his interest from himself (as a joint tenant) to himself (as a tenant in common) because the traditional ceremony of feoffment with livery of seisin required two participants; "one could not enfeoff oneself."[58] But indirectly, using one of those ingenious sleight-of-hand tricks that brought flexibility to the common law, the answer was "yes." In a prearranged, sham transaction, B simply conveyed his interest to C (an intermediary called a "straw man"), which severed the joint tenancy, and C conveyed the resulting tenancy in common interest back to B.

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[55] *See, e.g.*, White v. Smyth, 214 S.W.2d 967 (Tex. 1948) (cotenant who removed rock asphalt required to account to other cotenants for his net profits); *but see* Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988) (cotenant enjoined from mining coal without consent of other cotenants).

[56] Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

[57] A joint tenancy may be severed when one joint tenant merely enters into a contract to sell his interest. Estate of Phillips v. Nyhus, 874 P.2d 154 (Wash. 1994).

[58] Riddle v. Harmon, 162 Cal. Rptr. 530, 533 (Ct. App. 1980).

Common law courts tolerated this fiction because it facilitated free alienation, and thus encouraged productive use of land. Because the interest was no longer burdened with a right of survivorship, it could be transferred more easily.

Although some states still require use of a "straw man," the modern trend is to allow a joint tenant to terminate the joint tenancy by conveying his interest directly to himself. The rationale for the traditional rule ended in 1677 when the Statute of Frauds effectively replaced livery of seisin with the deed. Moreover, as one court commented, "[c]ommon sense as well as legal efficiency dictate that a joint tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fictions."[59]

Yet the joint tenant's unilateral right to end the joint tenancy poses a hidden peril. As Professor Samuel Fetters observed, "one joint tenant, while secure in his own survivorship right, can defraud his cotenant of his survivorship right with impunity."[60] Assume that H and W take title to Redacre as joint tenants, but that unscrupulous H secretly executes a deed conveying his interest to B, his brother; H places the deed in his personal safe deposit box. If H dies first, the deed will be seen as having severed the joint tenancy during H's lifetime; thus W is a mere tenant in common with B. On the other hand, if W dies first, H simply destroys the hidden deed and acquires sole title to Redacre.[61]

What if A, B, and C are all joint tenants in Greenacre and C conveys her interest to D? D is a tenant in common because he does not share the unities of time and title with A and B. But C's conveyance does not affect the unities *between* A and B; thus, *as between themselves* A and B are still joint tenants. Greenacre is now held in a hybrid form of ownership: D owns a one-third interest as a tenant in common, while A and B each own a one-third interest as joint tenants.[62] Assuming A dies first, B and D will then be tenants in common, B owning a two-thirds interest and D retaining his one-third interest.

[2] Lease or Mortgage Executed by One Joint Tenant

When will a cotenant's transfer of less than her entire interest sever a joint tenancy? This issue arises in two main contexts: leases and mortgages.

It is unclear whether a joint tenancy is severed when one joint tenant leases the common property. "[T]he problem is like a comet in our law: though its existence in theory has been frequently recognized, its observed

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[59] *Id.* at 534.

[60] Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 Fordham L. Rev. 173, 175 (1986).

[61] *See* Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994) (joint tenant wife secretly conveyed her interest to child by a prior marriage). *But see* Cal. Civ. Code § 683.2 (allowing unilateral severance only if severing deed is recorded before grantor's death or shortly thereafter).

[62] Jackson v. O'Connell, 177 N.E.2d 194 (Ill. 1961).

passages are few."[63] *Tenhet v. Boswell*,[64] an influential decision by the California Supreme Court, held that while a joint tenant had power to execute a valid lease, the lease did not effect a severance.[65] Thus, the lease was subject to the other cotenant's right of survivorship and ended when the lessor cotenant died. While the reasoning of the *Tenhet* court is somewhat circular, the decision seems to rest on the policy of protecting the good faith expectations of the nonleasing cotenant that her survivorship right will endure. Some decisions follow the *Tenhet* approach. Others conclude that a lease effects a permanent severance, because the unity of interest is lost; this result is presumably based on the policy of encouraging alienability by eliminating the survivorship right.

The law governing the effect of a mortgage on a joint tenancy, in contrast, is well developed. In states that follow the traditional view that a mortgage transfers legal title to the mortgagee, a mortgage executed by one cotenant effects a severance. This result is usually justified with the formalistic conclusion that the unities of time and title have been broken. As a policy matter, recognizing a severance protects the mortgagee (and thus presumably enhances the availability of credit) by ensuring that the mortgage will survive the death of the mortgagor joint tenant. Conversely, in states that follow the modern approach that a mortgage merely creates a lien, most courts find that no severance has occurred, again based on the formalistic rationale that the unities are intact.[66]

[3] Agreement Between Joint Tenants

A joint tenancy may be severed by agreement of all cotenants. The issue arises most commonly in divorce proceedings that result in a property settlement agreement. Does such an agreement sever a joint tenancy? Most courts appear to follow a presumption that a divorcing spouse does not intend to preserve any right of survivorship in the other spouse, and thus tend to interpret ambiguous agreements as terminating the joint tenancy.[67] However, an agreement between joint tenants that merely provides that one of them will occupy the common property does not effect a severance.

[B] Partition

The traditional "escape hatch" from the confines of cotenancy is partition. Any tenant in common or joint tenant may sue for judicial partition, which ends the cotenancy, distributes the property among the former cotenants as solely-owned property, and provides a final accounting among them. Absent a contrary agreement, each cotenant has a right to obtain

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[63] Tenhet v. Boswell, 554 P.2d 330, 334–35 (Cal. 1976).

[64] 554 P.2d 330 (Cal. 1976).

[65] *See* Swartzbaugh v. Sampson, 54 P.2d 73 (Cal. Ct. App. 1936).

[66] *See, e.g.*, Brant v. Hargrove, 632 P.2d 978 (Ariz. Ct. App. 1981); People v. Nogarr, 330 P.2d 858 (Cal. Ct. App. 1958); Harms v. Sprague, 473 N.E.2d 930 (Ill. 1984).

[67] Mann v. Bradley, 535 P.2d 213 (Colo. 1975) (agreement impliedly severed joint tenancy). *But see* Porter v. Porter, 472 So. 2d 630 (Ala. 1985) (divorce decree did not sever joint tenancy).

partition—without proving any cause or reason—regardless of any inconvenience, burden, or damage to other cotenants.[68] Why? The conventional explanation is that free partition is central to the efficient use of land. If cotenants are stalemated by mutual disagreement about the future of their common property,[69] the land may not be developed for its most productive use. This perspective, which views all land as a relatively fungible commodity, ignores Professor Margaret Radin's concern for respecting the emotional attachment that many owners feel toward family residences and other "personhood" property.[70]

There are two basic types of partition: *partition in kind* and *partition by sale*. Partition in kind—the preferred technique—is a physical division of the property into separate parcels.[71] If E, F, and G all own equal shares as tenants in common in Redacre, a 300-acre unimproved farm tract, a partition in kind would probably assign each one sole ownership of a 100-acre parcel.[72] Of course, the value of the parcels might not be equal due to differences in soil quality, topography, access, or water availability; a court can equalize the distribution by ordering a money payment called *owelty*.

However, if physical division of the land is impossible, impracticable, or inequitable, a court may order partition by sale. It is usually impracticable, for example, to divide a single-family home. Under this technique, the property is sold and the sales proceeds are divided among the cotenants according to their respective shares. Partition by sale typically forces poorer cotenants off their land simply because they cannot afford to bid successfully.[73]

The right to partition, while strongly favored in the law, is not absolute. An agreement to restrict partition will be upheld if the restraint on alienation it imposes is reasonable under the circumstances.[74] Moreover, statutes universally bar a condominium owner from obtaining partition; otherwise, any owner could effectively destroy a condominium project.

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[68] *But see* Harris v. Crowder, 322 S.E.2d 854 (W. Va. 1984) (husband's creditors can reach his joint tenancy interest and force partition only if wife's rights are not prejudiced).

[69] Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

[70] Margaret J. Radin, *Property and Personhood,* 34 Stan. L. Rev. 957 (1982).

[71] *See, e.g.,* Defino v. Vealencis, 436 A.2d 27 (Conn. 1980) (requiring partition in kind); Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) (stating preference for partition in kind); Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004).

[72] *See* Schnell v. Schnell, 346 N.W.2d 713 (N.D. 1984) (discussing factors considered for partition in kind of 4,420 acre ranch).

[73] *See* John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies,* 27 B.C. L. Rev. 755 (1986).

[74] Michalski v. Michalski, 142 A.2d 645 (N.J. Super. Ct. App. Div. 1958).

EXAMPLES & EXPLANATIONS

Property

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13

Concurrent Ownership

As we have seen, property ownership can be divided up in several ways. A landowner of 100 acres, for example, may give 50 acres to one person and 50 acres to another; the landowner may give one person the whole 100 acres as a life estate and another the remainder; the landowner may sever the surface from the subsurface by granting away the mineral rights; or the landowner may transfer legal title to a trustee with rights to manage and sell the property for the economic benefit of beneficiaries who have the right to income and value appreciation.

Finally, two or more persons may concurrently own the same estate in the same land. There are three major concurrent interests recognized in America: tenancy in common, joint tenancy with right of survivorship, and tenancy by the entirety.

Tenancy in Common

The most common form of concurrent ownership is the tenancy in common. Each tenant in common owns a share of one piece of property. While the default rule is that each co-tenant has equal rights to possess the whole property and to share equally in rents and appreciation in value, the parties frequently own different interests in the land. One rebuttable presumption is the co-tenants own the land in proportion to the amount each contributed to purchase the property. Tenants in common normally share in rents and sales proceeds according to their respective ownership interests. Even if co-tenants own varying interests in property, it does not affect each co-tenant's right to possess the entire property. Thus if *A* owns a 50 percent interest and *B* and *C* each own a 25 percent interest in Blackacre, as tenants in common, *A* would receive 50 percent of any net rents from the property, but all three would have equal rights of possession.

As discussed more fully later, concurrent ownership breeds conflict and disagreement. Common law default rules have evolved to resolve possession, use, profit sharing, and expense contribution issues that may arise when concurrent owners cannot agree.

A person's tenant-in-common interest is assignable (transferable), devisable, and inheritable. Transferees become tenants in common with the remaining tenants in common. A co-tenant can mortgage his interest to secure a loan or can sell his interest; a co-tenant cannot sell his co-tenants' interests in the property, however.

Example: *O* transfers Blackacre, a 100-acre farm, to *A* and *B* as tenants in common. *A* and *B* each own a 50 percent (or half) undivided interest in the entire 100 acres. Three years later *A* dies, devising his interest in Blackacre to *M*. *M* now owns a 50 percent (or half) interest in Blackacre. *B* and *M* are tenants in common.

Joint Tenancy with Right of Survivorship

The joint tenancy with right of survivorship is a form of concurrent ownership with a survivorship element. It is often used as a will substitute. When a joint tenant dies, her interest ends. The last surviving joint tenant owns the property outright, and may sell or devise the property.

Example: Annie and Brady are joint tenants with right of survivorship in Whiteacre. Annie dies, her will devising all her real property to Donna. Donna gets no interest in Whiteacre. Brady is the sole owner. A year later Brady dies, his will devising all his real property to Emmylou. Emmylou owns Whiteacre.

At one time — and still today in many states — a joint tenancy could be created and maintained only if all co-tenants shared the four unities:

(1) Unity of Time — The joint tenants' interests must vest at the same time.
(2) Unity of Title — The joint tenants must acquire title in the same deed or will.
(3) Unity of Interest — Each joint tenant must own equal shares of the same estate.
(4) Unity of Possession — Each joint tenant has a right to possession of the whole property.

Historically a joint tenant could destroy the joint tenancy with right of survivorship by destroying any one of the four unities. That absolute rule is no longer the law either for creating or destroying joint tenancies in many states. An agreement between joint tenants that one tenant have sole possession, for

example, does not destroy the unity of possession. Likewise, a court in equity may look to the respective contributions each joint tenant made to acquire the property and divide any sales proceeds in proportion to each joint tenant's respective contribution.

Unity of title is still required in some states, but it has been abolished by statute or judicial opinion in most states, after decades of being circumvented by use of a strawman. A ***strawman*** or ***straw*** is a person who briefly takes legal title for the sole purpose of reconveying the property back to his grantor. Usually the straw is someone in the lawyer's office.

The process worked this way: A person holding land solely in his own name wanted to own the property as a joint tenant with right of survivorship. He may have wanted to pass the property to his spouse or child outside of probate. The joint tenancy with right of survivorship is a useful tool to avoid the cost and time of probate administration since a decedent's interest in the property ends on his death and the other joint tenant takes the title. Often the property involved is the family residence.

Let's assume the landowner wanted to transfer the family residence to himself and his wife as joint tenants with right of survivorship. The law treated a transfer from a person to himself as a nullity; so either a direct transfer to his spouse or a transfer to himself and his spouse created an interest in the spouse at a different time and under a different title (deed). The landowner could not deed an interest the property to his spouse as a joint tenant or to himself and his spouse as joint tenants with right of survivorship. A tenancy in common and not a joint tenancy with right of survivorship resulted. The solution was for the landowner to transfer the property to a straw, who immediately deeded the land to the original landowner and his wife as joint tenants with right of survivorship.

The majority of states have concluded that there is no reason to require a straw, especially on transfers between spouses, and allow a direct transfer from one person to himself and another as joint tenants with rights of survivorship, particularly when the other is the spouse.

A joint tenancy does not arise by intestate succession: Two or more persons inheriting the same property become tenants in common. On the other hand, it is possible under proper facts — usually taking the land under a faulty deed naming the co-tenants as joint tenants with right of survivorship — that joint adverse possession could yield a joint tenancy held by two or more adverse possessors.

When two joint tenants die simultaneously, most courts treat half the property as if one tenant survived and the other half as if the other tenant survived — effectively treating the property as a tenancy in common, giving the heirs of each tenant an equal share. When one of two co-tenants murders the other one, the murderer forfeits the right of survivorship, but not his interest. In effect, murder turns the joint tenancy into a tenancy in common.

Since her interest in the joint tenancy ends on her death, a joint tenant cannot devise her interest in a joint tenancy with right of survivorship; nor is

her interest inheritable. A joint tenant may, however, transfer or assign her interest inter vivos. As discussed more fully below under "Severance," the assignment ends the joint tenancy at least as to the transferee, who thereafter holds his interest as a tenant in common with the other tenants, who continue to hold their fractional share in a joint tenancy with right of survivorship.

Distinguishing Joint Tenancies from Tenancies in Common

Centuries ago in England, the joint tenancy was the default concurrent interest. A transfer from *O* "to *A* and *B*" created a joint tenancy with right of survivorship. It was presumed to be the intent of parties when there was any ambiguity as to whether a document created a tenancy in common or a joint tenancy. The purpose of the presumption was to maintain family estates intact.

Today, however, this presumption is reversed. The tenancy in common is preferred. Statutes in the majority of states provide that a grant to concurrent owners is presumed to be a tenancy in common unless the deed clearly establishes that the grantor intended to create a joint tenancy with right of survivorship.

A major caveat with regard to married couples is in order here. In many states that recognize the tenancy by the entirety (an estate exclusively reserved for married couples — to be developed later in this chapter), a grant to a husband and wife is presumed to create a tenancy by the entireties unless the deed expresses a clear intent to create another interest. In some states that do not recognize the tenancy by the entireties, a grant to a husband and wife is presumed to create a joint tenancy with right of survivorship unless the deed or will clearly manifests an intent to create a tenancy in common. In some states that do not recognize the tenancy by the entirety, only married couples can hold property as joint tenants with right of survivorship, but the presumption is that the grant creates a tenancy in common unless the grant evidences a clear intent to create a joint tenancy with right of survivorship. In the remaining states, a grant to a husband and wife is treated like any other grant to multiple persons, and is presumed to be a tenancy in common unless a clear intent to create another concurrent interest is expressed.

The most popular words to create a joint tenancy with right of survivorship are "to *A* and *B*, as joint tenants with a right of survivorship, and not as tenants in common." Some courts will find the requisite intent to create a joint tenancy with right of survivorship in a grant "to *A* and *B* as joint tenants," but many courts refuse to find a joint tenancy with right of survivorship unless the deed or will contains words of survivorship. "To *A*

and *B* jointly" creates a tenancy in common for example, not a joint tenancy with right of survivorship. A specific indication of an intention to establish the right of survivorship, along with a negation of a tenancy in common, is the best course for the conveyancer.

A grant to "*A* and *B* as joint tenants, remainder to the survivor of them" creates joint life estates, with a contingent remainder in the survivor. It is not the same as a joint tenancy with right of survivorship, however, and dramatically different legal consequences may follow. As discussed in the next section, any joint tenant can unilaterally "sever" her interest from the joint tenancy and become a tenant in common with the other co-tenants. Severance destroys the survivorship character as to her interest. When she dies, her heir or devisee takes her interest. In contrast, persons holding joint life estates with a contingent remainder cannot unilaterally terminate the survivorship requirement.

Severance

In some states, when one or more of the four unities of a joint tenancy with right of survivorship is destroyed, the joint tenancy is said to be ***severed***. States that don't emphasize the four unities look for some action or relationship that is inconsistent with a person continuing as a joint tenant to find a severance. A severance turns a joint tenancy into a tenancy in common between the severed interest and the remaining joint tenants. The remaining joint tenants continue holding their fractional interests in the property in a joint tenancy with right of survivorship. Thus, when the joint tenancy is created in three or more persons, a unilateral act of one of them leaves the joint tenancy intact as between the remaining tenants, who together then would hold a tenancy in common with the severing tenant.

Example 1: *O*, the holder of a fee simple absolute in Blackacre, conveys "to *A*, *B*, and *C*, as joint tenants with right of survivorship." Five years later *C* conveys to *D*. The deed to *D* is a severance of *D*'s interest in the joint tenancy. *A* and *B* continue in joint tenancy with each other, but are in a tenancy in common with *D*, each of the three having a one-third interest in Blackacre. If *A* dies, leaving a will devising her interest in Blackacre to *M*, *M* gets nothing. *A*'s interest ends on her death and *B* owns a two-thirds interest in Blackacre as a tenant in common with *D*, who owns a one-third interest.

Example 2: Same facts as in Example 1, except *A* and *B* survive while *D* dies, leaving a will devising his interest to *N*. *D* held an interest as a tenant in common at his death. A tenancy in common is devisable, so *N* owns a one-third interest in Blackacre. *A* and *B* continue to own the remaining two-thirds

interest in Blackacre as joint tenants with right of survivorship as between themselves, but as tenants in common with *N*.

Example 3: Same facts as in Example 1, except *A*, *B*, and *D* all survive. *A* sells her interest to *L*. This severs *A*'s interest from the joint tenancy. Since joint tenancy requires more than one person (and *B* cannot be in a joint tenancy by herself), the joint tenancy is now a tenancy in common, with *B*, *D*, and *L* as co-tenants.

Severance is an important issue in joint tenancy with right of survivorship. It keeps one joint tenant from passing his interest to someone in a younger generation to maximize his bloodline's chances of getting the property. Underlying the joint tenancy, moreover, is the idea that one should be in a joint tenancy only with people they know and would want to have the property. The chance those expectations may be frustrated is why the law favors the parties hold as tenants in common when the original arrangement is disturbed.

The most common voluntary severance occurs when one joint tenant unilaterally transfers her interest to another person, as when *A*, a joint tenant, deeds to *E*, a third party. The most common involuntary severance is a foreclosure sale or a sale in bankruptcy proceedings.

(a) Leases

Courts have disagreed on whether a severance results by one joint tenant's leasing the property to an outsider, or by a joint tenant's granting a mortgage to secure a loan from a financial institution. Courts agree that a short-term lease by one joint tenant does not sever a joint tenancy. However, the lease will end on the death of the leasing joint tenant. The lessee has possessory rights through the lessor joint tenant; when the lessor joint tenant no longer has an interest, the lessee also loses his right of possession. The lease terminates with the death of the leasing co-tenant even though the lessee has no notice in the lease or elsewhere of the extent of the lessor's rights. Some older cases held that a lease with a longer term might work a severance, at least for the term of the lease. More recent cases have concluded that even a long-term lease by one joint tenant will not sever the joint tenancy. Lesson to be learned: A lessee should be sure all joint tenants execute a lease.

(b) Mortgages

The vast majority of states are ***lien theory states***, meaning a mortgage is security for a loan. Title remains with the debtor. Since legal title remains with the debtor joint tenant, the giving of a mortgage by one joint tenant to secure his personal debt does not sever the joint tenancy. Only if the creditor forecloses on the interest and the interest is sold does a severance occur.

States differ on what happens to the mortgage if the debtor joint tenant dies while the mortgage is outstanding. Conceptually, the mortgage should be worthless since the deceased debtor no longer owns an interest in the property; the creditor's rights depend on the debtor's interest. The deceased joint tenant's interest, moreover, does not pass to the other joint tenants; rather, the interest just ends, similar to a life estate. Some states, by statute or judicial opinion, conclude that the property continues to be subject to the mortgage. Lesson to be learned: Lenders should have all joint tenants sign the mortgage, even if they are not personally liable for the debt. For more on mortgages, see infra pages 354-357.

About a dozen states are known as ***title theory states***, where a mortgage conveys legal title to the creditor. The creditor owns the debtor's interest in fee simple determinable, to revert to the debtor when the debt is retired. Some courts, especially a few decades back, viewed the transfer of legal title as destroying at least one of the four unities, and thus severed the debtor's interest from the joint tenancy. While that is still the law in some title theory states, others recognize that the mortgage is a security device, and the debtor remains the true owner. In these states the mortgage, as in the lien theory states, does not sever the joint tenancy.

(c) Unilateral and Secret Severances

A joint tenant unilaterally can sever a joint tenancy by transferring her interest to a third party. Sometimes a joint tenant wants to sever her interest from the joint tenancy, but she wants to maintain her interest in the property, as a tenant in common rather than as a joint tenant. In some states the joint tenant must resort to the use of a strawman or straw[1] to sever her interest. A few states from among those that allow the direct creation of a joint tenancy with right of survivorship without the use of a strawman see no reason to prevent the direct severance without using a straw. Some allow direct severance when the other joint tenants are given notification.

Usually direct severance or a deed to a third party is known to others. Attorneys, for example, prepare the document. Often the beneficiaries of the severance — the heirs of the severing joint tenant, for example — are given notice of it in some fashion. Sometimes the severance document is recorded in the public land records of the county. In other words, the unilateral severance is not a matter of complete secrecy — and the notice or the recording may help explain why some cases seem to tolerate it.

The possibility exists, however, that the severance is done secretly and does not come to light until one or the other joint tenant dies. The secret

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1. See supra page — as to the use of a straw to create a joint tenancy with right of survivorship.

severance opens up the possibility of fraud: A joint tenant may execute a severance deed to himself or to another as a tenant in common without telling anyone else or even recording the deed in the public deed records. If he dies first, a severance will be found to have occurred, with the joint tenant's assignee, devisee, or heir taking the joint tenant's interest as a tenant in common. If he is the survivor, he might destroy the severance document and take the whole of the property. The law should not countenance this ruse. Thus, where courts approve direct severances that do away with the use of straws, they should closely scrutinize the completely secret severance. To prevent this fraud on the other joint tenants, some states require either public recording or notification to the other joint tenants. See Samuel Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 Fordham L. Rev. 173 (1986).

Tenancy by the Entirety

A third form of concurrent ownership is the tenancy by the entirety. The tenancy by the entirety is limited to husbands and wives, who own the property as a unit, not by equal shares. The same four unities necessary to form a joint tenancy with right of survivorship are essential to form a tenancy by the entirety; in addition, the couple must be married at the time they acquire the property. Engaged to be married is insufficient. Hence, a couple buying a home to live in after their marriage will not hold the home in a tenancy by the entirety. Divorce terminates the tenancy by the entirety and a tenancy in common results in most states (a joint tenancy with right of survivorship results in a minority of states).

Like the joint tenancy with right of survivorship, the tenancy by the entirety is characterized by a right of survivorship in the surviving spouse. Unlike in the joint tenancy, one spouse cannot unilaterally sever the tenancy by the entirety. Moreover, neither spouse can seek judicial partition.

About half the states recognize the tenancy by the entirety. In the majority of those, a grant to a husband and wife is presumed to create a tenancy by the entirety unless a different form is indicated in the deed. In other states, a grant to a husband and wife creates a presumption that a tenancy in common is created unless the deed indicates a tenancy by the entirety or joint tenancy with right of survivorship is intended. Parties intending to create a tenancy by the entirety should convey to "*H* and *W*, husband and wife, as tenants by the entirety."

At one time, a husband and wife owning property as tenancy by the entirety were deemed one — and that one was the husband. He had management rights, rights to the income, and the power to sell. The wife had survivorship rights — even if the husband sold the property, the wife's survivorship rights continued in force; so as a practical matter husbands and

wives both signed deeds conveying the property to third parties. A wife relinquished her survivorship rights if she signed the deed.

Since the husband could sell the property, he also could pledge it as security. His creditors, secured and unsecured, could foreclose on the property. A purchaser at foreclosure was entitled to possession of the property, and to all rents and income from the property. If the husband outlived the wife, the purchaser kept the property in fee simple absolute. If the wife survived her husband, she got the property back.

Well over a century ago, states began enacting Married Women's Property Acts (MWPA) giving married women rights to control property. Courts and legislatures applied MWPA to fashion three theories of the modern tenancy by the entirety.[2] In the majority of tenancy-by-the-entirety states, a creditor can foreclose on the tenancy by the entirety property only if both spouses are liable for the underlying debt or both have executed a mortgage. Husband and wife, moreover, must both execute deeds on the sale of the property. In a second group of states, a creditor of one spouse's separate debts may foreclose on the debtor spouse's half interest (the half interest being a fiction, since the couple holds the property as whole) subject to the other spouse's survivorship rights. Thus the creditor can get rents from the property if any are collected, but will lose all rights in the property if the nondebtor spouse outlives the debtor spouse. Finally, in two states — Kentucky and Tennessee — creditors can reach a spouse's survivorship interest, but not the right to current possession and rents. Hence creditors have no interest while both spouses are alive, and will have an interest only if the debtor spouse survives the nondebtor spouse.

Rights and Obligations Between Co-Tenants

(a) Possession and Ouster

Each co-tenant (tenant in common, joint tenant, or tenant by the entirety) has the right to possess the entire property. As such, the majority rule is that a co-tenant using the whole property, absent ouster, does not owe rent to the other co-tenants. In a small minority of states, a co-tenant using the property owes a fair rental to the remaining co-tenants.

In the majority of states where a co-tenant owes no rent to his co-tenants for using the property, the rule changes if the occupying tenant ousts the other co-tenants. ***Ouster*** occurs when the occupying tenant acts to prevent the other co-tenants from using the property. Ouster may occur if

2. By the mid-1990s the last state had abandoned the tenancy by the entirety in its original form.

the occupying tenant changes the locks or if the occupying tenant makes use of the property in a way that no other use can be made of any part of the property and refuses to make room for another's use. Generally, before the ousted co-tenant can bring an action for ouster, the co-tenant must make a demand for access to the property and be denied access.

(b) Contribution

A co-tenant who expends money for some matter related to the co-owned property may want to be reimbursed for his expenditure. There are three distinct processes to seek reimbursement from his co-tenants: contribution, an accounting, and a final settlement on sale or partition. A co-tenant seeks ***contribution*** when he demands his co-tenants pay for their pro rata share of the expenses.

(1) Taxes, Interest, and Insurance

Assuming no one is using the property, a co-tenant who pays the annual property taxes, government assessments, or interest on mortgages may seek contribution from the other co-tenants.[3] Taxes and interest are known as ***carrying charges***. All co-tenants have a duty to pay taxes and interest on mortgages. In a minority of states, insurance is a carrying charge. Where insurance is a carrying charge, a co-tenant paying insurance premiums can seek contribution. Otherwise, no contribution is allowed for insurance premiums.

If the paying co-tenant is the only co-tenant using the property, no contribution is permitted for carrying charges up to the fair rental value of the property. Because the occupying co-tenant is not obligated to pay rent to her co-tenants, she is responsible for the taxes and interest on the mortgage since she is the principal beneficiary of the payment (plus, in some way it serves as a substitute for the payment of rent). If the occupying co-tenant does pay rent to her co-tenants, she may offset the others' share of the carrying charges against the rent due.

(2) Mortgage Principal

A co-tenant who makes a mortgage principal payment when due or past due may seek contribution from his co-tenants. A co-tenant who prepays the principal of a mortgage, on the other hand, cannot seek contribution, but must wait until the principal payment comes due and payable under the original mortgage.

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3. Co-tenants are responsible only for interest on mortgages existing when the concurrent ownership began, or the mortgage secures a debt for which all co-tenants are personally liable. If one co-tenant mortgages the property or her interest in the property, she is solely liable for the interest payment and cannot get contribution.

(3) Repairs and Maintenance

A co-tenant cannot get contribution for repairs, even necessary repairs. While on first blush it would seem best if the paying co-tenant received contribution for necessary repair and maintenance — say, to fix a broken window, replace a roof, or mow the lawn — courts have been reluctant to decide on a case-by-case basis which repairs were necessary, what type of repair (quality and extent) was needed, and how much should have been spent for the repair. Hence courts have concluded that no co-tenant has the duty to make repairs. We found no case on point, but wonder what a court will decide when a co-tenant pays to repair a building or clean a yard because a city orders him to do so pursuant to a city ordinance. It seems contribution would be appropriate.

(4) Improvements

A co-tenant who improves property cannot compel contribution from his co-tenants. The rationale is that no one has a duty to improve property, and no one who chooses to improve the land should force his co-tenants to contribute.

(c) An Accounting

Even though a co-tenant cannot seek contribution for repairs and improvements, he may get some reimbursement indirectly in an accounting. An accounting occurs when a co-tenant rents the property to a third party. Even though a co-tenant can solely possess co-owned property and keep any profits generated from that sole possession, once he leases or rents the property to others he must account for any profits and share the net proceeds with his co-tenants. See Statute of Anne, ch. 16, § 27 (1705) (adopted by all American states either as part of the common law or by statute).

In an accounting the co-tenant collecting rent payments may offset the costs associated with generating and collecting the rent. The co-tenant offsets revenues by the amount he expended on taxes, interest, mortgage principal, and insurance. In addition, he can offset other expenses, such as advertising, management fees, *actual* amounts spent on repairs or maintenance, and utilities. The co-tenant can offset monetary outlays only to the extent of any rental income received. In other words, the accounting serves to reduce how much of the rental proceeds the co-tenant must distribute to his co-tenants. The accounting does not allow him to demand contribution from his co-tenants if expenditures exceed revenues (unless the co-tenants have agreed to share the risk). Notwithstanding this limitation on the accounting, the paying co-tenant can still demand contribution if rent revenues are insufficent to pay the property taxes, interest, and currently payable principal payment on a mortgage.

Example: *A, B,* and *C* own raw land as tenants in common. *A* pays the annual taxes of $3000 and the interest of $5000 on the outstanding mortgage. *A* rents the land to a local farmer who will cut the grass on the land to use as hay to feed his livestock. The farmer pays *A* $2000 rental. *A* can demand *B* and *C* each contribute $2000 ($8000 total carrying costs less $2000 rents equals $6000, divided by 3 equals $2000 per co-tenant).

Improvements are tricky. The co-tenant cannot offset the total cost of improvements in an accounting. He can offset only so much of the cost of the improvements as is traceable to the increased rental received because of the improvements, but no more.

(d) Final Settlement on Sale

If the co-tenants sell the property, either voluntarily or by a judicially ordered partition sale (discussed below), a final settlement takes place. A co-tenant who expended money and has not been reimbursed for taxes, interest, mortgage principal, repairs, maintenance, insurance, and other common expenses associated with owning the property will be reimbursed out of sales proceeds.

Improvements are a special case. A co-tenant who paid for improvements will receive the sales proceeds attributable to the value added by the improvements. The amount paid for the improvement is irrelevant.

Example 1: Adam, who owns a one-third interest in Blackacre as a tenant in common, builds a house on Blackacre for $100,000. Five years later the three co-tenants sell Blackacre for $250,000. The land is worth $75,000; the building is worth $175,000. Adam receives the $175,000 attributable to the building and one-third of $75,000 ($25,000) as his share of the sales proceeds.

Example 2: Maurice, who owns a one-third interest in Whiteacre as a tenant in common, spends $20,000 to install a swimming pool. Two years later the co-tenants sell Whiteacre for $215,000. The land and building are valued at $210,000. The swimming pool added $5000 to the property's value. Maurice receives $5000 for the swimming pool and one-third of the $210,000 ($70,000) for the land and building as his share of the sales proceeds.

(e) Tax Sales and Foreclosure Sales

If no co-tenant pays taxes or mortgage payments, the state or the mortgage may seek a judicial sale of the property to pay either the taxes or the mortgage. The co-tenants share excess proceeds as explained in (d), above.

If a co-tenant purchases the property at the tax sale or foreclosure sale, the majority rule is that the purchasing co-tenant is deemed to be acting in her capacity as a co-tenant. The remaining co-tenants have the option of remaining co-tenants by contributing their share of the taxes or mortgage. If the other co-tenants choose not to contribute, after a reasonable time the purchasing co-tenant will own the property outright.

In a minority of states, if the other co-tenants have an opportunity to bid at the tax sale or foreclosure sale, the purchasing tenant represents himself and not the co-tenancy. There are exceptions — if the other co-tenants are not adults, if the purchasing co-tenant deceived the other co-tenants into believing he was representing the co-tenancy, or if the purchasing co-tenant intentionally did not pay the taxes or the mortgage because he was in a superior financial position to successfully purchase the property at the forced sale.

(f) Adverse Possession

Since each co-tenant has the right to possess the co-owned property, it is difficult for a co-tenant to adversely possess the property. It can be done, however. To begin running the statute of limitations the co-tenant claiming by adverse possession must give clear notice to the other co-tenants that she is claiming adversely. Usually the notice must be in writing. Mere ouster may not suffice, but ouster combined with acts so inconsistent with a concurrent ownership that co-tenants must be deemed to be on notice of the adverse possession might suffice.

Partition

Tenants in common or joint tenants with right of survivorship are not obligated to continue a concurrent ownership, and they are not required to sell just their interests to separate themselves from the co-tenancy. Instead, the tenant in common or the joint tenant may petition a court to partition the property.[4] There are two distinct categories of partition: partition in kind and partition by sale.

(a) Partition in Kind

Courts favor partition in kind, or physical partition. In a partition in kind, the court divides the property into parcels of equal value; each co-tenant

4. Neither spouse can seek partition of property held in a tenancy by the entirety.

receives a parcel as his or her separate property, or one or more hold separate parcels while two or more parties become co-owners of a parcel.

If a court cannot partition the property into parcels of equal value, the court may order a money payment from one party to another. This payment is known as ***owelty***. Because a partition is seldom likely to involve equally valuable parcels distributed to each tenant, owelty is a common feature in a partition in kind.

(b) Partition by Sale

Partition in kind is not always practicable or advisable. A single-family residence, for example, is not suited to partition in kind. Other factors, including the number of co-tenants, the terrain, and the size of the tract, may convince a judge that a partition in kind is not advisable. The court then may order a ***partition by sale***. Judicial discretion in administering this action is broad, although the rules governing contribution traditionally confine this discretion. The proceeds of the sale are distributed as in a final accounting and settlement discussed above. Any co-tenant who has not accounted for any rents must do so. Sales proceeds from improvements will be allocated to the improver equal to the *value* of the improvements added to the overall value of the property, and not the *cost* of the improvements.

An agreement between the co-tenants prohibiting judicial partition normally is invalid as a restraint on alienation, but such restrictions will be sustained when limited to a reasonable time. See Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957). For example, limitations on sale of a residence, embodied in a divorce settlement and prohibiting a co-tenant's filing a partition action, have been found reasonable. Whether a restriction is reasonable may depend on whether the co-tenant wanting partition acquired his or her interest with knowledge of the restriction, the expertise of the co-tenant in possession, or the terms of an agreement on the subject between the parties.

Nonetheless, an agreement to limit access to the judicial process is not to be inferred lightly. Partition is favored by the law and agreements to limit the remedy will be strictly construed. A provision that one of two co-tenants receive the rents and profits from an apartment house, contained in a judicial decree (of divorce, say), is not likely to be found by implication to prohibit a partition action brought by the other tenant. A voluntary contract to the same effect might give rise to such an implication, and the implication might be stronger still if the property were residential.

EXAMPLES

Drafting Exercise

1. Now that you know the basic characteristics of all three of the major concurrent interests, please draft the granting clauses in a deed to create a

tenancy in common, a joint tenancy with right of survivorship, and a tenancy by the entirety.

Dying to Know What Happened

2. (a) *O*, the holder of a fee simple absolute in Blackacre, conveys "to *A*, *B*, and *C* as joint tenants with right of survivorship." A year later *C* conveys all his interest in Blackacre to *D*. Who has what interest in Blackacre?
   (b) *A* dies five years later, devising his interest in Blackacre to *E*. Who owns what interest in Blackacre?
   (c) Three years later *B* dies, devising his interest in Blackacre to *F*. Who owns what interest in Blackacre?

Surviving Joint Tenancies

3. *O* conveys Blackacre "to *A* and *B* and the survivor of them." What interest or estate is created for *A* and *B*?

Creating a Tenancy by the Entirety

4. Toby purchased his home when he was single. Now he is married to Veronica and wants to own the home as a tenant by the entirety with Veronica. How would you advise Toby to create the tenancy by the entirety?

On Second Thought

5. Kent and Richard own their law office building as joint tenants with right of survivorship. Kent was recently diagnosed with cancer. He wants to sever the joint tenancy and drafts a deed conveying his interest in the office building to himself as a tenant in common. What is the result of such a conveyance?

Mortgage Business

6. In a jurisdiction that does not clearly adhere to either a lien or a title theory, how would you recommend that a mortgage lender proceed in a loan for the purchase price of a residence whose title is to be held in the name of a husband and wife as joint tenants?

Our Land, His Debt

7. *H* and *W*, husband and wife, hold title to Blackacre as joint tenants. They separate. *H* executes a mortgage on Blackacre. A year later *H* dies.

Blackacre is condemned by the state to build a new arena. The state agrees to pay $500,000 for Blackacre. The mortgage ($100,000) is unpaid, but not the subject of a foreclosure. *H*'s executor claims a portion of the condemnation award for his estate. Is this claim valid?

He Did *What*?

8. (a) Anthony and Barlow hold title to Blackacre as joint tenants with right of survivorship. Barlow executes a mortgage in a lien theory state. Barlow defaults on the mortgage loan and the creditor brings a foreclosure action. The court hearing the foreclosure orders that Blackacre be sold through a judicial sale, conducted as an auction. Barlow shows up at the sale, is the highest bidder for the property, and obtains a decree confirming the title to the property to him in fee simple absolute. Anthony now claims his interest in Blackacre. Barlow sues Anthony to quiet title in fee. What result?

   (b) Same facts as in the previous problem, but a third party, not Barlow, obtained title through the foreclosure sale. Would this affect the result?

   (c) What result in (a) if Anthony and Barlow had both signed the mortgage, and Barlow was the highest bidder at the foreclosure auction?

Future Interests Intrude

9. (a) *O* conveys Whiteacre "to *A* for life, remainder to *B* and her heirs." *A* and *B* cannot agree on the management of Whiteacre and *A* sues *B* for partition. What result?

   (b) *O* conveys Blackacre "to *A* and *B* as tenants in common for life, remainder to *C* and her heirs." *A* and *B* disagree about the management of Blackacre and *A* sues *B* for its partition. May *A* bring this action?

Contribution and Accounting

10. (a) Shane, a widower, died intestate, survived by his three children: Homer, who lives one mile from Shane's residence; Louise, in Louisiana; and Ken, in Kentucky. Shane's residence passed to his three children under the state's intestacy statute. In what concurrent interest do the three children own the home?

    (b) The house sat vacant for four months after Shane's death. Homer looked after the house but did not reside in it. He paid the monthly water and electricity bills totaling $120 for four months, paid a

junior high school student $240 over four months to mow the lawn, and paid $90 for the annual termite inspection. Homer sent a check monthly to Mortgage Company in the amount of $1000 ($4000 total in four months). Of the $4000, $1200 was interest, $1800 went against principal of the note, $600 went to property taxes, and $400 went to insurance on the house. Homer asked Louise and Ken to reimburse him. Assuming Ken and Louise do not want to pay anything, but will pay the minimum the law requires, how much will Homer collect from Ken and Louise?

(c) After four months of letting the house sit empty, Homer hired a painter to paint both the exterior and the interior of the house for $4500. He could have a hired a painter for $3600, but felt more comfortable with the one he hired. After the house was painted, Homer paid $90 to advertise the house for rent.

Homer leased the home for $1500 a month. Homes in the neighborhood similar to the house rented for $1800, but Homer was happy to get $1500. Homer continued paying the $1000 each month to Mortgage Company. The tenant paid for the utilities and lawn maintenance.

What are the financial ramifications to Homer, Louise, and Ken after the first month's rental?

(d) After two years, Homer collected enough rental revenues to reimburse himself for expenditures out of his personal funds. In the first month after that he collects $1500 rent and pays Mortgage Company $1000, $120 for the annual termite inspection, and $80 to repair a clogged toilet. What financial consequences to the co-tenants?

(e) A year later the tenant moves out. In the first month there is no revenue on the house, but for outgoing expenses there is only the Mortgage Company's $1000 ($900 carrying charges and $100 insurance premium). Instead of sending Louise and Ken the $1000 a month they had come to expect, Homer sends a letter demanding each contribute $300. Louise does not want to pay and demands to know why she did not receive her $100. Homer, frustrated, files a suit seeking judicial partition. Should the judge order a partition in kind or a partition by sale?

(f) Homer engages a real estate broker, who finds a buyer who purchases the house for $180,000. The broker's commission was $10,800. Other expenses of sale were $4200. To retire the note and mortgage, $15,000 of the sales proceeds were paid directly to Mortgage Company. Homer tells the closing agent that he spent 45 hours on the sale of the house and dedicated 450 hours to managing the property for the benefit of the three co-tenants since their father's death. He figures conservatively his time was worth $20 an

hour, for which he has never been compensated, and for which he wanted to be compensated out of the sales proceeds ($900 for time on the sale of the house; $9000 for his labors all those years). How much does each co-tenant get from the sale of the house?

Alimony and Child Support

11. The tenancy by the entirety was established in an era without widespread divorce, and in an era when a person was expected to marry for life. Would it be wise to remove the immunity from levy and sale enjoyed by entireties property when a former spouse seeks to collect support payments — including child support — due from an ex-spouse now remarried and presently holding property in a tenancy with a subsequent spouse? What are the legislative alternatives?

EXPLANATIONS

Drafting Exercise

1. To create a tenancy in common, you might say that *O* conveys to "*A* and *B*, in equal shares, as tenants in common." For a joint tenancy, say *O* conveys to "*A* and *B*, as joint tenants with full right of survivorship, and not as tenants in common." For a tenancy by the entirety *O* conveys to "*A* and *B* (husband and wife) and to the survivor of them as tenants by the entirety, and not as tenants in common or joint tenants." Some of these suggestions are the product of caution, some make use of a default rule, but the intent in each case is made clear.

Dying to Know What Happened

2. (a) *C*'s deed to *D* severs the joint tenancy. *A* and *B* continue in joint tenancy with each other, but together reform as a tenancy in common with *D*, each of the three having a one-third interest in Blackacre.

   (b) *A*'s interest in Blackacre ends on his death. He has nothing to devise to *E*. *B*, as a joint tenant, gets *A*'s interest. *D* is a tenant in common and will not increase her ownership. *A* now owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.

   (c) *B* died owning her interest as a tenant in common. *A* tenant in common can devise her interest. Therefore, *F* owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.

Surviving Joint Tenancies

3. Because a survivorship right is indicated (though not as clearly as it might be), many state courts say that this conveyance creates a joint tenancy with a right of survivorship in *A* and *B*. However, some state courts — a minority — hold that *A* and *B* have a concurrently held life estate, lasting as long as they both live, followed by a contingent remainder held by the survivor in fee simple absolute. States using the minority rule sometimes do so in order to prevent a partition action that would otherwise defeat the survivorship right. See William Stoebuck & Dale Whitman, *The Law of Property* § 5.2, at 181 n.39 (3d ed. 2000).

Creating a Tenancy by the Entirety

4. When one party to a proposed joint tenancy already owns the property to be held in the tenancy, the parties should proceed in a two-step transaction. First, Toby should transfer the title to the property to a straw (an intermediary to temporarily hold legal title). Second, the straw should retransfer the title to Toby and Veronica as husband and wife in a tenancy by the entirety; they then would receive the title with the four unities present at the moment of the tenancy's creation. A straw is used when a jurisdiction does not clearly permit the unilateral creation of a joint tenancy by one of the tenants. The straw serves some function. The formalities of the process bring home to the sole owner the legal significance of what he or she is doing. They also prevent a layperson from accidentally creating a tenancy by the entirety when a tenancy in common was intended.

On Second Thought

5. It depends on the jurisdiction. If a jurisdiction requires a straw for a sole owner to create a joint tenancy in himself and another, then it is also likely to require the use of a straw to end the joint tenancy. Some jurisdictions allowing a person to create a joint tenancy directly without the use of a straw may require a straw for a joint tenancy to sever his interest. In either of these jurisdictions, Kent's deed to himself is ineffective to sever the joint tenancy; and the joint tenancy continues.

If, however, the jurisdiction allows a joint tenant unilaterally to sever a joint tenancy, Kent's deed severs the tenancy. This assumes Kent abides by any other requirement the state may impose, such as recording in the public deed records or notifying Richard.

Mortgage Business

6. The simplest and safest method is for both husband and wife to sign both the note and the mortgage.

Our Land, His Debt

7. The executor's claim is not valid. The mortgage, even given without *W*'s consent, works no severance of the joint tenancy in lien theory states and in many title theory states so long as *H* has the financial ability to repay the loan and eliminate the mortgage. In most states the mortgage is extinguished with *H*'s death (*H*'s estate still is liable on the loan, however; only Blackacre does not serve as security for nonpayment). The survivorship right is still effective on *H*'s death and on *H*'s death *W* owns Blackacre. As owner of Blackacre she is entitled to the entire condemnation award. The separation does not affect how the title is held. People v. Nogarr, 330 P.2d 858, 861 (Cal. Dist. Ct. App. 1958).

In some title theory states, however, *H*'s mortgage severs the joint tenancy with right of survivorship. In these states *H*'s estate owns a one-half interest in Blackacre as tenant in common and will receive half the condemnation proceeds. The executor can use $100,000 to retire the outstanding note. *W* keeps her half of the condemnation proceeds. For more on condemnation, eminent domain, and the Takings, see infra Chapter 35.

He Did *What?*

8. (a) Anthony prevails. Barlow will neither win nor quiet the title. The mortgage did not work a severance of the joint tenancy when executed, but when the property was put into foreclosure and beyond Barlow's power to recall, a severance occurred. Thus, when the court ordered that the results of the sale were binding on Barlow, a severance of the joint tenancy had destroyed the survivorship right and Anthony and Barlow became tenants in common. Only Barlow's interest in Blackacre was auctioned. The title obtained in foreclosure was subject to Anthony's rights and, by decree, the court in Barlow's suit will find that Anthony and Barlow hold Blackacre as tenants in common. A deed claiming to give Barlow sole ownership in fee simple absolute may have been color of title for an adverse possession action, but Anthony acted well within any limitations period.

(b) A third party, not Barlow, obtaining title through the foreclosure sale would not affect the result. Anthony and Barlow would still be tenants in common at the point when the court orders the sale. The third party is now a tenant in common with Anthony.

(c) First, since both parties executed the mortgage, a third party purchasing at a foreclosure sale would own the whole property, not

just a one-half interest. The issue here is whether Barlow will receive the same favorable treatment allowed a third-party purchaser. In a majority of states Barlow would be deemed to purchase the property on behalf of the joint tenancy. If he had the money to buy at the foreclosure sale he had the money to make the mortgage payments, and he had a duty to make the mortgage payments. Anthony would be allowed to continue as a joint tenant with right of survivorship. In most states Anthony would be required to contribute funds for his share of the purchase price.

If, however, Anthony and Barlow lived in a state where a joint tenant is treated the same as a third party as long as the other joint tenants have an equal opportunity to bid, and there was no indication Barlow engaged in fraudulent conduct or was in a fiduciary relationship with Anthony for some reason, Barlow would own Blackacre outright. Any excess sales proceeds over the amount of the mortgage would be divided between the two in a final settlement.

Future Interests Intrude

9. (a) Judgment for *B* — no partition. *A* has a present possessory interest in life estate; *B* has a vested remainder in fee simple absolute. *A* and *B* do not have concurrent possessory right and so neither has a right to bring a partition action against the other. See Garcia-Tunon v. Garcia-Tunon, 472 So. 2d 1378, 1379 (Fla. Dist. Ct. App. 1985).

(b) Yes. *A* and *B* have a concurrent right to possess the life tenancy, so each has a right to bring partition against the other, but only as to the life estate they both hold, and not as to *C*'s remainder. *C* does not have any concurrent rights to possession with them. Concurrent life tenants may bring partition inter se. An analogous result: If *T1* and *T2* both hold a joint leasehold, they have a right to partition the lease inter se, but have no such right against their landlord.

Contribution and Accounting

10. (a) A tenancy in common is presumed unless the deed or will stipulates another form. Here there was no deed or will, only a statute. Homer, Louise, and Ken own the residence as tenants in common.

(b) Ken and Louise are obligated to pay carrying charges, which are the interest of $1200, the property taxes of $600, and the mortgage principal reduction payments of $1800. In some states the $400 for insurance is also a carrying charge; in others it is not. The law of the state where the property is located controls what is a carrying charge, not the state where the various co-tenants live. Assuming

insurance is not a carrying charge, the total of the carrying charges is $3600. The three siblings own equal shares and are equally liable for the carrying charges. Thus Ken and Louise should both contribute $1200 to Homer.

While it seems in fairness the co-tenants should all contribute to pay the reasonable costs of societally acceptable (and even mandated) expenses, a court will not force Louise and Ken to contribute for the yard maintenance, the utilities, the termite inspection, and, in most states, the insurance premiums. The termite inspection is an interesting twist, since in some states legislatures mandate annual termite inspections. Thus this may not be an elective expense. A good argument could be that this should be a carrying charge since it is state mandated and outside the control of any co-tenant. On the other side of the argument, a co-tenant must select the inspector, and that may result in a range of costs within the discretion of one co-tenant.

(c) Homer keeps the entire first month's rental of $1500. Under the Statute of Anne, Homer must share net rental proceeds with his co-tenants, Louise and Ken. In an accounting, Homer can reduce the amount to be split with Louise and Ken by the interest ($300), the mortgage principal reduction ($450), and the taxes ($150) (total of $900). In addition, he can offset other expenses related to the rental — insurance ($100), advertising ($90), and painting (repairs and maintenance are not an improvement) ($4500) (total of $4690).

In the accounting the revenues are the actual amount collected, not what ***could*** have been collected, so rent revenues are $1500, not $1800. Likewise, deductions are actual amounts paid, not what ***could*** have been negotiated, so it is the full $4500 deductible. The total deductions cannot exceed the gross revenues, however. Thus, even though Homer paid $3990 ($1500–($900 + $4690)) more than he collected, he cannot ask for a contribution for the excess. Homer could have demanded contribution if the rent revenues did not cover the carrying charges, but here they did. Nothing prohibits Homer from requesting Ken and Louise pay their share if Louise and Ken are willing to pay, but he cannot force them to contribute. Expenditures not offsetting revenues are carried forward to offset any excess revenues in the next month, months, or years.

(d) Homer can offset the carrying charges, the insurance premium, and the termite inspection costs (total of $1200). Homer keeps the $1200. He then splits the remaining $300 equally among himself, Louise, and Ken; or $100 to each.

(e) Partition by sale. It's hard to imagine any of the three co-tenants even arguing for a partition in kind. Assuming one does, the judge

begins with the presumption that a partition in kind is preferred. But here, where the property is a rental house — a single-family house — in a neighborhood, the impracticalities of a partition in kind are so great that a partition by sale is an easy decision.

(f) First, no co-tenant is entitled to compensation for representing the co-tenancy unless the co-tenants agree. Therefore, Homer gets no money for his efforts in the sale or for the many years he managed the property. After that, the math is simple. Sales proceeds of $180,000 less the commissions ($10,800), the other fees ($4200), and the mortgage payment ($15,000) leaves $150,000 to be divided among the three co-tenants, or $50,000 each.

Alimony and Child Support

11. There are at least two legislative alternatives. First, legislation might authorize a court to issue a lis pendens (a recorded document in the deed records giving notice of a potential claim against the property) for a tenancy-by-entirety property, so that when the present spouses seek to sell or transfer it, the proceeds of that sale or transfer will be available to support the spouse of the former marriage to the extent of the ex-spouse's interest. This recognizes the continuing usefulness of the tenancy for the subsequent marriage, but only so long as the property itself is needed to support that marriage. This approach might, however, encourage evasion — as when the property is leased under a long-term arrangement, rather than sold outright — and so might be difficult to enforce.

Second, the docketing of a judgment or order for support of the former marriage might convert the tenancy in the subsequent marriage into a tenancy in common for purposes of the lien attachment/execution with regard to the support order. Here, the legislature recognizes the primacy of the first marriage over the second. This alternative is best suited to situations in which an ex-spouse has failed to meet support obligations for children of a former marriage. When the second spouse of the nonsupporting ex-spouse relies on the tenancy, this approach might work a hardship, and might deny the partners of the second marriage a future domicile of equal quality. Given the deference to state property law in the courts, the choice between these alternatives is best left to a legislature.

14

Marital Property

At common law, a spouse was not an heir of his or her husband or wife. By virtue of the marriage, however, each held a life estate in some types of property of the other. These life estates were implied by law, not created by a deed or in a will.

Common Law Dower

At common law, a wife had a claim in the form of a life estate to a one-third share of all of the real property of which the husband was solely and beneficially seised in fee simple at any time during his marriage. This estate is called ***dower***.

Dower is available from the moment of marriage. In early England dower designation of the dower house and lands was a part of the marriage ceremony: This designated property was called "named dower." Originally, the bride's family met with the groom and determined the lands to serve as his bride's house and lands, should she outlive him — hence the term "dowager," meaning a resident of a dower house. Often a large estate had a permanent dower house on its grounds. Kensington Palace in London, for example, is the dower house of the House of Windsor. Dower expanded from that beginning to include all lands.

Dower is intended to provide economic and social security for a widow, assuring her that she will live as she had become accustomed during her marriage. Originally it permitted her to live in the same locale as during the marriage. Today it permits her to maintain the same social position. In an age of primogeniture, it also provided in some measure for younger sons and daughters, who could continue living with their mother.

Before a husband's death, the wife's dower interests were called ***inchoate dower*** — not yet a legal estate in the husband's real property, but giving her a basis for suit in case the husband attempted to defeat a later dower claim by a fraudulent conveyance during the marriage.

After the husband's death, dower was termed ***consummate dower***. On the basis of it, when the husband in his will provided for the wife less than dower would, she had the right to have commissioners or masters appointed by the court probating the will survey the husband's property and set aside one-third of each parcel of his land — the dower lands — for her life.

Dower Reform

States are abolishing dower. Where it continues, it is a claim to a one-third or one-half life estate in all the spouse's real property. Although in most states retaining dower, the wife (and in some states the surviving spouse — dower being extended to husbands as well as wives) has a dower in all lands, unless barred or released, of which the deceased spouse was ever seised during marriage; a few states limit dower to lands held by the decedent spouse at death. In Kentucky a wife has a dower of one-third of the lands the decedent did not own at death and of half the lands held at the husband's death. Moreover, contrary to the trend of most states to abolish dower, Kentucky extends dower to personal property. See Ky. Rev. Stat. Ann. § 392.020 (Michie 1999).

A spouse cannot defeat his spouse's dower by selling or mortgaging the property. Purchasers and lenders thus are advised to get the dower-owning spouse's signature releasing her dower in the property.

The Elements of Dower

Today the first element of a dower claim is a ***valid marriage*** when the property is owned. A marriage that is annulled or otherwise void ab initio is insufficient. A final decree in divorce may extinguish the dower claim by agreement. If no agreement is reached at divorce or in some other post-nuptial agreement, the dower continues, but will not attach to property acquired after the divorce.

The second element is ***sole and beneficial seisin*** in the deceased spouse of the property at any time during the marriage. Property transferred before the marriage or acquired after the marriage ends cannot be dower.

Seisin is always in a person holding a present possessory freehold estate. If the deceased spouse was a co-tenant, no dower lies because he or she was not solely seised. If the deceased spouse was a trustee for another, there is no dower in the property held in trust because there was no beneficial seisin. Similar results obtain when the spouse held as a strawman or otherwise held bare legal title. If the spouse, for example, executed a binding contract of sale to sell the property before death, there is no dower in it. That title was held for the purchaser pending the closing are transfer of title.

The estate of which the deceased spouse is seised cannot be one that ends at the deceased spouse's death. Dower does not apply to remainders and executory interests since the husband never had seisen in the property. A right of reentry, exercised or exercisable by the time of death, is subject to dower. As to whether a possibility of reverter must be exercised, there is a split in the cases on the matter: Some courts do not require exercise because the right of possession given in the possibility of reverter is automatic.

In summary, dower does *not* apply to a deceased spouse's . . .

1. term for years. It is a nonfreehold estate and has no seisin.
2. life estate. It has seisin, but is not inheritability. The purpose of dower is to give the surviving spouse a share of what the deceased's spouse's heirs take, for her security and for the security of younger children of the marriage. The life estate ends at the death of the deceased spouse and the heirs have no further interest in the property to which it applied.
3. joint tenancy. Where the deceased spouse is not the surviving tenant, the right of survivorship prevails over a dower claim.
4. partnership interest in real property. A partnership interest is not subject to common law dower because the interest is regarded as personalty rather than real property. Any restrictions on transfer should be limited to those in the partnership agreement.

Dower does apply to a . . .

1. fee simple determinable. Dower attaches, but is subject to the occurrence of the stated condition. Dower rises no higher than the estate to which it attaches (which, as a general rule, explains why it does not attach to a life estate).
2. fee simple subject to a condition subsequent, or to an executory limitation. Same answer as in the prior paragraph: Dower attaches, but subject to the condition.

Dower applies to legal, rather than equitable, estates. Dower applies, moreover, whether the spouse held property in fee simple absolute or fee tail. Only in the instance of a fee tail special — i.e., a fee tail limited to the issue of a prior spouse — did dower not apply.

Dower and Adverse Possession

Property acquired by adverse possession is subject to dower. If the deceased was in the process of adversely possessing property and so was still subject to disseisin or ouster by its true owner, so is the spouse claiming dower: He or she cannot acquire more rights than the deceased spouse had acquired by the time of death.

Dower and Waste

In this country, widows were early permitted by statute to protect their inchoate dower rights with a cause of action in waste, and were protected from suits in waste when clearing uncultivated lands held through dower.

Release of Dower

A wife can release dower by signing away her rights. Release of dower claims is necessary, or at least customary where dower has been repealed, upon the transfer of the property. Buyers and lenders insist wives join in executing deeds with their husbands even if the husband is the sole legal owner of the property.

Dower also can be released by an agreement, including a prenuptial or postnuptial agreement. Since dower survives divorce unless the wife (or husband) agrees to release her (or his) rights, a final divorce decree (as opposed to a pending action for one) may and should make express provision to release a spouse's estate from a dower claim by the exspouse.

Barring Dower

Dower claims can sometimes be barred in two ways. The first way is by putting property into a trust prior to marriage, because dower does not apply to equitable interests. An example of such an interest is a spouse's right to receive the income from a trust. Today this is not a foolproof method of barring dower because it may apply to personal as well as real property — and trust proceeds are regarded as personalty.

Second, dower is barred by giving the deceased spouse a life estate in property, with a power of appointment created prior to the marriage. This may be a surer method of barring dower, but it is more inflexible than a trust.

Forcing an Election

Some states retaining dower stipulate that the surviving spouse must choose between taking her dower or taking under the husband's will (or by inheritance if there is no will). In states that allow a wife to take dower in addition to taking under the deceased husband's will, a husband can force a surviving spouse to elect between her dower rights and her rights under his will.

Curtesy

Dower was a wife's life estate in one-third of her husband's real property at common law. In contrast, at common law a husband received a life estate in

all — not just a third — of his wife's real property of which she was seised. This estate arose at the time of the marriage. It lasted until either the husband or the wife died. It was called the ***estate by the marital right***, or the estate (in Latin) ***jure uxoris*** — all this while the wife was entitled only to the equivalent of walking-around money. The husband's estate by marital right was a right of use and occupation — a right to possess the eligible property and use its rents and profits. It carried with it a life tenant's rights and duties and depended on the continued survival of the wife.

At the birth of issue born alive to the husband and wife during their marriage, the husband acquired a life estate measured by his life — called tenancy for life by the ***curtesy initiate*** (this was intended to support children and maintain their father in the same economic condition as existed throughout the marriage). Thus, so long as the issue of the marriage were born alive, whether or not they survived, the estate jure uxoris merged into a larger estate the husband acquired a life estate in the wife's freehold estates inheritable by the children. This estate lasted so long as the marriage did, and was followed by a reversion in the wife, should she outlive her husband.)

The common law also gave the husband, upon the death of a wife by whom there was a child born, a tenancy for life by the ***curtesy consummate*** (or curtesy). Thus did curtesy initiate become curtesy consummate, and it continued to the end of the husband's life. Unlike dower, both claims to curtesy by the husband required the birth of issue born to the couple during their marriage; no such requirement attached to a dower claim. So curtesy was, like dower, a life tenancy, except that it applied to both legal and equitable estates of the wife in any lands she held during the marriage. Like dower, it is a derivative estate, but for the husband to claim curtesy, the wife need not have had seisin in the lands claimed; some cases said that "seisin in fact" (bare possession) would suffice.

One of the principal legislative results of the first women's movement, begun at the Seneca Falls Convention in 1848, was the enactment by state legislatures of the Married Women's Property Acts. Courts interpreted the Married Women's Property Acts to have abolished the estate jure uxoris. Curtesy soon was abolished. States retaining dower extended dower to husbands so that husbands and wives were treated the same.

Comparing Dower with Curtesy

Dower	Curtesy
attaches to a fraction	attaches to all
requires seisin in law	requires (actual) seisin in fact
attaches to legal estates	attaches to legal and equitable estates
does not require issue	requires birth of issue

The Modern Elective Share

States abandoning dower and curtesy give the surviving spouse an ***elective share***, also known as a ***statutory share*** or ***forced share***. The elective share is a right of the surviving spouse to elect to take as though she were an heir under the state's intestacy statute or under a provision in the elective share statute, or to take under the deceased spouse's will.

The elective share is usually one-third or one-half of the deceased spouse's estate. It is generally one-third of the estate when there are lineal descendants of the decedent, and one-half when there are none. It applies to both real and personal property and to both legal and equitable interests in property, so long as the property is owned by the deceased at death.

The elective share is not self-executing. It provides nothing until the surviving spouse — during probate of the estate or as part of an intestate distribution — files an election to take it after the decedent's death. Typically, the election must be made within nine months of the spouse's death, or within six months after the will is probated, whichever occurs later. The survivor taking the elective share must forego all devises under a decedent's will.

Calculating the Amount of the Elective Share

Calculating the amounts of an elective share is complicated. As background, not all of a decedent's property passes by will or by intestate succession (through probate). Much passes outside probate. We have studied tenancy by the entirety and joint tenancy with right of survivorship. Other nonprobate assets include trusts (i.e., one spouse tranfers valuable assets to a trustee making himself, his spouse, or a child the beneficiary), life insurance policies, retirement plans, and inter vivos gifts.

An issue is to what extent nonprobate assets should be considered in calculating the elective share. Some states do not consider nonprobate assets; others include only some. The Uniform Probate Code lumps most nonprobate assets into an ***augmented estate***, which is the total of the probate estate and a reclaimable estate.

The ***reclaimable estate*** is comprised of the following:

1. Assets owned by the electing spouse received from the deceased. This prevents the electing spouse from getting a larger share than is due by getting inter vivos gifts, for example, and then electing an intestacy share of what remains in the decedent's estate.
2. Assets held in trust for the spouse that originated with the decedent.
3. Insurance and pension plans of the decedent naming the spouse as beneficiary.

4. Assets held by others, often in a trust, if the decedent had a power of appointment (a right to designate who would receive the income or principal of the trust on a yearly basis or at his death), or had a right to revoke the trust.
5. Assets transferred by the decedent to another where the decedent retained a life estate, possession, or income, or with a right of survivorship. This keeps the decedent spouse from depleting the surviving spouse's share.
6. Any assets gratuitously transferred to anyone within two years of the decedent's death (i.e., gifts). There is a $3000 per donee exception.
7. A 1990 revision to the Uniform Probate Code would bring into the reclaimable estate all the assets held by the surviving spouse, not just those received from the decedent.

The reclaimable estate is added to the probate estate to get the augmented estate. The applicable fraction (normally one-third or one-half) is multiplied against the augmented estate to determine the surviving spouse's elective share. The spouse's elective share is reduced by the assets already in his or her possession, and by the assets passing to the electing spouse outside of probate. That leaves the net elective share, which comes from the decedent's estate.

Homesteads

Some state statutes and state constitutions protect a family's residence or "homestead" against creditors' claims. The homestead exemption protects eligible property from the claims of unsecured creditors and many secured creditors of either spouse. The homestead property cannot be foreclosed on by secured creditors unless the mortgage or lien being foreclosed was given for delineated purposes — a mortgage to purchase or improve the homestead property; a lien for past-due property taxes; a federal tax lien; or as a lien from a property settlement in a divorce, for example.

The main homestead property is the principal residence. The residence is defined as a dwelling and the land on which it is located, the acreage sometimes being limited to a certain area or acreage, or value, or both. Some states protect other assets, such as a car or motorcycle, farm animals, or tools of a trade, but it is the family residence and sometimes one business location that constitutes the major protected asset. Not only is the residence protected against creditors, but purchasers cannot defeat a spouse's homestead rights unless the spouse signs the deed. Hence both spouses are required to sign the deed to a residence even if the house is in the name of only one spouse. In some states a homestead right is not self-executing; there must be a recorded declaration of homestead defining its extent.

The homestead is of limited effectiveness as a shield against the claims of creditors in most states. The homestead exemption is typically limited to a stated value and often that value, adequate when enacted into law, is outmoded and too low. If a residence is worth more than the homestead value, the house gets sold and the creditors can claim the excess value. In other states, however — Texas being the prime example — the homestead exemption can safeguard some valuable assets (200 acres plus improvements for land outside a city; up to 10 acres of land with improvements including the residence and maybe a business in a city).

Community Property

Eight states — Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington, and Idaho — were founded as community property states, derived from the civil laws of Spain and France, which were brought by early settlers from those countries to these states. Two other states — Wisconsin and Alaska — have chosen to become community property states in recent years. The remaining, common law states, derive their concepts of property ownership from English common law.

In ***common law states***, property is owned by the spouse who paid for or inherited it. A person's property is separate from his or her spouse's property. In practice, for most of our history, that meant the husband owned most of the marital assets since he earned income, while the wife cared for the house and children. On divorce the husband got the assets. Common law states developed alimony and support laws to prevent divorced women from becoming destitute. On the death of the husband, he controlled who got his assets, unless dower or the elective share rules protected the widow. Many common law states have passed legislation that mimics those of community property states in cases of divorce.

Community property states view the marital unit as one — a universal partnership — in which the husband and wife work as a unit for their mutual benefit. Hence, whatever one earns is deemed owned by both. Property bought with the husband's wages, for example, is deemed owned half by the husband and half by the wife. As a starting premise, all property acquired during the marriage is presumed to be community property.

That community property presumption can be rebutted, however. Property acquired before the marriage is ***separate property*** and belongs to the spouse who owned the property before the marriage. Property acquired during marriage as a gift or an inheritance or devise is the separate property of the recipient spouse. In most community property states, a couple can enter into a prenuptial agreement, providing assets purchased with income earned by one party shall remain that person's separate property. This may occur, for example, on second or third marriages, where

both spouses have independent sources of income and also likely children by prior marriages.

The biggest divergence among the community property states centers on income earned from separate property. In three community property states (Texas, Louisiana, and Idaho) income from separate property is community property. In the five other states, income from separate property is separate property. Gains from the sale of separate property are separate property and considered a return of the principal of the asset.

If separate property is commingled with community property (usually this concerns money in bank accounts), the rebuttable presumption is the separate money was spent first and for living expenses rather than for assets. In other words, commingled funds most likely will be found to be community property. To illustrate, if *W* owns corporate stock as a separate asset and receives dividends from the corporation, in the majority of community property states the money received as dividends remains her separate property (in the minority of community property states the income is community property). If, however, *W* deposits that money into a joint banking account or any account with both separate funds and community funds in it, unless *W* kept meticulous records classifying the separate funds and the community funds, the funds will be presumed to be community funds.

The spouses can ***transmute*** separate property into community property (or vice versa) by agreement — written in most of the eight states, oral in some. Both spouses must agree. One spouse cannot act unilaterally.

Recognizing that some married couples move from common law states to community property states, some community property states say property continues to hold its character as separate or community property, as it had when acquired. Others say all separate property acquired during a marriage is considered to be quasi-community property once the couple moves to a community property state.

Each state has its own rules as to who can manage which assets and which assets creditors can reach. A typical statute may require creditors of only one spouse to exhaust that spouse's separate assets before resorting to the community property. A creditor of one spouse cannot reach the other spouse's separate property. A creditor of both spouses can reach community property, as well as the separate assets of both spouses.

In marriages of any length most assets will be community assets on divorce each spouse is entitled to half the community property. If one spouse has a business, generally that spouse gets the business's assets, and other assets of equal value will be awarded to the other spouse. On death, the deceased spouse may devise his or her half of the community property.

Until 1948, there was a decided federal income tax advantage given to married couples in community property states, but the Internal Revenue Code that year was amended to permit married persons in all states to split their income with their spouse for purposes of income tax liability. Hence

the category of "married, filing jointly" on IRS Form 1040. Much of the community property system is embodied in the Uniform Marital Property Act, enacted in Wisconsin in a modified form. Its aim is to bridge the gap between common law and community property jurisdictions by providing for shared management of property during the marriage, no matter who holds title to it, and to protect the nonowning spouse if the owner dies first or upon dissolution of the marriage.

EXAMPLES

Dower Power

1. Harry and Wanda marry. Harry acquires Blackacre in fee simple absolute. They divorce. Years later, Harry dies. Does Wanda have a common law dower claim on Blackacre?

Elective Share

2. Darrell holds title in fee simple absolute to Blackacre. Darrell transfers that title to his son Steven for "one dollar ($1.00), love, and affection." Shortly after the transfer, Darrell dies. Is the value of Blackacre subject to the elective share otherwise available to Darrell's spouse, Wynona?

Will Substitutes

3. Does the elective share apply to will substitutes — e.g., gifts causa mortis, gifts to another's bank account, and joint bank accounts?

The Tax Man Cometh

4. *H* and *W*, husband and wife, own their residence, Blackacre, as tenants in common. *H* and *W* file separate federal income tax returns, as they have done for years. *H* becomes delinquent in the payment of his taxes. The Internal Revenue Service is authorized by Int. Rev. Code §§ 6321 and 7403 to seize and sell any property in which the delinquent taxpayer has any right, interest, or title. Thus, the IRS seeks to satisfy *H*'s delinquency by asserting its statutory lien on and selling Blackacre. *H* and *W* seek to block the sale, saying that under state law the homestead is exempt from such a sale. Are they correct?

Community Property Transmuted?

5. In a community property state, Harvey opens a stock brokerage account, held in trust "for Harvey and Willa as joint tenants, with a right of

survivorship, and not as tenants in common." Willa signs a form consenting to the creation of the trust. Willa dies and her estate asserts a claim against the account as community property. A state statute requires that a "transmutation" (as described above, a civil law term) of community property into separate property is invalid unless an express declaration is made by a spouse whose interest is adversely affected. Is the claim valid?

A Community Effort in Common

6. Larry and Melinda had been married for six years. Larry received a $100,000 year-end bonus at work. He bought $100,000 of Capitol Co. stock. Melinda's grandfather died soon thereafter, leaving Melinda $100,000 in Capitol Co. stock. A year later Capitol Co. sent Larry a dividend check in the amount of $5000. Capitol Co. also sent a $5000 dividend check to Melinda. Larry and Melinda deposited their dividend checks in separate bank accounts (Larry into his account and Melinda into hers). Six months later they divorced.

(a) Assuming Larry and Melinda live in a common law state, who gets the Capitol Co. stock, and who gets the $10,000 from dividends?

(b) Assuming Larry and Melinda live in a community property state, who gets the Capitol Co. stock, and who gets the $10,000 from dividends?

EXPLANATIONS

Dower Power

1. Yes, Wanda has a dower claim. Absent a contrary provision in the divorce decree, dower is not terminated by divorce, and so Wanda's dower claim is not barred, even though it is asserted years after the end of the marriage. This is a rule that was formulated long ago, well before the divorce rate rose so steeply. It makes little sense today, but indicates the strong attachment of the common law to dower claims.

Elective Share

2. Under the Uniform Probate Code, the value of Blackacre is subject to the elective share otherwise available to Darrell's spouse, Wynona, since it was a gratuitous transfer within two years of Darrell's death. If Darrell's intent in effectuating the transfer is to give *S* what he would otherwise inherit under Darrell's will, but takes Blackacre out of his estate, the answer should be yes.

If, on the other hand, Steven had paid full consideration for the asset, then Darrell's estate would be held harmless and the amount of Wynona's elective share would not be diminished by the transfer.

Will Substitutes

3. Does the elective share apply to will substitutes — e.g., gifts causa mortis, Totten trust bank accounts, and joint bank accounts? This is a generalized way of reiterating the issue in the previous problem. The answer, then, is essentially the same, but with regard to any particular will substitute, the answer will often be a matter of statute and part of the state's probate code. So check the applicable code. When the code is silent, it makes sense to include within the elective share any assets and funds governed by any functional equivalent of a valid will. The intent of the transferor is the same as that of a decedent, and the decedent's estate would be depleted if the use of the substitute robs the estate of its value. The value of the elective share is lost if the value of the substitute is not included in the share's calculation.

The Tax Man Cometh

4. No. A homestead provides an exemption from many debts, but not from tax liens. The IRS may levy on the whole title to property held in co-tenancy by a delinquent taxpayer with a nondelinquent one, so long as the nondelinquent co-tenants receive just compensation for their interest as a result of the IRS sale. United States v. Rogers, 461 U.S. 677, 698 (1983).

Community Property Transmuted?

5. Yes, there was no express transmutation. The consent form has a narrower purpose and is insufficient. This ends the inquiry. The transfer fails to create a joint tenacy also because it does not meet the four unities to create a joint tenancy with right of survivorship unless the state allows a direct transfer from a person to himself and another as joint tenants rather than using a straw.

The property remains community property and Willa's estate gets half the account. Spouses in community property states can hold property as joint tenants with right of survivorship, but the intent to do so must be more formally expressed than was done here.

A Community Effort in Common

6. (a) In a common law state, each marital partner owns separate property. Larry's bonus is his, and his purchase of the stock with his money means he owns the $100,000 worth of stock. The dividends earned from his property are his money. Likewise Melinda's inheritance is hers, and the dividends she receives from her stock are her money. Larry and Melinda each get $100,000 in stock and $5000 in cash.

(b) In a community property state, all income earned by either spouse is community property and belongs equally to both spouses. Larry's bonus, therefore, is community property. The dividends on community property are community property. Gifts and inheritances received by a spouse during a marriage are the separate property of the recipient spouse. Thus the $100,000 in stock Melinda inherited is Melinda's separate property. The community property states differ on the character of the dividends on community property. Some say income earned on separate property is community income; others say income earned on separate property is separate property.

For sure, Larry gets $50,000 of Capitol Co. stock and $2500 in cash for his half of the community property. Just as certainly, Melinda gets $150,000 worth of Capitol Co. stock (her $100,000 separate property and her $50,000 share of community property) and $2500 in cash from the community property dividends. In some community property states, Larry and Melinda split the $5000 dividends Melinda received on her separate stock; in other states Melinda gets the entire $5000.