

Chapter 16

The Nonconsenting Cotenant in Oil and Gas Development: The Oil Patch Version of the "Little Red Hen"

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This Chapter discusses the rights of nonconsenting cotenants vis-a-vis the development of oil and gas in selected Eastern states.⁽²⁾ States falling within the classification of "Eastern" for the purposes of this Chapter include: Alabama, Florida, Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Virginia, and West Virginia.

The subject of this Chapter is analogous to the children's story, "The Little Red Hen." Recall that the Little Red Hen went through all the steps needed to bake bread. At each step, she asked her fellow farmyard

animals to help her. They all refused; but when the bread was baked and ready to eat, all the animals expected to share. Instead, the Little Red Hen ate the bread herself. The lesson of this classic children's story is obvious; however, the lesson is not so easily applied to oil and gas development by a cotenant because the applicable law does not conform either to the ending or to the moral of the story.

In the oil patch version, the Little Red Hen would have to share any oil and gas production with her fellow cotenants. In fact, in a few jurisdictions, the Little Red Hen could not even commence development without the permission of her cotenants. If they refused to consent, her only remedy would be partition (and even partition might not be possible). When accounting for each cotenant's share of production, she could deduct a proportionate share of costs, but she could not collect those costs directly from the cotenant. Moreover, in some cases, she could not even deduct costs when accounting for production. And if her drilling activity proved unsuccessful, she would bear the entire loss. Isn't it strange how law can ruin a perfectly good children's story? The oil patch version of the "Little Red Hen" seems more like "Chicken Little" – only in this case the sky really falls!

This oil-patch version of the "Little Red Hen" is the subject of this Chapter. As with all legal fables, we begin with a summary of the common law.

§ 16.02. Concurrent Estates at Common Law.

[1]--In General.

While three types of concurrent estates (tenancy in common, joint tenancy, and tenancy by the entirety)⁽³⁾ survived the transition from the English Common Law and were incorporated into the common law of the United States,⁽⁴⁾ this Chapter will focus only on the rights of tenants in common, as this is the tenancy, with respect to oil and gas rights, most commonly encountered. Also, most disputes among concurrent owners of oil and gas rights occur among tenants in common.⁽⁵⁾ Accordingly, throughout this Chapter, the terms "cotenant" and "cotenancy" should be construed respectively as referring to a tenant in common and a tenancy in common.

A tenancy in common is characterized by the requirement that each cotenant has an equal right to the possession and enjoyment of the entire property (unity of possession). Unlike a joint tenancy, a tenant in common generally may alienate or lease the interest in the property without destroying the character of that interest. Also, a cotenant, having no right of survivorship, may transfer the property by devise, and if a tenant in common dies intestate, the undivided interest passes to the cotenant's heirs.

A cotenant had no cause of action for waste until the passage of the Statute of Westminster II in 1285.⁽⁶⁾ This statute, which is part of American common law, created a Writ of Waste and provided a cotenant with a cause of action either to partition the property or to restrain another cotenant from further depletion of the property. The remedies granted under the Statute of Westminster II were augmented by the passage of the Statute of Anne in 1705.⁽⁷⁾ The Statute of Anne established a cotenant's right to an action for accounting against another cotenant who makes a disproportionate use of, or profit from, the property.

A cotenancy, as well as a joint tenancy, may be terminated through either a voluntary or an involuntary partition. Generally, a court is compelled to grant partition as a matter of right; however, a court may, in the absence of a statutory directive, elect to partition the property in kind or by sale. Courts generally favor partition in kind because each cotenant is allowed to retain a divided portion of the property. Nevertheless, a partition in kind will not be granted if the overall value of the property is diminished or if partition in kind would be unfair or unjust. The probable presence of oil and gas on the property may work such an injustice, requiring partition by sale. Here, the property is publicly sold and the proceeds of sale divided among the