



Chapter 6

Selected Issues in the Law of Co-Tenancy

G. Brian Wells

Wyatt, Tarrant & Combs, LLP

Lexington, Kentucky

Synopsis

§ 6.01.	Introduction	156
§ 6.02.	Creation of a Co-Tenancy Relationship	156
§ 6.03.	Severed Estates	157
§ 6.04.	Consent Required to Develop the Oil and Gas Estate	158
	[1] — Surface Owners	158
	[2] — Mineral Owners	160
	[a] — Majority Rule	160
	[i] — Rationales for the Majority Rule	161
	[b] — Minority Rule.....	163
	[i] — Rationales for the Minority Rule	163
§ 6.05.	State-by-State Analysis	164
	[1] — States Following the Majority Rule	164
	[a] — Kentucky	164
	[b] — Indiana	165
	[c] — Pennsylvania	165
	[d] — Tennessee	166
	[e] — Illinois	166
	[2] — States Following the Minority Rule	168
	[a] — Virginia.....	168
	[b] — West Virginia.....	169
	[c] — Possible Remedies in Minority States.....	170
§ 6.06.	Doctrine of Ratification and Acquiescence	171
§ 6.07.	Co-Tenants’ Lease Not Binding	172
§ 6.08.	The Duty to Account	172
§ 6.09.	Bases of Accounting	173
	[1] — Royalties	173
	[2] — Value Less Expenses.....	175
§ 6.10.	The Doctrine of Waste	177
	[1] — Definition.....	177
	[2] — Policy to Prevent Waste	179
	[3] — Traditional Notion of Waste.....	179
	[4] — Waste Specific to Co-Tenancy	180
§ 6.11.	Injunctive Relief for Waste	181
§ 6.12.	Monetary Damages	182

§ 6.13. **Enhanced Damages**.....182
 § 6.14. **Waste Distinguished from Accounting**.....183
 § 6.15. **Conclusion**.....183

§ 6.01. Introduction.¹

Despite its obvious conflicts with the laws of physics, the law of co-tenancy presupposes that two people can be at the same place at the same time. This concept is known as an undivided interest in real property and grants each co-owner an absolute right to occupy the “whole” of the jointly owned property.

Perhaps not surprisingly, conflicts often arise among co-tenants as to how the co-owned property should be best utilized. These conflicts become significant in the context of drilling for and extracting oil and gas from the co-owned property due to the substantial effects to the real property which may occur during the course of the development of the oil and gas estate. When a conflict arises, the notion of an undivided interest in the “whole” puts one tenant squarely at odds with his fellow co-tenants. In such a case, the law has struggled to balance the competing interests of the co-owners while usually supporting a general policy to promote the efficient development of natural resources.

§ 6.02. Creation of a Co-Tenancy Relationship.

There are essentially three forms of ownership by which owners of real property may jointly own real property.

Co-owners may be “tenants in common” if they hold the same land together by separate and distinct titles, but they have a unity of possession.² A tenancy in common is a form of ownership whereby each tenant holds an undivided interest in property, and generally it is the default form of ownership of real property. Co-owners will be designated as tenants in common unless they are a married couple or have otherwise designated another ownership type. Also, a tenant in common has the ability to convey

¹ The author expresses his gratitude to Karen J. Greenwell, Wyatt, Tarrant & Combs, LLP, R. Cordell Pierce, Equitable Production Company, and Justin W. Ross, University of Kentucky College of Law for their assistance in the research and writing of this chapter.

² *Black’s Law Dictionary* 5th Ed. 1315 (1979).