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Co-Ownership & Partition-Part One

from the desk of David M. Touchstone

Ownership is defined by Article 477 of the Louisiana Civil Code as "…the right that confers on a person direct, immediate, and *exclusive* authority over a thing." If you think about it, ownership is largely about being able to say something like "that's my land; keep off." While there is more to ownership than the power to exclude others, the power of exclusion is the bedrock of ownership. Even the power to derive the benefits of land such as its timber, its agricultural produce, and its mineral products is founded on the power to exclude. The owner of the land is the guy who gets the timber and the cotton from the land because, well, nobody else is entitled to harvest it.

Viewed from this perspective, the word "co-ownership" is oxymoronic. For, if the essence of ownership is the power to exclude others, how can two or more persons experience "direct, immediate, and *exclusive* authority" over the same parcel of property? Well, truth be told, it is problematic. The whole idea of co-ownership made the heads of the ancient Romans hurt. Oh, by the way, our property law here in Louisiana came down to us from the ancient Romans. The Romans just didn't much want to think about co-ownership. They did the Scarlett O'Hara thing and said to themselves, "I'll worry about that tomorrow." For the Romans, co-ownership was always a temporary and unnatural state of affairs. Their solution was,

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well, to end co-ownership just as fast as possible and then one could avoid the headaches that come with trying to think about how two or more people can experience direct, immediate, and exclusive power over the same patch of land. "End it?" you say. Other than all the co-owners transferring their ownership to one of the other co-owners, or all of them transferring to a third person, you may be scratching your head at this point as to how this "temporary and unnatural" state of affairs can be brought to its deserved end. In a word, the solution is "partition".

Partition is the proceeding that occurs when one or more co-owners petitions the court (i.e. sues the other co-owners) to have a judge divide the co-owned property. By and by, we will return to the process by which a judge can divide, or partition, co-owned property.

But first, let's spend some time talking about what happens while the property is in the temporary and unnatural state of co-ownership. Co-ownership arises in a variety of contexts. Oftentimes, persons simply purchase property together. Maybe they do this because one of them finds the deal and the other guy has the cash. Maybe they do this because neither of them has enough cash by himself, and they have to marshal their cash jointly to be able to purchase. Maybe one of them has the fix-it-up know-how and the other guy has a friendly banker. Whatever the reason, human persons (like you and me) and entity persons (like corporations, partnerships, and limited liability companies) often team up and acquire property in co-ownership.

That's when it starts …er, the phone calls to me. "Hey, Dave, me and this other guy bought this land together, and we're not getting along too well. In fact, we can't agree on anything. He just wants to sell it, and I want to spend some money and seed it with baby trees. We're about ready to kill each other. Which one of us is right? Help!" Like I said, it's "temporary and unnatural". No, wait; it was the Romans who said that.

Acquiring co-owned property by purchase is not the only way that co-ownership arises. Let's not forget about divorce and death. Okay, okay, before divorce, there has to be a marriage, which, it turns out, is all too often another "temporary and unnatural" state of affairs. Most people in Louisiana who get married here, or get married somewhere else and then come back, or move here after living in another state, live in a legal arrangement known as a "community property regime". I've discussed community property law at some length in another article, so I'm not going to beat that particular horse again except to the extent that we hit some high points on the use of and disposition of community property, which, of course, is a form of co-ownership. Now, let's talk death. Most co-ownership arises when somebody dies. A typical example occurs when Mom and Dad bought a house together, had three kids, and then Dad died. If Dad died without a will, Mom owns half, has a usufruct on the other half, and the three kids each own a one sixth interest which is subject to Mom's right of usufruct. Oh, wait, I did death, heirship, and succession rights in another article, so I'm not going to do that all over here, except once again we will examine how these co-owners manage the temporary and unnatural arrangement.

And, then there's the forty acre tract of land that Great Grandpa bought in 1917. Great Grandpa was a rounder. He was married three times, but the deed by which he acquired ownership of the forty didn't say if he was married, to which wife, or if he was just between wives. He had two kids with the first wife, four with the second, and one with the last. And, oh, he had one "outside" kid. All of them are dead and neither Great Grandpa's succession, nor any of the successions of his wives and kids have been filed. This week, there are 67 living heirs, we think, depending on how you look at things. Next week, there will be seven more heirs when two of the 67 die this weekend. Nobody wants to sell because Great Grandpa's forty is where the family meets for the annual reunion. You think I'm making this up. Nope, I see it and hear it all the time.

All right…that's enough beating around the bush. Time to make our heads hurt and talk

about what co-ownership *is*. But, wait… indulge me just one more trip around the bush to talk for a minute about what co-ownership *isn't*. Since I've just barely managed to learn Louisiana law, I am routinely circumspect about opining on the meaning of common law terms (that crazy law they have in the other 49 states), but here goes. Some of the other states have something called "joint tenancy". As I understand it, persons who are joint tenants have a right of survivorship. So, if one joint tenant dies, the other joint tenant automatically becomes the owner of the property. Joint tenancy will override the content of the dying joint tenant's last will and testament. We don't have this weirdness in Louisiana. If some knucklehead drafts a deed pertaining to Louisiana property that says the purchasers are joint tenants (which I have, on occasion, seen), a court will just disregard the joint tenancy language, because joint tenancy is not permitted in Louisiana; it violates public policy. In all likelihood, a deed which declares the purchasers of Louisiana property to be "joint tenants" will be interpreted by a Louisiana court as having created a state of co-ownership between the purchasers.

And now the rubber meets the road. Co-owners possess the land jointly. In practical terms, that means that all co-owners can physically possess every smidgen of the co-owned land. And it doesn't matter what their fractions of ownership are. By the way, this is a good time to discuss terminology. Co-owners are often said to be "undivided" owners or owners of "undivided interests". These words are just another way of saying "co-ownership". But they are useful when expounding on the fractional interests owned by the co-owners in the property. If, for instance, one of the co-owners owns a 3/8 interest in the property, he can also be said to be the owner of "an undivided 3/8 interest". Now, let us supposed a hypothetical arrangement in which one co-owner owns an undivided 1/2 interest and six other owners each own undivided 1/12 interests of a forty acre tract. Question is: who gets to physically occupy what part of the tract. Do they vote on it? The answer is that all seven of them get to occupy every molecule of the forty, and "no", it's not a democracy. The owner of the half interest can go anywhere on the forty he wants and every one of the owners of the 1/12 interests can, likewise, go upon every portion of the forty. I have on occasion known of situations in which some of the co-owners built houses on the co-owned land. However, you will see as we go on why this may not be such a bright idea. If a co-owner builds his house on and lives on the co-owned land, he owes no rent to the other co-owners if none of them demand to use the co-owned house (although this rule may be different as to community property still co-owned by divorcing or divorced spouses).

If co-owned property generates revenue, then the co-owners are to divide the revenue in accordance with their fractional interests. Using our example of the forty in the above paragraph, if there is a timber sale, the owner of the undivided ½ interest is entitled to one half of the money generated from the timber sale, and each of the 1/12 owners is entitled to 1/12 of the timber money. If one of the co-owners incurs expense in the process of generating the income from the co-owned property, he is entitled to recover his costs off the top before division of the net revenues among the co-owners.

Co-ownership that does not arise out of community property law allows a co-owner to sell, mortgage, or lease his fractional interest. In the case of sale or mortgage of the co-owner's fractional interest, the act is complete without approval of the other co-owners. Thus a co-owner can sell his fractional share to a third person or to one of the other co-owners without approval of anyone. He can also mortgage his interest and if he defaults on the mortgage, the mortgage holder can cause the fractional interest to be seized and sold at public auction. While a co -owner can sign a lease, and can sign an act of servitude pertaining to the co-owned property, these acts will be in suspense until such time as the rest of the co-owners join in either the act of lease or the act of servitude. It is not invalid for a co-owner to lease his interest or grant a servitude as to his interest; either of these acts just has no effect until the rest of the co-owners join in. There are two exceptions to persons obtaining rights to use co-owned property with less than unanimous agreement by the co-owners. Mineral rights can be granted by agreement of co-owners owning a cumulative total of at least an undivided eighty per cent of the land. Likewise, timber rights can be granted by co-owners owning a cumulative total of at least an undivided eighty per cent of the land. This concession to the rule of unanimity is to protect co-owners who wish to grant such rights but who would have otherwise been blocked by one or two balking minority interest owners. It is also in furtherance of a public policy to promote full utilization of Louisiana's resources. Finally, these two exceptions to the rule of unanimity are monuments to the lobbies of the oil and gas industry and the timber industry in Louisiana.

The rules of co-ownership are different as to community property or former community property. In this article I am not addressing any property other than real estate, so the rules I am discussing herein pertain to real estate and may not be the rules applicable to other forms of property which are not real estate. While spouses are married, as to any property which is community property, like the song says "It takes two." Neither husband nor wife can sell, lease, mortgage, alienate, or grant rights of servitude in community property without the other spouse's signature. After the spouses are divorced, the rules are pretty much the same. It takes both spouses' signatures to sell, lease, mortgage, alienate or grant rights of servitude in property that was acquired during the existence of the community.

Co-owners have a duty to preserve and protect the co-owned property. The standard is different depending on whether the co-ownership arises during marriage for damage that occurs during marriage, the co-ownership arises during marriage for damage that occurs after termination of marriage, or damage to co-owned property that did not become co-owned as a result of marriage. During marriage, a spouse's duty to the other spouse as to community property is pretty low level; he is liable "for any loss or damage caused by fraud or bad faith in the management of the community property." After divorce, the standard of required conduct elevates somewhat; the divorced spouse is bound to "preserve and to manage prudently former community property under his control …in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect." The standard ap-

plicable to a co-owner of co-owned property that is not community property is that he is "liable for any damage to the thing held in in -division caused by his fault."

Now we come to the question of "use" of co-owned property. In one place the law tells us that "The use and management of co-owned property is determined by agreement of *all* the co-owners." On the other hand, the law states "… a co-owner is entitled to use the thing held in in-division according to its destination, but he cannot prevent another co-owner from making such use of it." This is where the ancient Romans' heads started to hurt (and mine too). While it takes all the co -owners acting unanimously to make a use of the property, the law also says that just one co-owner can use the property according to his sole volition if he does so according to the property's "destination." Consulting the writings of the law professors informs us that "in this context, *destination* acquires concrete meaning only by looking back at the practices and uses to which the co-owners have already put the property." So, it seems to me that there is a balance here. A co-owner who on his own uses co-owned property in a substantially new manner exposes himself to the loss of his capital expenditure and in some situations exposes himself to a claim for damages. We have positive case law that tells us if a co-owner attempts to harvest the timber or extract minerals from co-owned property without agreement of the co-owners, the non-consenting co-owners can obtain a legal injunction. We have some further guidance from the Civil Code as to certain uses of co-owned property when other co-owners are not in agreement: "Substantial alterations or substantial improvements to the thing held in in-division may be undertaken only with the consent of all the co-owners." So, back to that example of building a house on co-owned property; that's not looking like a very good idea. A not improbable outcome of this would be that the other co-owners would become owners of the house according to their fractional interests in the land without having to reimburse any of the construction cost to the co-owner who built the house. What happens when co-owners simply cannot agree on use of and management of the co-owned property? In such an instance, one or more of the co-owners can file a lawsuit against his fellow co-owners and have a court decree what use of and what management will be made of the co-owned property.

A co-owner who expends money for "necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person" is entitled to recoup such expenditures from his fellow co-owners according to their respective fractional interests. However, if the expenses undertaken by the co-owner were related to a use of the property that only that co -owner was enjoying, then he cannot recoup his expenses. He also cannot claim expenses for managing the property; he can recover from his fellow co-owners management expenses only for costs paid to a third person.

Let's get back to the Romans. They just didn't have much use for "you children play nice." The old Romans were *serious* folks. If there's a problem, nuke it. The way to nuke a co-ownership problem is to partition the property. If co-owners can't agree, divide the property.