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The Rights and Duties of Mineral Cotenants

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The Rights and Duties of Mineral Cotenants

By Chris Aycock¹

I. Introduction.

It has long been the law in Texas that two or more persons can concurrently own undivided interests in the same land. Indeed, this notion of “cotenancy” is hardly unique to Texas jurisprudence. The concept of concurrent ownership has been recognized in the English common law since at least the fourteenth century.² Even in the middle ages, the English courts acknowledged that cotenants share “the ‘unity’ of possession—i.e., that each cotenant should have an equal right of possession and enjoyment with respect to the entire property.”³

The unity of possession concept carried forward into Texas law with some of the earliest cases dealing with the rights of undivided owners to harvest timber from the commonly owned land.⁴ One cotenant could not exclude the other from access. Each cotenant had the right to enter the property and retrieve more than his or her fair share of the timber. However, the harvesting cotenant had to account to the other cotenant for the value of the non-harvester’s share, less reasonable expenses.

As the economic value of Texas property began to be derived as much from what was located under the ground as it was from what was growing on it, so too did Texas courts recognize concurrent undivided ownership in the mineral estate with each cotenant having the concomitant right to explore for and produce the undivided minerals. As the common law had required of the cotenant harvesting timber, the courts also obligated the cotenant producing minerals to account to the nonproducing cotenant the value of such minerals less certain expenses.

The law of cotenancy made no distinction whether each mineral cotenant also owned the executive rights. But, with the *Lesley v. Veterans Land Board*⁵ decision, the Texas Supreme Court held that, absent ownership of executive rights, a cotenant does not have the right to explore for or produce the undivided mineral estate. As a result, there now appears to be two classes of mineral cotenants: (1) those owning executive rights—thus having a unity of possession; and (2) those without executive rights—being the non-possessory mineral cotenant. This paper will address each class separately.

II. Rights and Obligations of the Executive Mineral Cotenant.

A. Unity of Possession.

The general rule has been that among cotenants, each has a unity of possession. In other words, “a tenant in common has the

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² See e.g., Cunningham, *THE LAW OF PROPERTY*, §§5.1 and 5.2, pp. 195-96 (West 1984).

³ *Id.* at §5.2, p. 196.

⁴ See e.g., *Gillum v. St. Louis, A.&T. Ry. Co.*, 5 Tex. Civ. App. 338 (1893).

⁵ *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479 (Tex. 2011).

right to occupy the entire joint property.”⁶ The same rule holds true if the joint property is the mineral estate. Each cotenant has the right to explore for and produce the minerals without the consent or joinder of the other cotenants.⁷ This rule “is founded on the distinctive legal relationship existing between cotenants; that is, each cotenant has a right to enter upon the common estate and a corollary right to possession.”⁸ “The interest of each co-tenant is coextensive of the property and extends to every part thereof, and while each co-tenant has the right to occupy the property, neither of them has the right to occupy any particular part of it to the exclusion of the others.”⁹

B. Common Circumstances Involving Cotenancy.

The most common situations in which this “distinctive legal relationship” arises concerning the mineral estate are: (i) when two or more persons concurrently own undivided interests in each of the attributes of the mineral estate; (ii) where a mineral interest owner leases its share of the undivided minerals but one or more of the remaining mineral interest owners is

unleased; and (iii) among owners of the leasehold estate, i.e., among the working interest owners.

1. Mineral Cotenants.

In *Altman v. Blake*, the Supreme Court articulated “five essential attributes of a severed mineral estate.”¹⁰ Those being: “(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments.”¹¹ When two or more persons concurrently own each of the attributes of the mineral estate, they are mineral cotenants. “Owners of undivided portions of oil and gas rights in and under real estate are tenants in common...”¹² Each mineral cotenant can execute an oil and gas lease covering its respective minerals without the consent of the other cotenant or the

¹⁰ *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986).

¹¹ *Id.* Although it is beyond the scope of this paper to address all the impacts of the *Lesley* decision, it is the author’s opinion that, as a result of *Lesley*, the commonly referred to “bundle of sticks” representing the attributes of the mineral estate has been reduced from five sticks to four. In all likelihood, beginning with *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 n. 1 (Tex. 1995) and culminating in *Lesley*, sticks one and two, the right of development and the right to lease, have been combined. See e.g., Christopher S. Kulander, THE EXECUTIVE RIGHT TO LEASE MINERAL REAL PROPERTY IN TEXAS BEFORE AND AFTER LESLEY V. VETERANS LAND BOARD, 44 St. Mary’s L.J. 529, 575 (2013)(“[B]ased on *Altman*, a case that does not expressly hold the right to self-development and the executive right pass as one in a conveyance, and a reliance upon footnotes in *French* and *Day & Co.*, cases that did not directly speak to any link between the executive right and the right of self-development, the Texas Supreme Court seemingly decided to combine the executive right and the self-development sticks of the mineral estate”).

¹² *Willson*, 274 S.W.2d at 950.

⁶ *Rosse v. Northern Pump Co.*, 353 S.W.2d 287, 293 (Tex. Civ. App.—Austin 1962, writ ref’d n.r.e.).

⁷ See e.g., *Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986)(“It has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants”); citing, *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965) and *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 334 (Tex. Civ. App.—San Antonio 1912), *aff’d on other grounds*, 195 S.W. 1139 (Tex. 1917).

⁸ *Id.*

⁹ *Willson v. Superior Oil Co.*, 274 S.W.2d 947, 950 (Tex. Civ. App.—Texarkana 1954, writ ref’d n.r.e.)(+citing *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942)).

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