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Cotenants: Right to Possession v. Right to Contribution

by Coleen Clemente

In our society there is an increasing number of people in non-traditional relationships purchasing real property together. The possibilities include those cohabiting for an indefinite period, those intending more permanent situations and those finding themselves among the formerly married. Whether of the same or opposite sex, these individuals correspondingly increase the number of cotenants.

A cotenancy refers to the relationship between the parties regarding their holding of the real property, encompassing tenancy in common, joint tenancy, and tenancy by the entirety. When two or more people own real property together, they are cotenants. The acquisition of legal rights and duties inevitably gives rise to legal problems.

For instance, the cotenants could rent or lease the property to a third party. When profits are derived from a third party's use or possession of the jointly held property, the cotenants are entitled to share in the profits in proportion to their interest. *Colburn v. Colburn*, 265 Md. 468, 290 A.2d 480 (1972). To ensure this right, there is a statutory provision for an accounting. "A tenant in common or a joint tenant who receives rent from a third party for the use and enjoyment of the property, is accountable to any cotenant for that portion of the rent over and above his proportionate share." Md. Real Prop. Code Ann. § 14-106 (1974).

Right to Possession

Usually, cotenants encounter few, if any, problems of legal significance while occupying the property, unless or until the relationship fails and one party vacates. Whether a cotenant moved out on his own or was forced out is an issue to con-

sider in a determination regarding his right to possession.

Ouster Absent an agreement to the contrary, a cotenant is liable to the other cotenant(s) for the sole use and occupancy of the common property. This general rule applies unless there has been an ouster. *Israel v. Israel*, 30 Md. 120, 96 AD 571 (1869). Ouster is "a notorious and unequivocal act by which one cotenant deprives another of the right to the common and equal possession and enjoyment of the property." *Young v. Young*, 37 Md. App. 211, 221, 376 A.2d 1151, 1158 (1977). For example when a cotenant has forcibly removed the other cotenant from the property, has changed the locks and has denied the other cotenant(s) entry, an ouster has occurred.

Ouster is an important exception to the liability of a cotenant for the exclusive possession of real property. If one cotenant has been unjustly or unlawfully deprived of his right to possession, he may not be required to contribute to the cost of the real property. The cotenant who is depriving the other cotenant(s) of possession may be denied rights, for example, the right to contribution, that otherwise might have been permitted.

There is an unexpected analogy between modern cohabitations and outmoded sibling situations. In the past, one or more of the "children" of a family frequently were living in the family home after the parent's death. As each brother or sister moved out to seek employment, to marry, or merely to live elsewhere, one usually remained in possession of the property, becoming the sole occupant. The cotenant(s) in the sibling situation had not been ousted from the property. Similarly, with modern counterparts, if the coten-

ant(s) moves out because of dissatisfaction with the relationship, or because of a new one, he has not been ousted.

Use and Possession Award Use and possession of the marital home by one spouse as awarded by the court, under the Maryland Property Disposition Act, Md. Cts. & Jud. Proc. Code Ann. 3-6A-06 (1974, 1980 Repl. Vol., 1982 Supp.) "effectively creates a right in one tenant to remove a cotenant from property owned by tenants by the entirety. . . ." *Pitsenberger v. Pitsenberger*, 287 Md. 20, 28, 410 A.2d 1052, 1057 (1980).

This award to one cotenant does not usually relieve the other cotenant of his responsibilities toward the jointly held property because the vacating spouse has not been ousted in a legal sense. The court in *Pitsenberger* emphasized that the cotenant is still receiving a benefit from the use of his property. The award of use and possession of the marital home depends on the existence of a dependent minor who will live in the home with the remaining spouse. *Id.* at 34, 410 A.2d at 1060. The vacating spouse, charged with the care of his minor children, is "using his property to properly house his children" even though he is not in possession with them. *Id.* Maryland domestic law empowers the courts to order either party to pay certain expenses even in addition to support. Maryland Property Disposition Act, Md. Cts. & Jud. Proc. Code Ann. 3-6A-06 (1974, 1980 Repl. Vol., 1982 Supp.). However, a court may decline to follow domestic law and instead apply the rules of cotenancy.

Rental Value Although a cotenant is entitled to share in profits and benefits from the rental of the property to third parties, this does not entitle one cotenant to exact rent from the other cotenant for occupancy of the property absent an ouster. An action for accounting would also be disallowed, because this remedy only applies to an accounting by one cotenant to the other regarding a third party and not by one cotenant to the other for his

own possession. However, both remedies, profit-sharing and an accounting, may be available when there has been an ouster.

The nature of a cotenancy entitles each cotenant to the possession of the common property, with the possession of one presumed to be that of all others. In the absence of an ouster or an agreement between the parties, the sole occupant cannot be held liable for rent or any other compensation to his cotenant(s) for that to which he has a perfect right. *Brown v. Brown*, 248 Md. 139, 235 A.2d 706 (1967). The demanding cotenant also has the right to occupy, use and enjoy the property. He cannot sue other cotenant(s) because he is not exercising his right of possession.

Yet in at least one case the trial court erroneously treated the payments made by one cotenant for mortgage, real estate taxes, and insurance "in the nature of monthly rental payments" which "would have been incurred were she to live anywhere, while similar payments were presumably being incurred elsewhere by" her husband. *DiTommasi v. DiTommasi*, 27 Md. App. 241, 255-56, 340 A.2d 341, 349 (1975) (quoting the trial court opinion). The Maryland Court of Special Appeals expressly rejected this concept. In *DiTommasi*, the party had been denied contribution for specific expenses of the joint property that she had paid. On appeal, the court held that by equating those payments with monthly rental payments, the chancellor failed to "compel the ultimate payment of a debt by the one who in equity and good conscience ought to pay it." *Id.* at 260, 340 A.2d at 352 (quoting *Aiello v. Aiello*, 268 Md. 513, 519, 302 A.2d 189, 192 (1973)). A cotenant is required to contribute his share of certain expenses regardless of whether or not he shares possession of the real property with his cotenant(s) as long as there has not been an ouster.

Right to Contribution

The right of contribution from other non-possessing cotenant(s) is

basically the law of restitution with special application to real property law. The expenditures for which contribution may be sought include mortgages and other encumbrances, real estate taxes and insurance, and repairs and improvements to the property.

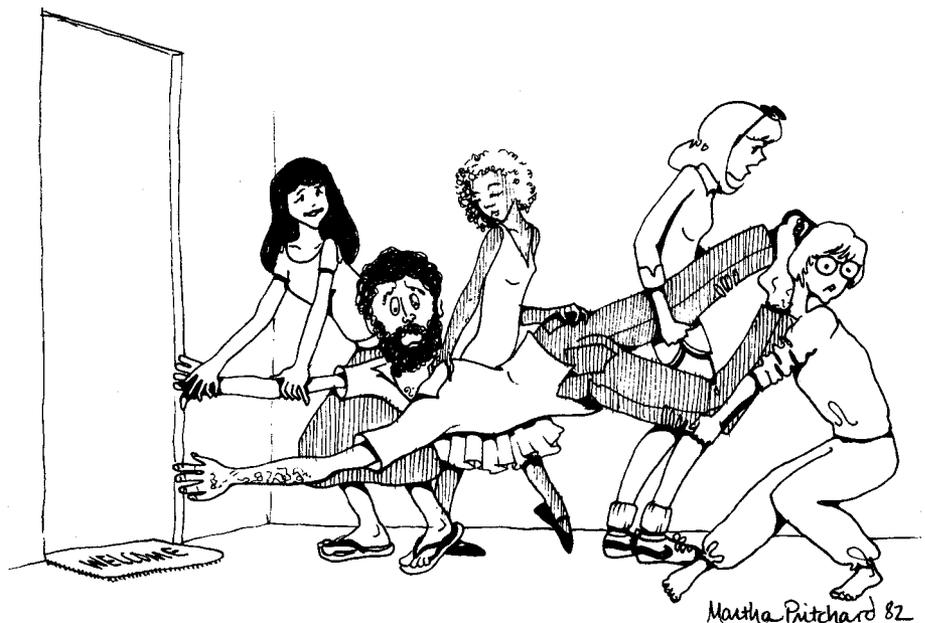
Mortgages Generally, in Maryland when one tenant pays a mortgage or other encumbrance upon the common property, he is entitled to contribution from his cotenant(s) to the extent to which he paid their share. *Pino v. Clay*, 251 Md. 454, 248 A.2d 101 (1968). After the other cotenant(s) vacates the property, the remaining owner may pay the mortgage or other liens to prevent foreclosure and to preserve his right to possession. Since the equity of the non-contributing cotenant(s) is being increased by these payments, the cotenant(s) would be unjustly enriched if contribution were not required.

If the non-possessing cotenant(s) does not voluntarily contribute his share, the other cotenant(s) may pay the full amount due. The paying cotenant(s) may then seek contribution by reimbursement, either by a lien on the property or upon sale for the amount required from the other cotenant(s).

Real Estate Taxes and Insurance In addition to mortgage payments or other encumbrances on the real property, there may be real estate taxes and insurance premiums paid by the occupying cotenant for which he is entitled to contribution. As with mortgage payments, consent to payment of taxes and insurance by the other cotenant(s) is not necessary for the right to contribution to be enforceable. The cotenant's interest in the real property is being protected from loss by the payment of real estate taxes and insurance.

Repairs Consent may become an issue with other types of expenditures. Repairs may be a source of conflict between the occupant of the property and the non-occupying cotenant. As a general rule one cotenant is entitled to contribution from another for necessary repairs when they were done with the assent of the other, or when the repairs were necessary for the preservation of the building or other erection on the land, or when the repairs were done by one cotenant after request of and refusal by the other cotenant(s).

The "expediency of making necessary repairs, the possible obligations of third parties to make the repairs, and the necessity of the re-



pairs themselves are proper objects of consideration for all of the joint owners." *Colburn v. Colburn*, 265 Md. at 477, 290 A.2d at 485 (1972). The court in *Colburn* held that by not informing another cotenant regarding the performance of the repairs, the one cotenant deprived the other cotenant of the opportunity to make a determination prior to the money being expended. If the cotenant is requested to participate and refuses, then the court will determine entitlement to contribution.

When a situation arises in which it is necessary to make a repair or otherwise to act to preserve the joint property, the cotenant performing the repair or improvement should inform the other cotenant(s) and request participation. Nevertheless, there are certain instances in which that requirement should be waived, such as, emergencies which require immediate action, or times when a cotenant cannot be contacted. The general rule was propounded in *Young* that "one cotenant is entitled to contribution from another for necessary repairs made *with* the assent of the other, or *without* such assent when the repairs are necessary for the preservation of the structures on the land." 37 Md. App. at 219, 376 A.2d at 1157 (emphasis added). However, the court in *Young* did not distinguish between a request and a refusal because the general rule was inapplicable to the *Young* situation which involved an ouster.

Improvements The present Maryland position is best explained in *DiTommasi v. DiTommasi*, 27 Md. App. 241, 340 A.2d 341 (1975). There was no reference in the record to either a request or refusal for the expenditures involved. However, the trial court granted the contributions for both repairs and improvements on the basis of equity. Contributions were allowed for improvements—storm windows, central air-conditioning, and a new bathroom sink. It would have been an injustice to allow the non-contributor to profit upon the sale of the property

without reimbursement to the cotenant for his share of the improvements (or repairs) made before the sale. The Court of Special Appeals commented that by failing to appeal, apparently the non-contributor recognized the validity of the Chancellor's ruling charging him for the contributions. *Id.* at 263, 340 A.2d at 353.

The right to contribution is based on the fact that improvements add to the value of the property. On the other hand, amounts for maintenance, rather than for improvements or repairs, have been disallowed. Maintenance items include lawncare, dampproofing walls, wall-papering, and ordinary bills, such as telephone, gas and electric.

Tenancy by the Entirety

A tenancy by the entirety is essentially a joint tenancy and the same rules apply to this type of ownership as to any other type of cotenancy. It follows, therefore, that the rule of contribution between tenants in common is equally applicable to tenants by the entireties. *Crawford v. Crawford*, 293 Md. 307, 443 A.2d 599 (1982). The non-possessing spouse would be required to contribute for certain costs of the property as previously discussed. Nonetheless, there are many variables in domestic situations which can influence the outcome of the possession-contribution controversy. For instance, the court might order one cotenant to pay the expenses, including resulting tax liabilities, of the real property.

Conclusion

Cotenancy suits are usually brought in equity, thus, there is flexibility in the rules governing the determination of allowable expenditures. Fair play, the prevention of unjust enrichment, the preservation of real property, and the avoidance of inequities are all proper considerations of the court in exercising its discretion.

Decisions will differ if the cotenant was ousted, or moved out voluntarily, or is subject to a use and

possession award. Rent may not be required of a sole-occupancy cotenant, although it is possible to remove him effectively by filing for sale in lieu of partition. It may be that the cotenant first finds out that he is required to contribute for some expenses of the property when the other cotenant(s) brings the case into court. Absent an agreement or an ouster, both of which must be proven by the party alleging them, the cotenant may be required to contribute his share of the mortgage, real estate taxes, insurance and necessary repairs and improvements on the property.

Whether the cotenants are formerly married, siblings, or unrelated cohabitants, their interest in the jointly held real property is similar. An individual should be advised of his legal rights and duties regarding possession and contribution of real property, preferably before making the purchase with another. Realistically, however, it may not be until one of the cotenants has lost possession that he seeks advice. The information needed for that advice will depend on the circumstances of the case.

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