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BREAKING UP CAN BE HARD TO DO: PARTITIONING JOINTLY OWNED OIL AND GAS AND OTHER MINERAL INTERESTS IN TEXAS*

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When joint owners of oil and gas and other mineral interests come to a parting of the ways, they often find that breaking up their undivided interests can be hard to do.[1] The legal process through which joint owners break up their undivided ownership is known as partition, a concept with roots in thirteenth century England.[2] Applying this ancient concept of partition to undivided joint ownership of modem oil and gas and other mineral interests presents many interesting problems. Because both partition and the nature of legal interests either in oil and gas or in other minerals vary from jurisdiction to jurisdiction in the United States, it makes sense to focus specifically on how partition operates with regard to such interests in one particular state. This article focuses on Texas, which is a jurisdiction with a modem system of joint ownership combined with partition procedures which are in some respects surprisingly little changed from those in thirteenth century England. This odd mixture of joint ownership law applies to Texas' complex and highly fractionated oil and gas and other mineral interests. The resulting legal framework can make breaking up Texas oil and gas and other mineral interests particularly difficult.

This article considers partition in one of its most complex applications, the

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1. With apologies to Neil Sedaka, whose song, "Breaking Up is Hard to Do," topped the popular record charts in 1964.

2. Partition appears to date back to the reign of Henry III, around 1272 A.D. A. FREEMAN, COTENANCY AND PARTITION (1872). The idea of the need for a process to divide up undivided ownership has even earlier origins, for example in Roman law. W. H. Lloyd, Partition, 67 U. PA. L. REV. 162 (1919). Partition was extended to all forms of joint ownership except tenancies by the entireties by Henry VIII in 1539 and 1540. 31 Henry VIII Ch.1 (1539) and 32 Henry VIII Ch.32 (1540).

many varieties of oil and gas and other mineral interests recognized under Texas law. Although Texas has a relatively simple and straight-forward system of joint ownership, Texas partition processes are often cumbersome and unpredictable, especially when applied to oil and gas and other mineral interests. How a modern jurisdiction, such as Texas, struggles with applying the ancient property process known as partition in this particularly sophisticated and technical context is the story this article will tell. Both property lawyers and mineral, oil and gas lawyers will find the story intriguing. On one side, property lawyers often find Texas interests in minerals, oil and gas fiendishly complex and perplexing-almost as if the jointly owned property to be partitioned seems capable of fractionating into virtually infinite regression. On the other side, mineral, oil and gas lawyers sometimes encounter partition as an arcane and somewhat unpredictable ordeal. Partitioning jointly owned oil and gas and other mineral interests in Texas is worth looking at from both perspectives.

Part I of this article discusses the nature of joint ownership law as it has developed in Texas. Part II focuses more particularly on the application of joint ownership to various types of oil and gas and other mineral interests. The right to partition, sometimes described as an absolute right, which accompanies every joint owner's fraction of undivided ownership is the focus of the Part III. Part IV examines some of the details of Texas' compulsory partition procedures. Part V considers some of the consequences of partition, particularly with regard to title and taxes. Agreements not to partition jointly owned oil and gas and other mineral interests are the focus of Part VI. Investigating the intersection between venerable property law concepts and the technical world of Texas oil and gas and mineral law is the purpose of this exploration of partitioning oil and gas and other mineral interests in Texas.

I. JOINT OWNERSHIP IN TEXAS

For those familiar with the intricacies of Texas' system of mineral, oil and gas ownership, Texas law regarding joint ownership interests seems refreshingly simple and basic. In considering how these two areas of law interrelate, the best place to begin is with Texas' relatively simple approach to joint ownership interests.

A. A Single Form of Joint Ownership

Texas has a remarkably straight-forward concept of joint ownership. When there are multiple owners, each of whom individually owns an undivided, parallel and simultaneous fraction of something, that is joint ownership.[3] The opposite of joint ownership is technically called "ownership in severalty," an archaic term which is still used by lawyers to refer to what non-lawyers call "ownership

3. RESTATEMENT (THIRD) OF PROPERTY: JOINT OWNERSHIP (Preliminary Draft No. 1, 1997).

by a single owner" or "sole" or "separate" ownership. Property which can be jointly owned includes almost anything which can be owned, from intangible property, to land and other real property interests, including all varieties of mineral, oil and gas interests. The Texas approach to joint ownership law is quite different from the joint ownership regimes of other jurisdictions, which recognize several categories of joint ownership to which numerous implicit rights and obligations attach.[4] Texas simply recognizes a single common law form of joint ownership and attaches to that single form of joint ownership relatively few implied rights and obligations.'

Texas' one common law form of undivided ownership is usually called joint ownership, although Texas courts sometimes use "tenancy in common," "cotenancy" and occasionally "co-ownership" interchangeably with "joint ownership"? Texas never recognized other common law forms of joint ownership, such as joint tenancy, tenancy by the entireties or coparcenary, but rather simply found joint ownership to be sufficient. In other states, survivorship is an automatic characteristic of other forms of common law joint ownership, such as joint tenancies and tenancies by the entirety.' However, in Texas, survivorship is something which joint owners may choose.' Texas law does not attach survivorship as an automatic, presumed feature of joint ownership. The intrinsic characteristics of joint ownership in Texas are (1) more than one owner, (2) undivided, simultaneous ownership and. (3) if the jointly owned property involves possession, the susceptibility of that undivided ownership to partition.' Antiquated common law concerns about unities of time, title, interest and possession, which still complicate court decisions with regard to joint ownership in other jurisdictions, are virtually absent from Texas decisions regarding joint ownership law.[10] Undivided simultaneous ownership by multiple owners whose rights are individually held, but parallel and coextensive throughout the jointly owned property, is simply joint ownership in Texas.

Aside from the implicit right to partition, which is the primary focus of this article, joint owners of possessory interests in real and personal property

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4. See, e.g., MICH. COMP. LAWS ANN. §§ 554.44-554.45; DeYoung v. Mesler, 130 N.W.2d 38 (Mich. 1964); N.Y. EST. POWERS & TRUSTS LAW 6-2.2; OKLA. STAT. ANN. tit. 60 § 74; Swanson v. Swanson, 250 P.2d 40 (Okla. 1952); WYO. STAT. § 34-l-140, Choman v. Epperly, 592 P.2d 714 (Wyo. 1979).

5. The Texas Constitution and statutes also provide for a community property form of marital ownership. But community property is a statutory form of undivided ownership which differs in many ways from joint ownership. As will be discussed in greater detail below, Texas decisional law is not completely clear with regard to whether or not Texas' joint management community property should be considered to be an additional form of partitionable joint ownership. See *infra* at notes 22-30.

6. The Texas Supreme Court has used three of these terms within a single sentence: "It may sometimes be inequitable to one or mom of the joint owners if another co-owner is permitted to enforce partition of the jointly owned property; but this is one of the consequences which one assumes when he becomes a *co-tenant* in land." [Emphasis added] Moseley v. Hearrell, 171 S.W.2d 337,339 (Tex. 1943).

7. See examples *supra* note 5.

8. See Spires v. Hoover, 466 S.W.2d 344, 346 (Tex. Civ. App. 1971, writ ref'd n.r.e.). Even Texas' statutory community property law permits choice regarding "survivorship community property" under TEX. PROB. CODE ANN. § 46(b) (West 1997).

9. See 16 TEX. JUR. 3D, *Cotenancy and Joint Ownership* § 9 (1997).

10. See *Spires, 466* S.W.2d at 347.

have few other automatic rights and duties which derive from the joint ownership arrangement itself. A joint owner in Texas has duties not to commit waste, not to exclude another joint owner, and to account for profits derived from payments made by third parties for the use or possession of the jointly owned property." But a joint owner is neither an agent nor a fiduciary for another joint owner, unless the relationship among the joint owners also involves a confidential relationship." Instead of front-loading the joint ownership arrangement with ownership-based legal rights and obligations, Texas law emphasizes the capacity of joint owners to agree about such matters as survivorship and even waiver of partition rights. The simple structure of Texas joint ownership interests is a model for modem joint ownership law in emphasizing choice and self-determination by joint owners. Joint owners are empowered to choose those legal rights and obligations which best suit the joint owners' particular desires and circumstances. This straight-forward single concept of joint ownership carries with it relatively few mandatory rights and liabilities and leaves plenty of room for agreement and independent action by joint owners. These joint ownership qualities have been extremely useful in the development of oil and gas and other minerals in Texas. Highly nuanced agreements among joint owners have played an important role in fostering such development.[13]

B. Not All Shared Ownership Is Joint Ownership

Joint ownership is the only common law form of multiple ownership in Texas. However, it is not the only legal structure which permits multiple owners to share ownership of Texas minerals, oil and gas.[14] In part because the ever-present potential for partition can make joint ownership somewhat problematic, many other types of legal arrangements in which ownership of mineral, oil and gas interests can be shared are often preferred over joint ownership. For example, shared ownership can take the form of divided shares of corporations, limited partnerships, or limited liability companies, which hold oil and gas or mineral properties.[15] These corporate or limited partnership shares represent separately owned divided investment interests in entities which are usually managed independently of the shareholders or partners. In these instances, the entity owns the property; and the shareholders or limited partners own the enti-

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11. See 16 TEX. JUR 3d, *Cotenancy and Joint Ownership* § 10, 25-27 (1997).

12. Mining partnerships may involve something like fiduciary duties among partners. However, in Texas, although mining partnerships often include joint ownership, mining partnerships also have other essential features, such as joint management and operation of property as part of a joint enterprise. Of course, Texas oil and gas law recognizes a strong fiduciary relationship between the owner of the executive right and royalty interests in a mineral estate See Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984); Hawkins v. Twin Montana, Inc., 810 S.W.2d 441, 445 (Tex. App. 1991). But such a fiduciary obligation is not extended to apply among coequal joint owners. Transamerican Natural Gas Corp. v. Zapata Partnership, 12 F.3d 480 (5th Cir. 1994).

13. Such joint owner agreements play important roles in sophisticated oil and gas arrangements, such as pooling and unitixation.

14. HOWARD R. WILLIAMS & CHARLES J. MEYERS, 2 OIL AND GAS LAW § 501 (1996).

15. See RESTATEMENT (THIRD) OF PROPERTY: JOINT OWNERSHIP § 1 (Preliminary Draft No. 1, 1997) 1.

ty. In contrast, the direct and undivided, aggregate ownership interests of joint owners do not operate through an entity.[16]

Trusts are another common vehicle for divided, as opposed to joint, ownership. A trust divides ownership between the trustee, who holds legal title, and a beneficiary, who holds equitable title." Easements, real covenants and servitudes are other alternative arrangements in which an owner of real property may split off various types of rights regarding use of real property. Security interests, such as mortgages, represent yet a different way to split up property ownership into separate types of property interests. Successive interests, such as life estates, remainders and defeasible fees, also may divide ownership according to time of possession. But these present and future interests lack both the simultaneity of ownership and the undivided, coextensive rights characteristic of joint ownership. Texas mineral, oil and gas law also recognizes a variety of economic rights in the form of oil payments, net profits interests, overriding royalties, non-participating royalties and the like." None of these economic interests which permit investors to share in the economic risks and benefits of mineral, oil and gas development is joint ownership, because none involves undivided possession.[19] Various types of non-working oil and gas interests are mechanisms for sharing ownership. But their owners do not jointly own property with the working interests, because these different types of interests lack the coextensive and parallel rights which are essential attributes of undivided joint ownership." Moreover, although non-working interests are often jointly owned, joint ownership of such non-possessory interests is generally not partitionable?'

C. Community Property

In addition to a single common law form of joint ownership, Texas has a constitutionally based statutory form of undivided property ownership among married persons in the form of a community property system.[22] Whether or not

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16. For tax purposes, common law joint ownership is sometimes viewed as the ultimate pass-through entity. Actually a joint ownership arrangement is a non-entity, because joint ownership entails direct, aggregate ownership without an intermediate entity.

17. RESTATEMENT (THIRD) OF TRUSTS §§ l-6 (Tenative Draft No. 1, 1996).

18. *See* HOWARD R. WILLIAMS & CHARLES J. MEYERS, 8 OIL AND GAS LAW (1997). See generally E.E. SMITH & JACQUELINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 24 (1991) [hereinafter SMITH & WEAVER].

19. 16 TEX. JUR. 3d, *Cotenancy and Partnership* § 5 (1997).

20. *See*, e.g., Newcunb v. Blankenship, 256 S.W.2d 700 (Tex. Civ. App. 1953).

21. See discussion *infra* notes 56-61; Douglas v. Butcher, 272 S.W.2d 553 (Tex. Civ. App. 1954, writ ref'd n.r.e); Lane v. Hughes, 228 S.W.2d 986 (Tex. Civ. App. 1950, no writ).

22. Texas statutes which govern community property were recently recodified in Title 1 of the Texas Familv Code. See 1997 Tex. Sess. Law Serv. Ch. 7 (S.B. 334). Whenever married people acquire property in Texas; the usual statutory presumption is that, unless the spouses agree to the contrary: the property is treated as joint management community property. Under Texas' constitutionally based statutory community property system, each spouse is also capable of owning separate property. In Texas, separate property may include joint ownership interests in property which had been jointly owned by the spouses before their marriage. See Halamka v. Halamka, 799 S.W.2d 351 (Tex. App. 1990). Sole management community property is held in the name of and controlled by one spouse. See TEX. FAM. CODE ANN. § 5.22(a) (West 1997). However, most property acquired by married people in Texas is presumed to be joint management community property. See

Texas community property should be treated as a form of joint ownership which may be partitioned is a matter about which Texas appellate courts appear to disagree.[23] Since mineral, oil and gas property is frequently owned by married persons in Texas, a brief explanation of this uncertainty is probably warranted. The specific issue about which Texas appellate courts are divided is whether or not joint management community property should be treated as if it were joint ownership which involves individually 'held interests susceptible to independent transfer or partition. Texas statutes recognize community property partition agreements, which can transform joint management community property owned by both of the spouses into separate ownership by one of the spouses." But such mutual reallocation of community and separate property is unlike common law partition which breaks up undivided ownership into separately owned parts.

During marriage, spousal interests in Texas joint management community property have usually not been considered to be individually held shares, but rather the property of the community.[25] Community property theorists tend to view Texas community property as involving ownership by the marital community during marriage, without individual spousal shares susceptible to unilateral transfer or partition.[26] However, some Texas appellate courts have held that, during marriage, Texas community property operates as if it were joint ownership in which each spouse owns an undivided half of joint management community property which can be unilaterally conveyed. In *Williams v. Portland State Bank, the* Court of Appeals concluded that, during marriage, a husband could unilaterally convey his half of joint management community property.[27] While the spouses were married, the wife refused to execute a note and deed of trust in both spouses' names on two parcels of land owned by the spouses as community property. The husband then executed a new note and deed of trust prepared in his name only. The next week, the wife filed for divorce. The property settlement which accompanied the couple's divorce awarded the wife title to the two parcels. When the husband failed to make payments on the note, the

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TEX. FAM. CODE ANN. § 5.52(c) (West 1997).

23. *Compare* Williams v. Portland State Bank. 514 S.W.2d 124 (Tex. Civ. App. 1974) *with* Dalton v. Don L. Jackson, Inc., 691 S.W.2d 765 (Tex. App. 1985, writ ref'd n.r.e.).

24. See TEX. FAM. CODE ANN. § 5.52(c) (West 1997): "At any time, Texas spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as they may desire."

25. See Ware v. Ware, 809 S.W.2d 569 (Tex. App. 1991). At the end of a marriage by death or divorce, joint management c-unity property automatically becomes jointly owned. If the marriage ends when one spouse dies, the deceased spouse's estate and the surviving spouse each own one-half of the property. If the marriage ends in divorce, the property settlement usually divides joint management community property between the former spouses into separately owned shares. *Id.* However, divorced spouses sometimes retain undivided ownership of parts of the community estate which have been transformed by the dissolution of the marriage into ordinary joint ownership. See, e.g., Carter v. Charles, 853 S.W.2d 667 (Tex. App. 1993).

26. See, e.g., Thomas M. Featerston, Jr. & Julie A. Springer, *Marital Property Law in Texas: The Past, Present and* Future, 39 BAYLOR L. REV. 861, 890 n.169 (1987); Joseph W. McKnight, *Annual Survey of Texas Law: Family Law*, *29* SW. L.J. 67, 88-89 (1975).

27. 514 S.W.2d 124 (Tex. Civ. App. 1974, writ dism'd).

bank foreclosed.[28] The Court of Appeals ruled that the husband's independent execution of the note and deed of trust during the marriage created a prior and valid lien on his undivided one-half community property interest in the real estate.[29] The bank was permitted to foreclose with regard to that half, leaving the ex-wife with an undivided one-half interest in the real estate, unencumbered and unforeclosed, but jointly owned with the bank. The Court of Appeals treated the husband's conveyance of the deed of trust during marriage as binding on his half interest in the joint management community property, as if the husband's community property interest were an ordinary joint ownership interest.[30]

Eleven years later, *in Dalton v. Don L. Jackson, Inc.,* Another Court of Appeals came to a contrary conclusion.[31] In *Dalton,* a contract to sell some real estate which was joint management community property had been prepared for both spouses' signatures. Although one spouse signed the contract, the other spouse died before signing. The district court enforced the contract against the signing spouse's half interest; but the Court of Appeals reversed and expressly declined to follow *Williams.* The *Dalton* court held that "Community property may only be partitioned upon compliance with the provisions [of the Texas Constitution and Family Code.] . . . Accordingly, one spouse may not convey his or her interest in joint [management] community property to a third party, so as to effectuate a partition by creating a tenancy-in-common between the remaining spouse and the third party."[32]

So far, the Texas Supreme Court has not resolved this issue, nor is there a reported appellate decision which has applied either *the Williams* or *the Dalton* approach to Texas oil and gas or mineral interests held as joint management community property. For now, Texas law remains uncertain whether, during marriage, an individual spouse's share of mineral, oil or gas interests held as Texas joint management community property, will be treated as a joint ownership interest which can be unilaterally conveyed and partitioned. For present purposes, it is important to recognize the possibility that the partition processes described in Parts III and IV, infra, might apply to joint management community property if such community property is treated as if it were jointly owned.

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28. Id. at 125-26.

29. *Id.* at 127.

30. *Id.* A later Cant of Appeals decision, Vallone v. Miller, 663 S.W.2d 97, 98 (Tex. App. 1984, writ ref'd n.r.e.) distinguished Williams in a decision regarding a contract to convey some land held as joint management community property. The contract, which was prepared for the signatures of both Mr. and Mrs. Miller, was signed only by Mr. Miller, but not by Mrs. Miller, who had died. The Court of Appeals decided that, since the contract had been prepared for both signatures, it was incomplete. "There is no basis for a fmding that James B. Miller alone must specifically perform the incomplete contract as to his undivided one-half interest" was the court's ruling. *Id.* at 98-99.

31. 691 S.W.2d 765 (Tex. App. 1985, writ ref'd n.r.e.).

32. *Id.* at 768. In a later case, yet another Court of Appeals noted, "Most commentators have agreed with the *Dalton* court that the conveyance of a spouse's undivided one-half interest in community property to a third party violates these constitutional and statutory provisions because it is an attempt to involuntarily partition community property." Marriage of Monison, 913 S.W.2d 689, 692 (Tex. Civ. App. 1995, writ ref'd n.r.e.)

II. TEXAS OIL AND GAS AND OTHER MINERAL INTERESTS

In contrast to Texas' relatively straight-forward approach to common law joint ownership, Texas law recognizes a bewildering variety of oil and gas and mineral interests. From the perspective of partition, there are two distinct categories of jointly owned mineral, oil and gas interests: possessory real property interests (including working interests in oil and gas leases) which are subject to partition, on the one hand, and nonpossessory interests (such as royalty interests) which are not partitioned, on the other hand. The different treatment of the two categories is based on the presence or absence of undivided possession. It is a difference which reflects the focus on physical possession which underlies Texas' distinctive ownership-in-place approach to oil and gas as well as other mineral interests.[33]

Texas' distinction between possessory and nonpossessory interests operates within a concept of a unitary fee simple absolute title to real property. Into this unitary fee, Texas law fits a number of different categories of estates and subcategories of interests. Since the later parts of this article primarily focus on how partition works, most of this part will primarily concentrate on the possessory oil and gas and mineral interests which are subject to partition.

Oil and gas interests are a subcategory of mineral interests, which in Texas are governed by the ownership in place doctrine." Minerals on and under the surface, as well as the oil and gas temporarily "in place" under the surface are treated as separate possessory subparts of a unitary fee simple title.[35] The right to capture which accompanies ownership in place permits an owner of land to bring fugitive resources such as oil and gas to the surface, where they can be sold as personal property.[36] This right to capture attaches to full fee ownership, unless the right to extract the minerals, oil or gas has been severed from the surface either in whole or in part. There are several ways in which a fee owner can sever the minerals or convey the right to capture them: by conveyance of the mineral estate; or by conveyance of the surface estate while retaining the mineral estate; or by leasing all or some of the minerals, for example through conveyance of an oil and gas lease.[37] These interests (mineral estate, surface estate, mineral lease) as well as the full fee simple are all possessory interests which, if jointly owned, can be partitioned. The personal property used in mineral, oil and gas development, such as production equipment, drills, pumps and pipes, is also susceptible to joint ownership and can also be partitioned as pos-

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33. Texas embraces the common law notion that an owner of teal property in fee simple owns all aspects of the land, from the depths of the earth to the heavens. Practical, physical differences between immobile minerals and oil and gas, which tends to move around, make the ownership rights to the latter particularly distinctive under the "right to capture" doctrine followed in Texas law.

34. See Texas Co. v. Daugherty, 176 S.W. 717 (Tex. 1915).

35. See *generally* 1 SMITH & WEAVER, *supra* note 18 at § 2.3 (1995); JOHN S. LOWE, OIL AND GAS LAW 34 (3d. ed. 1995). *Cf.* Phillips Petroleum Co. v. Adams, 513 F.2d 355,363 (5th Cir. 1975).

36. 1 SMITH & WEAVER, *supra* note 18 at § 1.3.

37. *See generally* B.M. Kramer, *The Sisyphean Task Of Interpretting Mineral Deeds and Leases: An Encyclopedia Of* Canons *Of* Construction, 24 TEX. TECH. L. REV. 1 (1993).

sessory personal property.[38]

A. *Possessory Oil and Gas and Other Mineral Interests*

In Texas, the owner of a fee simple absolute title from which the mineral estate has not been severed, or the owner of a severed mineral estate which includes the leasing right, or the owner of the leasing attribute of the mineral estate (if that attribute has a different owner or owners) can convey a mineral lease.[39] Under Texas law, a mineral lease is treated as a conveyance of a determinable fee in the leased minerals (frequently a 7/8 interest).@ The possibility of reverter, as well as a royalty interest (frequently a 1/8 interest) in the minerals produced from the leased property, remain with the owner of the mineral estate.[41]

Assuming that a joint owner's leasing attribute (often called the executive right) has not been conveyed or restricted, Texas law permits each joint owner of any of the interests which hold the leasing attribute to lease the joint owner's undivided share of the minerals to a different mineral lessee.@ With regard to oil and gas interests, each lessee from a different joint owner holds a separate working interest, which conveys to that lessee an undivided right to explore and to produce from the jointly owned property. Lessees from different joint owners are not considered to be joint owners inter se, although they hold similar, undivided rights to extract minerals, or oil and gas, from the same real property. Rather, each lessee from a different joint owner can exercise his or her lessor's undivided right to capture the oil and gas under the jointly owned property. Once a joint owner conveys a mineral or oil and gas lease to a lessee, that lessee may convey undivided fractions of the lease to another layer of joint owners, who share undivided interests in the lease.[43] Unless the leasing attribute is concentrated in a single manager by agreement among the joint owners, the potential for multiple competing lessees is significant.

The Supreme Court of Texas explained the basis for the legal relationship among multiple working interests in oil and gas leases of different segments of a *very* small *(0.4* acre) parcel of land *in Ryan Consolidated Petroleum Corp. v. Pickens*.[44] In *Ryan,* the Texas Supreme Court affirmed lower court rulings rejecting a claim by the owners of a mineral lease in two lots in a four-lot tract which was four-tenths of an acre in size. The claimants were held not entitled to half of the production from a well which had been drilled on the other two lots under an earlier exclusive oil exploration and production lease.[45] The sub-

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38. TEX. R. CIV. PRO. 773 (West 1967 & Supp. 1997).

39. *See* 55 TEX. JUR. 3D, Oil *and* GUS §§ 161-162 (19%).

40. See 1 SMITH & WEAVE *supra* te 18, at § 4.1(A) (1994).

41. See Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); W.R. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 28-29 (Tex. 1929).

42. See 55 TEX. JUR. 3d, *Oil and Gas* §§ 19-20 (19%).

43. See discussion *infra* notes 65-69.

44. 285 S.W.2d 201 (Tex. 1955).

45. Id. at 210.

sequent grant of a mineral lease of the second two lots to the claimants only conveyed to them an undivided 7/8 of the minerals under those particular second two lots.[46] Although it was uncertain at the time of the later lease whether Texas Railroad Commission rules would permit an offsetting well to be drilled on the second two lots, the mineral lessees of the second two lots had no right to demand half of the production from the first two of the four lots in the parcel.[47]

The Supreme Court of Texas explained that in Texas, 'The rule of capture is simply this-that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of the oil or gas may have migrated from adjoining land."[48] The court relied on *Japhet v. McRae*,[49] a 1925 Texas Commission of Appeals decision in which a landowner sold a portion of his land to others, and later leased the land which he retained for oil and gas development. The Commission of Appeals noted:

> As our Supreme Court has held, oil is fugitive in its nature, and ordinarily should belong to him who captures it and brings it to the surface. The quest for it involves tremendous expense and a vast element of chance. In spite of the scientific knowledge of the geologists, the industry still partakes largely of a gamble. It seems to us that the only safe rule, and the only one free from much confusion, is the one which gives the oil to the man who owns the land upon which the well is located.[50]

The Commission's ultimate ruling was that the royalties belonged to the lessor, who was owner of the reatined tract where the well was located.

In addition to recognizing distinct ownership of different types and forms of minerals, Texas law also recognizes division of land ownership horizontally into various strata measured by depth.[51] Sometimes a different set of joint owners owns each horizontal slice. These horizontally divided strata, or horizons, which lie above or below each other within a single mineral estate, are considered distinct objects of ownership. The relationship between the owner of one stratum and the owner of a different stratum is not undivided joint ownership. Rather, each of the strata's owners has rights to a different piece of real property.[52]

Although all of the many different types of mineral, oil and gas interests recognized in Texas can be, and often are, jointly owned, partition applies only to joint ownership of those interests which involve undivided possession: the full fee simple, the surface estate, the mineral estate and the mineral lease.

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46. *Id.* at 206.
47. *Id.* at 209-10.
48. *Id.* at 207.
49. *276* S.W. 669 (Tex. 1925).
50. *Id.* at 671-72.
51. See, e.g., Gilbreath v. Douglas, 338 S.W.2d 279 (Tex. Civ. App. 1965, writ ref'd n.r.e).
52. See generally 1 SMITH & WEAVER, *supra* note 18, at §§ 3.3(A)(2), 3.8 (C)(3) (1989).

B. Nonpossessory Oil and Gas and Other Mineral Interests

In Texas, joint ownership also applies to royalty and other intangible attributes of mineral estates, as well as to oil and gas interests of many types. Joint ownership of these nonpossessory interests is often created through partial assignments of fractional shares of these interests.[53] Although Texas law treats royalty interests and several other attributes of the mineral estate as distinct nonpossessory real property interests, such jointly owned nonpossessory interests are not partitioned through compulsory court processes.[54] Professor John Lowe aptly suggests that royalty interests are "probably similar to incorporeal hereditaments,"[55] a category which includes easements, profits and real covenants. The Restatement, Third, of Property calls such nonpossessory interests "servitudes."[56] In the oil and gas context, they are production-related interests which do not involve undivided possession and are therefore not partitioned. They function as subparts of ownership, rather than undivided joint ownership.[57] In addition to the royalty attribute of the mineral estate, discussed above, there are various other types of specialized royalties and economic interests in mineral and petroleum production, or the profits from that production." All of these non-working interests can be, and frequently are, jointly owned. Since they are intangible rights, which do not involve undivided possession, they are not partitioned. Instead, unless there are contractual restrictions on their transfer, intangible rights are routinely transferred, often, in whole or in fractional parts. Joint ownership of these intangible interests arises as these interests are subdivided by joint owners who transfer fractional parts of them, for example through partial assignments of royalties?'

The Texas Supreme Court recently explained the nature of five nonpossessory interests included within the mineral estate: "A mineral estate consists of five interests: 1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals and 5) the right to receive royalty payments."@ Each of these nonpossessory interests can

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53. See, e.g., Royal Petroleum Corp. v. Dennis, 332 S.W.2d 313 (Tex. 1960). See discussion in text, *infra* at notes 62-69.

54. See, e.g., Douglas v. Butcher, 272 S.W.2d 553 (Tex. Civ. App. 1954, writ ref'd n.r.e). See *also* 1 SMITH & WEAVER, *supra* note 22, at § 4.1(A) (1994); Williams, *The Effect of Concurrent Interests on Oil and Gas Transactions, 34* TEX. L. REV. 519, 541-42 (1956).

55. 6 WEST'S TEXAS FORMS (J.S. Lowe, ed. 1997) at 57.

56. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (Introduction to Tentative Draft No. 1, 1989).

57. The splintering of ownership among different types of surface, mineral and nonpcesessory interests can result in very complicated arrangements, particularly with regard to lands in which the State of Texas retains mineral interests, after the surface long ago transferred into private ownership. For example, under a series of Sales Statutes, large tracts of Texas mineral lands came to be owned by surface owners, such as ranchers, with the mineral interests retained by the State of Texas. However, various aspects of the oil and gas interests, including royalty, delay rental, bonus interests and the like, are jointly owned 50/50 by the owner of the surface and the State of Texas. The surface owner also has the power to lease, subject to the consent of the State. *Cf.* 1 SMITH & WEAVER, *supra* note 18, at § 2.3.C (1996).

58. J.S. Lowe, *Defining the Royalty Obligation, 49* SMU L. REV. 223 (1996).

59. See discussion in text *infra* notes 62-69.

60. French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995), *citing* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986).

be separately conveyed, as well as jointly owned. The Texas Supreme Court noted that "[W]hen an undivided mineral interest is conveyed, reserved or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed.'*' Any of the five attributes can also be jointly owned by fractional owners of undivided interests in that particular attribute.[62] But joint owners of such nonpossessory interests do not have the right to compel partition. Although Texas courts have repeatedly held that nonpossessory interests are not partitionable,[63] Texas statutes and court decisions do not directly discuss why nonpossessory interests are not partitioned. The apparent reason why these nonpossessory interests are not considered partitionable is because the traditional function of partition is to divide the unity of possession. In the absence of undivided possession, partition seems unnecessary. Apparently only when there is undivided possession which needs to be broken up does compulsory partition have a role to play.[64]

C. *Fractionalization*

Texas oil and gas and other mineral interests have tended to generate complicated patterns of both possessory and nonpossessory joint ownership interests. Because the capital and know-how required to bring mlneral, oil and gas interests into production are substantial, a "piece of the action," in the form of a joint ownership interest in the land, the mineral estate or the mineral lease, has been a common practice in Texas from the earliest mineral production in the state.[65] Moreover, corporations and their subsidiaries may decide to split up ownership of mineral, oil or gas interests into undivided fractional interests jointly held by various subsidiaries.

For much of this century, this tendency to fractionalize has been a topic of considerable discussion and litigation, most recently with regard to the treatment of fractional interests in oil or gas as securities. In the context of securities regulation, Professor Louis Loss aptly described the fractionalization of a royalty interest:

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61. Day & Co. v. Texland Petroleum, 786 S.W.2d 667,669, n.1 (Tex. 1990). When each of the five attributes has a different owner, the five owners are not joint owners because their interests are divisions of the mineral estate, rather than undivided interests.

62. See French, 896 S.W.2d at 797. The Court in French struggled with interpreting a conveyance of a 11656.17 of a mineral interest, from which had been reserved all development rights, leasing rights, bonuses, and delay rentals. The Texas Supreme Court concluded that "what is conveyed is a fraction of royalty, not a fixed fraction of total production royalty." *Id.* at 798. The court treated the royalty attribute as a separate subpart of the mineral interest; and it was that subpart only which was held in undivided joint ownership.

63. See Belgam Oil Co. v. Wii Franklin Petroleum Cap., 209 S.W.2d 376 (Tex. Civ. App. 1948); Hardin v. Eubank, 25 S.W.2d 554 (Tex. Civ. App. 1952); Newcomb v. Blankenship, 256 S.W.2d 700 (Tex. Civ. App. 1953). *Cf.* Indian State Oii Co. v. McCutchen, 183 S.W.2d 692 (Tex. Civ. App. 1944) (partitioning joint ownership of a 7/16 interest in a working interest).

64. This feature of Texas partition law seems to be a rare instance in which Texas law reflects the common law unities associated with common law concurrent estates. See discussion *supra* note 6. *Cf.* Marla E. Mansfield, *A Tale of Two Owners: Real Property Co-Ownership and Mineral Development, 43* ROCKY MN. MIN. L. INST. § 20.02 (1997).

65. *See* William D. Warren, *Transfer of the Oil and Gas Lessee's Interest, 34* TEX. L Rev. 386, 388 (1956); A.J. THUSS, TEXAS OIL AND GAS (1929).

> This one-eighth interest is the "landowner's royalty interest," and it commonly finds its way into the securities markets in lots of fractional undivided portions after having been transferred to banks as collateral for loans or having been sold to an oil royalty dealer. The lessee's interest is termed the "working interest." If the lessee is an established producing company, it may retain all of the working interest. On the other hand, if it does not have independent resources, it may sell fractional undivided shares of the lease to raise working capital, or it may give a part interest in the lease to a drilling contractor, who in turn may sell all or part of his sham to finance the drilling.[66]

The 1933 Securities Act defined "a fractional undivided interest in oil, gas or other mineral rights" as a "security."[67] But because this definitional section also provided that the context of such an interest might indicate that the particular interest was not a security, litigation over possible exceptions to treatment of fractional interests in minerals, oil and gas as securities has continued. Judge Higgenbotham noted about ten years ago that "[s]ophisticated purchasers of fractional undivided interests in oil and gas have sought-and obtained — rescission of their purchases pursuant to the 1933 Act for at least thirty years."[68] In short, fractionalization of interests in minerals and in oil and gas can have a number of practical commercial ramifications unrelated to partition.

Fractionalization of mineral, oil and gas interests among joint owners also arises in noncommercial situations. Donative transfers, including inter vivos and testamentary gifts, as well as inheritance, generate many types of joint ownership interests. Moreover, as noted earlier, much of the property acquired by married persons in Texas is community property, which in many cases ultimately will be split into undivided joint ownership halves when the marriage ends either by death or by divorce. For example, assume that 1,000 acres were acquired by a husband and wife and automatically became community property. When the husband died, he willed his half of the community property to a group of four relatives. His surviving wife later died intestate, with her half passing to her heirs, five additional persons. Such a scenario would result in ownership of the 1,000 acre ranch by nine different joint owners within a single generation. Each of the nine joint owners can lease her or his undivided interest in the minerals to a different lessee, or three can lease to a first lessee and six can lease to a second lessee. Both the first lessee and the second lessee can convey undivided interests in their working interests to yet other joint owners, through partial assignments of their leases. Upon the death of one of the joint owners of a fraction of the mineral lease, the fractional interest in the mineral lease will be distributed according to the deceased's will or under the inheritance statute. Each royalty interest which was retained under each of the mineral leases may be conveyed or devised to joint owners, or perhaps inherited by a

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66. L. LOSS, SECURITIES REGULATION (1961) at 469.
67. Section 2(1) of the 1933 Securities Act.
68. Adena Exploration, Inc. v. Sylvan, 860 F.2d 1242, 1244 (5th Cir. 1988).

group of joint owners.

In short, fractionalization of mineral, oil and gas interests derives from many sources. It results in very complicated patterns of both jointly owned interests and partial interests. This multiplicity of jointly-owned interests characteristic of Texas mineral, oil and gas property makes construing joint ownership interests in mineral deeds and oil and gas leases particularly challenging.@ Dealing with this fractionated universe of joint ownership interests requires not only very close attention to the language and intent of deeds and leases, but also a strong grasp of fractions.

III. PARTITION IN TEXAS

Without a way to break up undivided interests, joint owners could be locked together indefinitely in an unworkable joint ownership arrangement. Partition enables a dissatisfied joint owner to disentangle his or her possessory rights from those of the other joint owners, but still retain ownership of an equivalent fractional part of the asset or the asset's value. In the United States, compulsory partition and joint ownership have traditionally been interdependent concepts. For example, the two concepts are joined in the title to the only treatise regarding United States joint ownership law, *Cotenancy and Partition* written by the well-known western legal scholar regarding the law of judgments, A.C. Freeman.[70]

In Texas, the symbiosis between compulsory partition and joint ownership remains a matter of considerable practical importance. Without partition, joint ownership could become intolerable, leaving disagreeing joint owners in a hopelessly indivisible situation. Partition provides a way out of dysfunctional joint ownership arrangements by breaking up the undivided whole of jointly owned property into separately owned parts, either physically, in kind, or in terms of a share of the proceeds from selling the jointly owned property. In most situations, when a dissatisfied joint owner seeks sole ownership of a smaller part instead of undivided ownership of a larger whole, the alternatives to partition are not very attractive. Aside from continuing to put up with joint ownership, a dissatisfied joint owner can choose between partition and selling his undivided interest.

Selling an undivided interest in real property is frequently undesirable because potential purchasers are often reluctant to buy into a joint ownership arrangement, especially a troubled one. As a result, the sale of a joint ownership interest rarely realizes the full proportionate value of the jointly owned asset. In fact, the value of a joint ownership interest is regularly discounted in tax cases by a factor of twenty-five percent or more below the joint ownership interest's proportionate share of the value of the whole asset.[71] Moreover, after

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69. B.M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Cannons of Construction, 24* TEX. TECH L. REV. (1993).

70. A.C. FREEMAN, COTENANCY AND PARTITION (1st Edition 1874 and 2d Edition 1886).

71. See, e.g., Propstra v. United States, 680 F.2d 1248 (9th Cir. 1982); Estate of Haydel v C.I.R., 62

transfer to a substitute joint owner, the undivided joint ownership arrangement remains the same, aside from a change in joint owner identity. If the joint ownership arrangement was dysfunctional before the transfer, bringing in a new joint owner rarely solves the underlying problems with the joint ownership arrangement itself. In such circumstances the only remaining options may be either to attempt to cooperate or to partition.

After describing some of the typical situations in which partition occurs, this part will consider some of the types of partition recognized in Texas law. Both voluntary and compulsory partition are possible in Texas; and each has several variations. Part IV, which follows, discusses Texas' court-ordered partition procedures in greater detail

A. Partition Situations

Reported court decisions rarely reveal the reasons for compulsory partition. The fact is, any joint owner can force a division of jointly owned property by bringing a court action to compel partition, without ever having to explain why. Moreover, when partition is voluntary, partition deeds in county land records do not reveal the partitioning joint owner's reasons. Potential reasons for partition appear to be as numerous and varied as Texas mineral, oil and gas interests. and their owners.[72]

Texas decisional law reflects a variety of circumstances in which joint owners have sought to partition jointly owned mineral, oil and gas interests. In some cases, business disagreements have led joint owners to seek to disentangle undivided ownership by partitioning the jointly owned property. Typical of this type of partition situation is the extended litigation regarding a hydrocarbon storage cavern leached out of a salt dome in Liberty County.[73] The 126.378-acre surface estate was owned by MAPCO Underground Storage of Texas, Inc. (MUST), which also owned an undivided 1/8 of the mineral estate. A 5/8 undivided interest in the mineral estate in 40 acres of the property was owned by the Carters-Clarence, James Ross and Mrs. Clyde Carter. Texasgulf, Inc. owned an undivided 2/8 of the mineral estate. After trying to stop MUST's salt leaching operations, the Carters sought partition of the mineral estate. They also sought recovery for waste and an accounting, although these damage claims

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T.C.M. (CCH) 956 (1991). In Re Estate of Ehlers, 911 P.2d 1017, 1022 (Wash. 19%) involved an accounting with regard to a testamentary trust. The court held that a 25% discounted value was reasonable for land subject to undivided interests.

72. Possible reasons for partition vary across a wide range. Sometimes a joint owner will partition for financial masons, such as to liquidate an investment. Sometimes a joint owner will seek partition when another joint owner appears to be taking unfair advantage of the jointly owned property. Sometimes a partitioning joint owner will use partition aggressively to retaliate against or to bully another joint owner for whom partition is undesirable and costly. Sometimes, joint owners disagree with regard to how jointly owned property should be managed. Sometimes joint owners find coordination of their undivided rights unreasonably cumbersome and costly. Some joint owners find each other annoying to the point that they simply prefer not to have to deal with each other any more.

73. See MAPCO, Inc. v. Carter, 817 S.W.2d 686 (Tex. 1991), modiiying 808 S.W.2d 262 (Tex. App. 1991, writ granted).

were severed from the partition action. Eventually, the Texas Supreme Court reversed a large in personam owelty[74] award against MAPCO, Inc., which was the corporate parent of one of the former joint owners (MUST), but which had not been made a party to the partition action in the trial court. The acrimonious relationship among these joint owners is typical of how complex business relationships can deteriorate and lead to partition.

Another example of this type of partition situation is *Hulsey* v. *Keel*,[75] in which the court denied partition. After many years of litigation, one joint owner sought partition against another joint owner, who owned a 1/16 free-carried interest in a producing oil and gas lease. Fourteen years after the business dispute arose, the court denied partition, because the court found an implied agreement not to partition based on the nature of the joint venture agreement between the joint owners.[76]

Partition of the joint ownership into which failed entities have devolved is now relatively rare in Texas, perhaps because Texas courts often use resulting trusts as repositories for a lapsed entity's property. However, in the early twentieth century, there were a number of examples of partition actions brought by joint owners who had been former partners or shareholders of dissolved entities. For example, the partition action *in Wiess v. McFaddin* involved a deadlocked unincorporated joint-stock association which had dissolved into joint ownership.[77] It had become impossible for the association to elect a full board of trustees necessary to carry on the agricultural business of the association. The Court of Appeals concluded,

> [I]t is patent that it is impossible for this company to continue business with any chance of success to the shareholders. It is true that a large amount of property, amounting to perhaps a fortune, is threatened with damage and depreciation. In our judgement, this threatened damage and threatened depreciation cannot be remedied. To dissolve the association is the only just and adequate remedy, and a partition of the property by the judgment of the court.[78]

In another case, a similar agricultural enterprise, the J. C. Minus Land & Irrigation Company, was dissolved in 1937 when its corporate charter expired. As a result, the dissolved company's 640 acres of land in Dimmit County became jointly owned. The court decided that each of the owner-members' shares should be "set out in the proportion that the amount of stock he owned at dissolution bore to the total outstanding capital stock."[79] Later, one of the joint owners sought partition against J. C. Minus and Mrs. Minus.[80]

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74. *Id.* at 688. Owelty is an equalizing payment associated with partition in kind, when the physical shares allotted are not proportionate in value to the respective undivided interests of the joint owners. See discussion *infra* notes 222-227.

75. 700 S.W.2d 255 (Tex. App. 1985, writ ref'd n.r.e.).

76. *See* discussion at notes 326-27.

77. 211 S.W. 337,339 (Tex. Civ. App. 1919).

78. *Id.* at 343.

79. *Id.* at 222.

80. J.C. Minus also sought an accounting for his expenses and taxes. The Commission of Appeals relied

On occasion, a joint owner of business property will use partition to gain strategic advantage over another joint owner. An example of this type of situation is reflected in the well-known Texas Supreme Court decision in *Moseley* v. *Hearrell*.[81] In *Moseley*, the Texas Supreme Court approved forced partition by sale of the mineral interests in a one-acre tract of land which was encumbered with a covenant that no more than one oil well would ever be drilled on the land." After a producing well was brought in, Mrs. Lola Hearrell, who owned an undivided 49/128 interest in the minerals, orally agreed with Wood, Moseley's predecessor in interest, that she would operate the well during the time she and Wood were joint owners of the mineral interest in the one acre. Moseley knew about the oral operating agreement, but sought partition anyway.[83]

Mrs. Hearrell objected to partition on the grounds that it would be inequitable. She argued among other things, that Moseley was really trying to acquire her interest through a partition sale from which she would not receive the full value of her interest and which would cause her to incur a large federal income tax liability.&' The Texas Supreme Court was unmoved. The court noted that the partition statutes "confer the right to compel partition in the broadest terms" and emphasized a joint owner's "absolute right to demand segregation of his interest from that of his co-owner."[85] The Texas Supreme Court's conclusion that the potential for unfairness, when one joint owner uses partition to gain advantage over another, is not relevant to the decision whether to order partition has undoubtedly fostered a great many strategic partition actions over the past half century. As will be discussed in Part VI below, this ruling also encouraged joint owners of mineral, oil and gas interests to enter into no-partition agreements, particularly in the context of joint operating agreements with regard to oil and gas property.

There are also many situations in which family members, who received jointly owned property by donative transfer or inheritance, have sought partition. Donors and testators often give or devise property to groups of relatives, such as children or grandchildren, who become joint owners of the property. These family members may then further divide their undivided interests among yet another generation of joint owners, and so forth. In addition, because inheritance statutes usually transmit intestate property to groups of heirs according to various degrees of kinship, intestate succession often fractionates undivided ownership of inherited property among a number of joint owners.[86] For exam-

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on Hanrick v. Gurley, 54 S.W. 347 (Tex. 1899), in which the Texas Supreme Court had established that in an equity action for partition, "the court must determine what each is entitled to receive of the estate to be divided. If charges upon it have been paid by one, of which the others are to receive the benefit, any balance in his favor over and above his just proportion becomes an equitable charge upon the interests of the others, to be worked out in the partition." *Id.* at 355.

81. 171 S.W.2d 337 (Tex. 1943).

82. Id. at 338.

83. Id. at *337.*

84. Id. at 338.

85. Id.

86. See, e.g., Texas Probate Code § 38 specifies the "Persons Who Take upon Intestacy." Bankston v.

ple, in the famous partition action *Bruni v. Vidaurri*,[87] there were more than 170 different claimants to joint ownership interests, who were "some of the descendants, and successors in title to descendants of Jose Vasques Borrego" who was granted 240,000 acres by the Spanish government in 1750.[88] Sooner or later, undivided owners, whether family members or not, decide to divide up their undivided interests. That is when they seek partition.

Joint ownership between former spouses is also a frequent context for partition, after a property settlement in a divorce action has transformed what had been joint management community property into joint ownership between the ex-spouses. For example, in *Ware* v. *Ware*[89] the Court of Appeals approved the partition of real estate which had been community property. The divorce decree ordered that the property be sold at an appraised price, and that one spouse could remain on the property until it was sold. When the property did not sell at the appraised price, the non-resident spouse sought partition.[90] Although relitigation of a property division upon divorce is not allowed under *Baxter* v. *Ruddle*,[91] if the former spouses have become joint owners of what was once community property, partition of the jointly owned property often occurs.[92]

When a marriage ends in death rather than in divorce, the deceased spouse's half of what had been community property becomes a joint ownership interest which passes by will or inheritance. The other undivided half of the community property is retained by the surviving spouse.[93] When the surviving spouse dies, his or her undivided half interest independently passes under that spouse's will or by inheritance to that spouse's heirs. The result is often joint ownership among two groups of heirs or devisees, who may not know each other or may not get along. Such a situation typically leads to partition.

Occasionally, partition occurs in connection with bankruptcy. For example, *in In re County Management*,[94] an unresolved Texas state court action to partition mineral interests in 113 acres in Lee County complicated a Chapter 11 bankruptcy reorganization. After the state court had appointed a receiver to execute a mineral lease over the entire parcel, a producing well was drilled on the jointly owned parcel. In dismissing the appeal for want of jurisdiction, the Fifth Circuit noted that 'The issue will be who will turn over how much" of the funds from production to the bankruptcy estate." On remand, the bankruptcy court "will be required to take further evidence in order to determine who owns what percentage of the tract and how much the revenues and expenses of the

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Bankston, 206 S.W.2d 839 (Tex. Civ. App. 1947, writ ref'd).

87. 166 S.W.2d 81 (Tex. 1942).

88. *Id.* at 84.

89. 809 S.W.2d 569 (Tex. App. 1991).

90. *Id.* at 571-72.

91. *794* S.W.2d 761 (Tex. 1990).

92. *See also* Carter v. Charles, 853 S.W.2d 667 (Tex. App. 1993).

93. See TEX. PROB. CODE ANN. §§ 37.45 (West 1980 & Supp. 1998).

94. *788* F.2d 3 11 (5th Cir. 1986).

95. *Id.* at 312.

well have been . . . . It will certainly apply Texas oil and gas law to the set of facts it determines . . . "[96]

Another example of partition arising out of bankruptcy is *Thomas v. McNair*,[97] in which the Texas Court of Appeals affirmed the trial court's order partitioning a 5.74-acre property in Bee County. Three men, one of them a retired oil company employee, went into the bird business. But the three fell into disagreement. Eventually the younger two of the three joint owners purchased a promissory note secured by a deed of trust on the jointly owned property and sought to foreclose on it. After the third filed for bankruptcy to prevent foreclosure, the trial court ordered partition by sale of the jointly owned property?' In *Dierschke v. Central National Branch of First National Bank at Lubbock*,[99] *the* Texas Court of Appeals affirmed a district court order which enforced an agreement to partition 325 acres of farmland. The farmland had been jointly owned by two sets of undivided interests. One undivided half was owned by a husband and wife individually. The other undivided half was owned by five spendthrift trusts for the couple's five children, with the husband acting as trustee for each of the five trusts.[100] As part of the couple's Chapter 12 bankruptcy reorganization plan, the husband and wife, individually, as well as the husband as trustee for the children's spendthrift trusts, had entered into the written agreement to partition the farmland through appraisal and sale. Eventually, after the husband and wife had defaulted on the Chapter 12 reorganization plan, their undivided half interest was foreclosed and purchased by the bank. The bank then sought to enforce the bankruptcy-based agreement to partition the land. The husband claimed that, when he entered into the partition agreement, he did not have the power, as trustee for the five trusts, to agree to partition. The court disagreed, and held that enforcing the partition agreement to sell the land would merely transform the nature of the trust asset from land into money, without affecting or conveying the five trusts' ownership of an undivided half of the asset."[101]

In these types of situations, and many more, partition is an often useful process designed to break up undivided joint ownership interests. As the following discussion explains, Texas recognizes several different ways in which joint owners can partition.

B. Types of Partition

Texas law contemplates several types of partition which may apply to break up jointly owned oil and gas, and other mineral interests. There are two sets of variables with regard to these different types of partition: (1) whether

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96. *Id.* at 314.
97. 882 S.W.2d 870 (Tex Civ. App. 1994).
98. *Id.* at 874-75.
99. 876 S.W.2d 377 (Tex Civ. App. 1994).
100. *Id.* at 379.
101. *Id.* at 382.

partition is accomplished in kind or by sale and (2) whether partition is voluntary or compelled by court order. Since both voluntary and court-ordered partition usually first consider partition in kind, this first section will address partition methods and the traditional preference for partition in kind, and then address partition by sale, which in Texas is the more usual way to partition mineral, oil and gas interests. The next two sections will describe first the nature of voluntary partition and then the nature of compulsory partition. The procedural complexities of compulsory partition by judicial process are addressed in Part IV, below.

Texas statutes, courts and lawyers sometimes also use the word "partition" in contexts other than the division of undivided joint ownership into separately owned parts. For example, under section 373 of the Texas Probate Code, the executor or administrator of an estate or the heirs or devisees can request partition and either full or partial distribution of both real and personal property in an estate.[102] As noted earlier, Texas community property statutes also use partition in yet a different sense, to refer to reallocation of community property into separate property of one of the spouses through a written agreement.[103] These and other uses of "partition" are outside the purview of this article, which focuses on the division of undivided joint ownership interests.

1. Partition Methods: Partition in Kind or Partition by Sale

A preference for partition in kind over partition by sale is a traditional feature of court-ordered partition.[104] Initially, partition in kind was the only way partition could be accomplished.[105] The Texas partition statute reflects this traditional approach in directing partition in kind unless it would be inequitable to do so.[106] Partition by sale is ordinarily a secondary strategy available only when partition in kind is demonstrably not feasible. Only if the partitioning court has determined that jointly owned property is not capable of division in kind will partition by sale be ordered."[107] However, partition of Texas mineral interests or oil and gas lands follows a rather different approach which presumes that known mineral lands are not generally partitionable in kind because of uncertainties about the unpredictable distribution of minerals.[108] Jointly owned land which is unexplored and undeveloped for minerals is usually partitioned in kind because it is presumed to have an equal distribution of potential

102. TEX. PROB. CODE ANN. § 373 (West 1997).

103. Article 16 § 15 of the Texas Constitution recognizes written partition agreements by spouses regarding transforming community property into separate property interests. Chapter 4, Subchapter B of the Texas Family Code now deals with marital property agreements. Chapter 9, Subchapter C of the Texas Family Code provides special procedures for divisions of property after a divorce decree. See discussion of community property at notes 22-32.

104. Henderson v. Chelsey, 273 S.W. 299, 303 (Tex. Civ. App. 1925, writ denied), *aff'd* 292 S.W. 156 (Tex. 1927).

105. 31 Hen. VIII ch. 1 (1539); 32 Hen VIII ch. 32 (1540).

106. TEX. R. CIV. PRO. 761 (West 1997).

107. TEX. R. CIV. PRO. 770 (West 1997).

108. White v. Smyth, 214 S.W.2d 967 (Tex. 1948).

minerals in every part of the property.[109] Although non-mineral property is routinely partitioned in kind by dividing up the mineral estate according to lines drawn on the surface, as in ***Henderson v. Chelsey***, known mineral lands are usually not partitioned in kind."[110]

Nevertheless, there are a few cases in which Texas courts have partitioned known mineral property in kind. In such cases the partitioning court determined that the minerals were evenly distributed throughout the property, such as when the joint ownership was of an interest in a very small piece of land. For example, in ***Amereda Petroleum Corp.*** v. ***Massad***,[111] the appellate court approved partition in kind of jointly owned interests in a lot 50 feet by 150 feet. The owners of 6/7 of the fee title had leased the mineral rights to one lessee and the fee owners of the other 1/7 had leased their undivided interest in the minerals to another mineral lessee."[112] Moreover, ***in MAPCO,*** Inc. v. ***Carter***[113], discussed above, the Supreme Court of Texas approved a non-statutory equitable partition action which partitioned a large and complicated mineral property in kind.

2. Partition Strategies: Voluntary or Compulsory

Texas law recognizes several strategies for partitioning jointly owned property, including oil and gas and other mineral interests. At the most general level, Texas recognizes two types of partition strategies: voluntary partition agreements among joint owners and compulsory partition by court order. Partition by voluntary agreement among joint owners is possible only when joint owners are capable of cooperative action. Because such voluntary action has the advantage of avoiding the time, expense, and sometimes acrimony, which can accompany compulsory partition through court action. The fact that any joint owner could bring an action for compulsory judicial partition at any time sometimes motivates voluntary agreements to partition.

In some situations, only one partition strategy is suitable. For example, compulsory partition will not be available if the joint owners have agreed not to partition their joint ownership interests.[114] In such circumstances, voluntary partition is the only way to break up the joint ownership arrangement. On the other hand, voluntary partition is generally not even considered by a joint owner who wants to bring partition offensively against another joint owner to gain strategic advantage.[115]

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109. See Henderson v. Chelsey, 273 S.W. 299, 303 (Tex. Civ. App. 1925, writ denied) *aff'd* 292 S.W. 156 (Tex. 1927).

110. *White,* 214 S.W.2d at 973.

Ill. 239 S.W.2d 730 (Tex. Civ. App. 1951, writ ref'd n.r.e.)

112. *Id.* at 734.

113. 817 S.W.2d 686 (Tex. 1991) modifying 808 S.W.2d 262 (Tex. App. 1991, writ granted).

114. See discussion *infra* notes 285-332.

115. See, e.g., Moseley v. Hearrell, 171 S.W.2d 337 (Tex. 1943).

a. Voluntary Partition

As noted earlier, an agreement to partition is often the fiit course of action considered when joint owners mutually decide to break up their undivided joint ownership interests into separately owned parts. Voluntary partition in kind is a simple concept. All of the joint owners agree either that each joint owner will separately own a particular part of the property or that the jointly owned property will be sold and the proceeds divided proportionately among the former joint owners. Often voluntary partition by sale is not even viewed as partition by joint owners who simply decide to sell the jointly owned property and to divide the proceeds. Voluntary partition is more apparent when joint owners agree to divide jointly owned property into separately owned parts through voluntary partition in kind.

Texas is distinctive in enforcing oral partition agreements among partitioning joint owners. For over a century, Texas courts have held that the statute of frauds does not apply to division of joint ownership by partition agreement.[116] However, as explained below, written partition agreements have the advantage of avoiding disputes and uncertainty. With regard to real property, recorded cross-conveyances, sometimes called partition deeds, may be important to prevent a bona fide purchaser from acquiring an undivided interest in what the land records would otherwise still show is jointly owned property.

Lundgrebe v. Rock Hill Oil Company,[117] illustrates the way voluntary partition agreements work in Texas. ***Lundgrebe*** involved a pooled oil and gas lease of three parcels of land in Goliad County. All three parcels had been owned by a husband and wife as community property. When the husband died, his will devised a life estate in his half interest in each of the three parcels to his wife, along with a power to sell these half interests in the three parcels. The couple's nine children jointly received the remainder interest in this half of the three parcels. The surviving wife owned outright the other half of the three parcels, in addition to the life estate and power of sale with regard to her deceased husband's half of the three parcels. She later executed an oil and gas lease of the three parcels. All of the nine children either joined in or ratified her oil and gas lease."[118]

When the wife died, the nine children inherited their mother's half interest in two of the three parcels as joint owners.[119] Since at their mother's death the children's joint remainder interests vested in possession with regard to the other half, the children jointly owned the two parcels. The children then agreed to partition the two parcels of land, which were surveyed and divided into tracts. They executed partition deeds which resulted in sole ownership by each child of various parts of the land. The court held that the partition agreement and deeds

116. See Aycock v. Kimbrough, 12 S.W. 71 (Tex. 1887).

117. 273 S.W.2d 636 (Tex. Civ. App. 1954, writ ref'd n.r.e.).

118. *Id.* at 637. She also conveyed one of the three parcels to one of the children under her power of sale.

119. *Id.* at 638.

effectively divided the surface estate.[120] However, their mother's oil and gas lease, which predated the partition agreement, remained a pooled community lease of the interests of all nine children.[121] As a result, all nine children were entitled to share proportionately in the royalties from a producing gas well on one of the tracts.'"

The terms of a partition agreement are often quite simple. Jointly owned property is physically divided into specified parts. The joint owners agree that each of the parts will be held in separate ownership by one of the joint owners. Usually, the resulting separately owned parts are designed to be proportionate to the joint owners' fractional joint ownership interests in the undivided whole. When partition is of real property interests, cross deeds are often exchanged, and recorded, because a partition agreement alone does not change the title to the land. In partition deeds, each joint owner conveys to each of the other joint owners his or her undivided interest in the part of the land allotted to each of the other partitioning joint owners.[123] In exchange, each joint owner will receive from all of the other joint owners deeds to their undivided interests in the parcel which the partition agreement allotted to that particular joint owner. Usually partition deeds are general warranty deeds so that if the title to one of the partitioned parts fails, all of the joint owners will share proportionately, in any loss.[124] Partition deeds may also disclaim owelty so that the title to the partitioned parts will be clear of potential owelty liens.

One noteworthy feature of voluntary partition agreements in Texas is that they have been held to work an ouster of an excluded joint owner for the purposes of adverse possession. The exclusion of a joint owner from a partition agreement effectively repudiates, or ousts, that joint owner's claim to joint ownership. This excluded or repudiated share is then susceptible to adverse possession by those who occupy the partitioned parts of the property for the period required by the statute of limitation.[125] In *Republic Production Co. v.* Lee, the Commission of Appeals ruled that when one joint owner was excluded from a partition agreement which allocated all of the jointly owned property among the partitioning joint owners, "such act of partition, when followed by adverse possession, even if wholly void as against the excluded cotenant, constitutes a complete and unequivocal repudiation of the cotenancy relationship."'%

The Republic Production case involved a 1/10 interest in some land in

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120. *Id.* at 639.

121. *Id.*

122. *Id.* at 640.

123. *Cf.* Houston Oil Co. v. Kirkindall, 145 S.W.2d 1074 (Tex. 1941) (regarding a defective partition agreement held not to constitute a conveyance). *Cf.* 57 TEX. JUR. 3d, Partition § 6 (19%).

124. However, the doctrine of after-acquired title, also known as estoppel by deed, or the *Duhig* Rule, does not apply to partition agreements (*Zapatero* v. Canales, 730 S.W.2d 111, 116-17 (Tex. App. 1987, writ ref'd n.r.e.)) or to partition deeds (Hamilton v. Hamilton, 280 S.W.2d 588, 593-94 (Tex. 1955)). See Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940).

125. Republic Production Co. v. Lee, 121 S.W.2d 973 (Tex. Comm'n App. 1938).

126. *Id.* at 977, citing Honea v. Arledge, 120 S.W. 508 (Tex. Civ. App. 1909, writ ref'd), with regard to "the effect of a partition, so far as an ouster is concerned".

Rusk County.[127] A 1/5 interest had been owned by Claudia, one of five children who inherited joint ownership interests from their father. Claudia married and moved to Utah. When she died intestate, her surviving husband received half of her 1/5 interest (the 1/10 interest at issue in the case). Several years later, the jointly owned land in Texas was partitioned among Claudia's relatives, who took no account of any possible interest Claudia may have had, much less the 1/10 interest inherited by Claudia's husband. After petroleum was discovered in the area, Claudia's husband asserted his undivided 1/10 joint ownership interest.[128] But he was too late; adverse possession initiated by the ouster embodied in the partition agreement had already vested title in Claudia's Texas kin who had been occupying the partitioned tracts.[129]

Sometimes, the "equitable partition doctrine" is misconstrued as affording yet another type of voluntary partition. However, the equitable partition doctrine does not refer to a form of partition, but rather to a remedial doctrine which can arise when one joint owner unilaterally has purported to sell full ownership of a specific part of jointly owned land.[130] Such a unilateral conveyance by a joint owner does not partition, or otherwise affect, the undivided joint ownership arrangement. One joint owner, acting alone, can only convey her undivided joint ownership interest.[131] As will be discussed more fully below, the equita-, ble partition doctrine[132] may be applied later, if the property is partitioned in kind by court order.

It is important to bear in mind that, for all of the practical advantages of voluntary partition, it requires unanimous consent by all of the joint owners. Particularly with regard to highly fractionated mineral, oil and gas interests, which may be held by dozens or hundreds of joint owners, unanimous agreement can be very difficult to secure. Moreover, the strategic bargaining position of the last of the joint owners whose agreement is needed for a voluntary partition can make voluntary partition more of a theoretical possibility than a real opportunity.

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127. *Id.*

128. *Id.* at 976.

129. See *id.* at 979.

130. See discussion in text *infra* notes 228-34.

131. See Larrison v. Walker, 149 S.W.2d 172, 177 (Tex. Civ. App. 1941, writ ref'd.)

132. A partitioning court may exercise its equitable powers to protect the expectations of a purchaser from one of the joint owners by allocating to the purchaser the specific part of the jointly owned property which one of the joint owners had earlier conveyed to that purchaser. Theoretically, in the subsequent partition action, the partitioning court allocates the portion of the land, which the joint owner had conveyed to the purchaser, to the former joint owner, who had earlier unilaterally conveyed it. Then, based on estoppel by deed, the allocated portion automatically inures to the benefit of the purchaser. The doctrine of equitable partition is the basis for a partitioning trial court to equitably allocate that specific part directly to the purchaser. Among the oil and gas and mineral decisions which have discussed the concept of equitable partition are White v. Smyth, 214 S.W.2d 967 (Tex. 1948) and Barfield v. Holland, 844 S.W.2d 759 (Tex. App. 1992, writ denied), both of which declined to follow the doctrine under the circumstances of these cases. See discussion *infra* notes 229-34.

b. Compulsory Partition

In Texas, as in other United States jurisdictions, any joint owner of a possessory interest has the right to break up her undivided joint ownership arrangement through involuntary partition by court action.[133] It is unnecessary for the plaintiff in a partition action to have attempted to voluntarily partition by agreement among the joint owners before filing for court-ordered partition. Any joint owner of a possessory interest is absolutely entitled to a court decree separating that joint owner's interest from the interests of the other joint owners.[134] Emphasizing the individualism and free enterprise long associated with doing business in Texas, the Court of Civil Appeals in *Lichtenstein v. Lichtenstein Building* Corp. explained some of the reasons why Texas courts welcome compulsory partition actions: "Partition is a right much favored by the courts upon the ground that it not only secures peace, but promotes industry and enterprise; that each should have his own. The mere difficulty of effecting it is not regarded as a sufficient reason for refusing to grant it."[135]

The right to compulsory partition is a very old incident of joint ownership, dating back to the second Statute of Westminster in 1272.[136] When Texas adopted its first partition legislation in 185 1, the statute recognized that the equitable powers Texas courts would also continue to provide an alternative partition process.'" At present, the right to partition both real and personal property is reflected in Texas Property Code § 23.001: "A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure."[138]

Texas Property Code § 23.002 provides in subsection (a) that "A joint owner or a claimant of real property or an interest in real property may bring an action to partition the property or interest in a district court of a county in which any part of the property is located." The following subsection (b) mandates that "A joint owner of personal property must bring an action to partition the property in a court that has jurisdiction over the value of the property."[139] As a result, unless there is an agreement among joint owners that they will not partition jointly owned property, compulsory partition is always available to break up possessory joint ownership into individually owned parts.

However, the right to compulsory partition does not apply to all types of jointly owned mineral, oil and gas interests. The Court of Appeals in

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133. See Moseley v. Hearrell, 171 S.W.2d 337 (Tex. 1943).

134. See Dierschke v. Central National Branch of First National Bank at Lubbock, 876 S.W.2d 377, 379-80 (Tex. Civ. Ct. App. 1994).

135. 442 S.W.2d 765,768 (Tex. Civ. App. 1969).

136. FREEMAN, *supra* 70, at 496.

137. Acts Dec. 24, 1851 at 20.

138. See TEX. PROP. CODE ANN. § 23.001 (West 1995). See also TEX. R. CIV. PRO. 756 et. seq. [West 1997).

139. See TEX. PROP. CODE ANN. § 23.002(a) (West 1995).

Lichtenstein insisted that compulsory partition is only available with regard to jointly owned possessory interests.[140] It does not apply to all of the varied types of jointly owned nonpossessory mineral, oil and gas interests, although these nonpossessory interests are sometimes described as having been partitioned by voluntary agreement.[141] With regard to mineral, oil and gas interests, the exclusion of nonpossessory interests makes compulsory partition available only with regard to undivided joint ownership of the full fee simple, the mineral estate and the mineral lease, which in Texas conveys a possessory interest in the minerals. Only when undivided ownership also involves joint possession of the same interest in land will compulsory partition apply.'"

In complicated arrangements involving multiple types and levels of mineral, oil and gas interests, this limitation to possessory interests means that undivided joint ownership of a mineral lease can be partitioned, but jointly owned royalty interests associated with that lease will not be partitioned by court action.[143] If the mineral estate is jointly owned, it is partitionable among the mineral estate's joint owners. For example, in Texas *Oil & Gus Corp. v. Ostrom,* the Court of Appeals held that mineral estate lessors and the owners of royalty interests in the same lease were not joint owners of the same possessory interest and therefore were not entitled to compulsory partition of their two different types of interests.[144]

The Court of Appeals *in Gilbreath* v. *Douglas,'"* explained that only joint owners who share undivided possession are entitled to bring partition against each other. The court noted that owners of nonpossessory interests, or of different types of interests, are not entitled to partition. Because a mineral lessee holds a different type of right from that of the owner of a royalty based on the same lease, these interests are not entitled to compulsory partition. The *Gilbreath* court insisted, "Necessary requisites to a partition, be it an estate in land or minerals, are that the partitioners must be joint owners of the interests sought to be partitioned and the party or parties seeking the partition must have an equal right to possession with the other joint owners."[146]

In *Gilbreath,* partition in kind of the oil, gas or other minerals in a quarter section of land in Wheeler County was limited in time as well as space. The partition was limited to "The SE 1/4 of Section 58 to a subsurface depth of 2512 feet [which] is the largest unit in which the cotenancy of all parties hereto exists in common. . . . That horizontal area contained a cotenancy of all parties

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140. 442 S.W.2d 765, 767-68 (Tex. Civ. App. 1969).

141. See Lane v. Hughes, 228 S.W.2d 986 (Tex. Civ. App. 1950). Texas court decisions which describe an owner of a royalty interest as having voluntarily "partitioned" a royalty appear to refer to a joint owner having subdivided a jointly owned royalty interest by conveying part of that fractional royalty to others. For example, in Winslow v. Acker, 781 S.W.2d 322 (Tex. App. 1989, writ denied) a unilateral transfer of a fractional portion of a fractional royalty was described as a partition of a royalty.

142. See *Lane,* 288 S.W.2d at 988.

143. See Texas Oil & Gas Corp. v. Ostrom, 638 S.W.2d 231 (Tex. App. 1982, writ ref'd n.r.e.).

144. *Id.* at 234.

145. 388 S.W.2d 279 (Tex. Civ. App. 1965, writ ref'd n.r e.)

146. *Id.* at 218.

hereto and such interests were in common to that depth only."[147] The Court also limited the duration of the partition to "a period of two years from July 8, 1963, 'and for so long thereafter as oil, gas, condensate, and distillate or other gaseous substance is produced in paying quantities from any well situated thereon.'"[148] The Court of Appeal explained that "This limitation was based on a Pooling and Unitization Agreement which pooled certain appellee's mineral interests in and under" the partitioned quarter section.'@

The opinion in *Gilbreath* exemplifies Texas courts' typically pragmatic approach to determining the nature and extent of partitionable mineral, oil and gas interests:

> Assuming the court had not limited the partition as to time, the pooling agreement itself places a limitation upon the mineral estate held thereunder according to its own terms. A partition in kind can not operate as a conveyance but is simply a distribution of interests in land between persons who are part owners. *Arnold v. Cauble*, 49 Tex. 527. A partition in perpetuity under the facts and circumstances of this case would be contrary to the expressed limitation placed on some of the [parties'] mineral estate."[150]

Partitioning the largest possible property in which joint owners held coextensive undivided possessory rights, in terms of time and of space and of interest was appropriate. This practical strategy is typical of the way in which Texas courts partition possessory joint ownership interests in oil and gas and other minerals.

IV. COMPULSORY PARTITION PROCESSES IN TEXAS

Within Texas' blended system of law and equity, there are several different processes through which Texas courts may carry out forced partition of jointly owned possessory mineral, oil and gas interests. In addition to the partition procedures which apply to possessory real property interests in minerals, oil and gas,[151] there are also procedures for partitioning jointly owned personal property, such as drilling equipment, pipe and other equipment."' Under the Outer Continental Shelf Lands Act, federal courts will also follow these Texas procedures when partitioning jointly owned oil and gas facilities located in Texas offshore areas.[153]

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147. *Id.* at *282.*
148. See *id.* at 281.
149. Id.
150. *Id.*
151. TEX. PROPERTY CODE ANN. ~23.001 (West 1995); TEX. R. CIV. PRO. 756-771 (West 1997). The original partition statute in Texas was enacted in 1851 (Act Dec. 24, 1851, at 20). During the early decades of the-twentieth century, mineral interests were specifically included in the statute as partitionable property.
152. TEX. R. CIV. PRO. 772-775 (West 1997).
153. See EP Operating Limited Partnership v. Placid Oil Co., 26 F.3d 563 (5th Cir. 1994).

A. Personal Property

Compulsory partition of personal property related to mineral, oil or gas production is governed by Texas Rules of Civil Procedure 773-775 which direct that such partition will normally be in kind, unless the "personal property will not admit of a fair and equitable partition."[154] In the latter circumstance, the personal property can be sold under Texas Rule of Civil Procedure 775 and the proceeds distributed among the former joint owners. The statutory partition procedure which applies to personal property"' is considerably simpler than the statutory process which applies to partition of real property. There may be a jury trial to determine the value of each article of personal property.[156] However, partitioning personal property does not require the complex, multi-phased process which applies to statutory partition of real property in kind. In practice, equipment associated with real property, such as mineral, oil or gas production equipment, is frequently partitioned through the same partition method (in kind or by sale) as that used for the jointly owned real property with which it is associated.

B. Real Property

Texas' distinctive blend of law and equity jurisdiction is reflected in the two different procedures available for compulsory partition of Texas real property: equitable partition and statutory partition.[157] Texas' statutory partition process closely resembles the cumbersome English common law action which dates back to the thirteenth century.[158] Equitable partition of joint ownership without going through the statutory process is usually somewhat simpler. Moreover, because Texas trial court jurisdiction includes blended equity powers, partition proceedings which fail to satisfy statutory requirements may nevertheless validly partition jointly owned property.[159]

1. Equitable Action to Partition

In *Thomas v. Southwestern Settlement & Development Company* the Supreme Court of Texas explained the origins of equitable partition:

> At a very early date [in England] courts of equity assumed jurisdiction in cases of partition, and even after partition at common law was extended by statute to joint tenancies and tenancies in common, the remedy in the law courts was still so narrow and imperfect that the jurisdiction of equity in partition soon became almost exclusive. . . . In this state partition by suit, whether brought under the statute or without the aid of the statute,

154. TEX. R. CIV. PRO. 775 (West 1997).
155. TEX. PROPERTY CODE ANN. § 23.001 (West 1995); TEX. R. CIV. PRO. 772 -775 (West 1997).
156. TEX. R. CIV. PRO. 773 (West 1997).
157. See TEX. R. CIV. PRO. 756 et seq. (West 1997).
158. See FREEMAN *supra* note 70, at 496-511.
159. See Pool v. Lamon, 28 S.W. 363 (Tex. Civ. App. 1894).

does not proceed independently of the rules of equity.'@'

Non-statutory equitable partition actions have been a frequent context in which the Texas Supreme Court has insisted on limiting the equitable powers of Texas trial courts. One of the oldest of these cases is *Arnold* v. ***Cauble***,[161] in which the Texas Supreme Court reversed a trial court's order partitioning a farm. The farm had been community property until the death of the husband. When the husband died, his heirs inherited his half interest in the farm, with the other half interest remaining in his widow. Apparently believing that she owned all of the farm, the widow sold the south half of the farm to a first grantee and, later, sold the north half to a second grantee. The trial court partitioned the north half to the heirs of the deceased husband and then exercised the court's equitable powers to move the second grantee down to the south half to share equally with the widow's first grantee. Ruling that this Solomonic solution exceeded the equitable powers of the trial court, the Texas Supreme Court reversed and held that the trial court's equity powers did not reach so **far.**[162]

The Texas Supreme Court's ruling *in Thomas v. Southwestern Settlement* & Dev. Co., noted above, is a somewhat more modem instance of the constraints placed on equitable relief in compulsory partition **actions.**[163] In ***Thom***-us, the equitable partition action involved a **3/35** interest in several thousand acres **in Hardin** County. This **3/35** interest had been retained by three of seven heirs of a man named Duck who had owned an undivided **1/5** interest in the land. The Houston Oil Company mistakenly thought it had purchased all of the joint ownership interests held by all of the heirs of Duck from a man named Vincent, who purported to act as attorney in fact for **all** seven of the heirs of Duck. Unfortunately for Houston Oil, Vincent had no power of attorney from three of the seven Duck **heirs.**[164] However, believing that it owned all of the Duck interests, Houston Oil purported to convey the surface to Southwestern Settlement, and retained what Houston Oil thought was the whole severed mineral estate. Later, Houston Oil conveyed an undivided one-half interest in its retained minerals to the Republic Production **Company.**[165] The Texas Supreme Court ruled that, even exercising broad equitable jurisdiction, the trial court could not validate the severance of the whole mineral estate from the whole surface estate, because Houston Oil never received title to the **3/35** interest in both surface and unsevered minerals held by the three Duck **heirs.**[166] The

160. 123 **S.W.2d** 290,296 **(Tex.** 1939).

161. 49 Tex. 527 (1878).

162. This venerable Texas case brings to mind Mark Twain's story about Slide Mountain, one of the chapters in Mark Twain's ROUGHING IT (1870) **(H.** Smith and E. Branch, eds. 1993 edition) at 221-227. This is "the great land-slide case of ***Hyde vs. Morgan,"*** *Id.* at 220, which Mark Twain spins into an amusing yarn about two miners in Nevada territory. A landslide sent one miner's property down the mountainside where it came to test on top of the property of another miner. The court ruled that them was no liability because it was an act of God, but noted that perhaps the two properties could continue to coexist, one on top of the other.

163. 123 **S.W.2d** 290 **(Tex.** 1939).

164. ***Id.*** at 292.

165. ***Id.***

166. ***Id.*** at 300.

holders of these unpartitioned joint ownership interests had not authorized any conveyance, much less severance, of their undivided interests in the full fee. Their joint ownership interests remained just as undivided and unsevered as when they were inherited from Duck. The 3/35 interests could be partitioned. However, any partition action would result in these interests owning, either in kind or in money value, 3/35 of the full fee simple absolute, including both the surface and the unsevered mineral estate.

Among the most interesting recent examples of an equitable partition action brought outside of the Texas partition statute, is *MAPCO, Inc. v. Carter.*[167] As previously discussed, the *MAPCO,* Inc. partition case involved a hydrocarbon storage cavern which had been leached into a salt dome by one joint owner, without the consent of the other joint owners.[168] The last of the published opinions from the Court of Appeals emphasized the equity powers of the trial court in an equitable partition action brought under the general equity jurisdiction of Texas district courts:

> A partition suit has been declared an equitable proceeding with appropriate relief reposing in the clear, clean conscience of the chancellor sitting in equity. One of the proudest boasts of Texas law and jurisprudence is that our District Courts sit as both judges at law and chancellors in equity in a perfectly blended system of law and equity. The trial court was well within its prerogatives and powers to apply the rules of equity when it adjusted the respective rights, duties and obligations between the parties. Indeed, the chancellor had a duty to do so. Historically, the king's chancellor was to keep the king's conscience clear and to see to it that justice was done and that right dealing and fair dealing existed between and amongst the parties. Historically and traditionally, the equity side of the *court* acts *in personam.* Historically, the chancellor in England was a high, important churchman.[169]

The Texas Supreme Court reversed one part of the Court of Appeals ruling which approved an award of "equitable owelty" amounting to $450,000 against the parent corporation of the joint owner which leached the cavern in the salt dome.[170] This reversal was based on the fact that the parent corporation had not been a party to the partition action. Since the parties did not contest the equitable partition itself, the Supreme Court of Texas did not disturb other parts of the Court of Appeals decision."[171] It is noteworthy that the Texas Supreme Court's ruling *in MAPCO, Inc.,* was similar to the court's ruling in *Thomas*[172] a half century earlier, and was also like the decision in *Arnold*[173] in the century before. In all of these decisions, the Supreme Court of Texas recognized the legitimacy of non-statutory equitable partition. But, at the same time, the Texas

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167. 817 S.W.2d 686 (Tex. 1991), *aff'g in part* 808 S.W.2d 262 (Tex. App. 1991, writ granted). See discussion *supra* at note 73.

168. 808 S.W.2d 262, 266-67.

169. *Id.* at 269 (Tex. App. 1991, writ granted), *aff'd in part,* 817 S.W.2d 686 (Tex. 1991).

170. 817 S.W.2d 686 (Tex. 1991).

171. *Id.* at 687.

172. 123 S.W.2d 290 (Tex. 1939).

173. 49 Tex. 527 (1878).

Supreme Court insisted on limits to the equitable powers of Texas trial courts in equitable partition actions. As the Texas Supreme Court noted in *MAPCO, Inc.*, usual rules of civil procedure, including jurisdiction over the parties whose property is affected by the partitioning court's equitable decision, continue to constrain the expansiveness and creativity of equitable partition actions.[174]

2. Statutory Partition Actions

The statutory partition process in Texas is much more structured, although the equitable background of all partition actions remains under the Texas Rules of Civil Procedure which relate to partition: 'The rules of equity . . . shall govern in proceedings for partition in all respects not provided for by law or these rules."[175] With regard to real property, the Texas statutory partition process, under §§ 23.001 through 23.005 of the Texas Property Code and Rules 756 through 778 of the Texas Rules of Civil Procedure, establishes a three-phase partition procedure, two phases of which result in separate appealable judgments, if partition in kind is ordered.'"

In the three-phase partition process which applies to possessory real property interests, the initial phase of a partition action used to be described as interlocutory.[177] However, this phase of partition results in a final judgment which is conclusive, unless reversed on appeal, with regard such matters as partitionability, the fractional interests of the parties, and whether the property is to be partitioned in kind or by sale.[178] If partition is to be in kind, the first phase also determines who the commissioners are to be and what instructions the commissioners are to follow in dividing up the real property, including whether the "equitable partition doctrine" should be applied to allocate a specific portion to an earlier purchaser from one of the joint owners.

Under Texas Rule of Civil Procedure 760 the court determines the fractional "share or interest of each of the joint owners or claimants in the real estate sought to be divided and all questions of law or equity affecting the title to the land which may arise." Under Rule 761, the partitioning court is directed to "determine before entering the [initial] decree of partition whether the property or any part thereof, is susceptible of partition," which in this context also means whether the property is susceptible to partition in kind. Under Rule 770, if the court determines that the property is not partitionable in kind, the court will order partition by sale.[179] If the land is partitionable in kind, under Rule 761 the court appoints three or more commissioners to work out the physical division of the property and instructs the commissioners with regard to the

174. 817 S.W.2d 686, 687-88 (Tex. 1991).

175. TEX. R. CIV. PRO. 776 (West 1967 & Supp. 1997).

176. See Griffin v. Wolfe, 610 S.W.2d 466 (Tex. 1980); Thomas v. McNair, 882 S.W.2d 870, 876 (Tex. App. 1994, no writ).

177. See 57 TEX. JUR. 3d, *Partition* § 50 (1996). *Cf.* Redden v. Hickey, 308 S.W.2d 225,229 (Tex. App. 1957, writ ref'd n.r.e.).

178. TEX. R. CIV. PRO. 761 (West 1967 & Supp. 1997).

179. TEX. R. CIV. PRO. 770. See 57 TEX. JUR. 3d, *Partition* § 61 (1996).

proportion to be set apart to each joint owner, as well as equitable considerations, such as improvements made by one of the joint owners.""'

Rules 758 and 759 provide for citation by publication with regard to a joint ownership interest in real property held by an unknown person or by a person whose residence is unknown. If a jury trial is demanded, the jury determines all factual issues."' At this stage, the court provides instructions to the commissioners regarding such issues as application of the doctrine of equitable partition'" and other equitable considerations such as improvements. At the conclusion of this first phase of statutory partition, the court enters an initial partition decree which is subject to immediate appeal.[183]

The second phase of the statutory partition process applicable to jointly owned real property involves the work of commissioners, described in Rule 761 as "three or more competent and disinterested persons,"'" who implement the initial partition decree by physically dividing up the jointly owned property into the fractional parts determined by the court in its initial partition decree. Under Rule 766, "The commissioners, or a majority of them, shall proceed to partition the real estate described in the [initial partition] decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules."[185] The property may be surveyed by order of the court under Rule 764.

In *Yturria* v. *Kimbro*, the Court of Appeals explained the unique role of commissioners in Texas partition actions:

> Although the commissioners exercise no judicial authority, neither do they exercise a purely ministerial duty without the exercise of some independent discretion on their part. A given quantity of real property to be partitioned is not generally a fungible mass, but may contain within its borders very different terrains, frontages, or other characteristics more or less valuable. Matters of valuation concerning the property itself and objective considerations concerning the best manner of dividing the property in accordance with the instructions given while retaining the highest value for the partitioned tracts, are entrusted to the commissioners and not the judge or jury.[186]

The appointment and work of the commissioners in partition actions echo the thirteenth century English practice of appointing four or five persons as justices of the peace for the purpose of dividing up land inherited by coparceners.[187]

The third phase of the statutory partition process accepts or rejects the report of the commissioners. Under Rule 77 1, if the commissioners' division into separately owned parts appears to have unjustly diminished the value of the

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180. See Sayers v. Pyland, 161 S.W.2d 769 (Tex 1942).
181. See Azios v. Slot, 653 S.W.2d 111 (Tex. App. 1983).
182. See discussion *infra* notes 228-234.
183. TEX. R. CIV. PRO. § 761 (West 1967 & Supp. 1997). See 57 TEX. JUR. 3d, *Partition* § *50* (19%).
184. TEX. R. CIV. PRO. 761 (West 1967 & Supp. 1997).
185. TEX. R. CIV. PRO. 766 (West 1967 & Supp. 1997).
186. 921 S.W.2d 338,343 (Tex. App. 19%).
187. See FREEMAN*supra*te 70, at 496-97.

property or if the partition results in shares not equal to the joint ownership interests determined by the court in its instructions, the report can be challenged. Rule 771 directs that "[i]f the report be found to be erroneous in any material respect, or unequal and unjust, the same shah be rejected, and other commissioners shall be appointed by the Court, and the same proceedings had as in the first instance."[188] This evaluation of the physical division, followed by acceptance or rejection of the commissioners' report, is subject to a second jury trial and results in a second appealable trial court decision, the final partition decree.[189]

With regard to mineral, oil and gas interests, the famous Texas Court of Appeals decision in ***Henderson v. Chesley,*** ruled that, in the first phase of partition, if "there has been no development or exploration of minerals of any kind, in, on, or under the land in question, we think that the court should assume for the purpose of partition that each acre of the land contains an equal amount of minerals and partition by dividing the surface.""" The court affiied the trial court's initial (first-phase) partition decree and endorsed "[t]he assumption that each acre contains an equal amount of undeveloped minerals."[191] The three commissioners had already been appointed, and were to go out and allot the mineral rights to the former joint owners in the famous "checkerboard" pattern of partition associated with ***Henderson*** v. ***Chesley,*** based on the assumption that each acre contains an equal amount of undeveloped minerals.

Later, ***in White*** v. ***Smyth,*** the Texas Supreme Court ruled that the jury had properly found a jointly owned rock asphalt mineral estate to be not partitionable in kind, because it was known mineral land: "[T]he trial court correctly directed its sale and the distribution of the proceeds instead of undertaking to divide it by lines drawn on the surface. There is no reason for assuming, as was done ***in the Henderson-Chesley*** case, where there was no evidence as to the existence of minerals, that each acre of the land contains an equal amount of minerals."[192] One of the joint owners, White, had earlier developed an extensive rock asphalt pit mine on one part of the property under a mineral lease. After surrendering his lease, White, who by then had acquired 1/9 of the mineral estate, physically removed his 1/9 share of the rock asphalt. He mined, processed and sold rock asphalt in an amount which White claimed was equivalent to his 1/9 share. Then he brought a partition action, in which he sought to have the mineral estate partitioned in kind. He wanted the area from which he had taken what he claimed was his 1/9 of the rock asphalt to be allocated to him, either under the theory that he was the "improver" of that portion or under an extension of the doctrine of equitable partition.

However, in the first phase of the partition process, the jury determined

188. TEX. R. CIV. PRO. 771.
189. See Word v. Druthett, 44 Tex. 365 (Tex. 1875); 57 TEX. JUR. 3d, *Partition* § 60 (19%).
190. 273 S.W. 299,303 (Tex. Civ. App. 1925 writ denied).
191. *Id.*
192. 214 S.W.2d 967,974 (Tex. 1948).

that the rock asphalt mineral estate could not be partitioned in kind because of the variable nature of rock asphalt deposits.[193] The court then ordered the mineral estate sold and the proceeds divided among the joint owners. In connection with the partition, the jury also found White liable to account to the other joint owners for their proportionate interests in the jointly owned rock asphalt which he had mined, processed and sold, after surrendering his lease. The Texas Supreme Court let stand the district court's first-phase partition decree, which ordered that the jointly owned property be sold.[194] In addition the decree required White to account to his joint owners for $22,382.72, plus interest, which was the value of 8/9 of the net profits White had realized from mining, processing and selling the 397,381.11 tons of rock asphalt which White had removed after he had surrendered his mineral lease.[195] The jury's determination in the first phase of the partition process that partition in kind was not feasible made validation of White's unilateral removal of 1/9 of the rock asphalt impossible and his liability to account to the other joint owners, for all practical purposes, inevitable.

Texas courts are generally quite strict in requiring compulsory partition actions to be brought in the county where the land is located, particularly when real property titles may be affected by a partition action.[196] For example, in *Goolsby v. Bond*,[197] a bankruptcy trustee brought suit in Hunt County to partition land in Andrews County. The Texas Supreme Court held the bankruptcy trustee's partition action was improper because it was brought in the wrong county.[198] The Texas Civil Practice and Remedies Code § 15011 (1997) currently requires that "Actions . . . for partition of real property . . . shall be brought in the county in which all or a part of the property is located."[199]

Although compulsory partition is always at least partly equitable, the "inviolate" right to a trial by jury, guaranteed in Texas Constitution article I, § 15 and article V, § 10, applies to Texas partition actions.[200] For example, in *Azios* v. *Slot*,[201] the Court of Appeal insisted that a factual dispute regarding whether jointly owned land was or was not partitionable in kind should have been tried before a jury, when a timely request for jury trial had been made under Texas Rule of Civil Procedure 216. In *Yturria* v. *Kimbro*,[202] the Court of Appeal followed *Azios* in holding that the right to a jury trial applies to determinations regarding equitable considerations, such as improvements. In *Yturria* one of three joint owners of several tracts of land constructed improvements on land

193. Id. at 969.
194. *Id.* at 974.
195. *Id.* at 969.
196. See Pena v. Sling, 140 S.W.2d 441 (Tex. 1940); 142 S.W.2d 840 (Tex. Civ. App. 1939).
197. 163 S.W.2d 830 (Tex. 1942).
198. *Id.* at 832.
199. TEX. CIV. PRAC. & REM. § 15.011 (West 1997).
200. TEX. CONST. art. I, § 15 & art. V, § 10.
201. 653 S.W.2d 111 (Tex. App. 1983).
202. 921 S.W.2d 338 (Tex. App. 1996).

which became jointly owned after the termination of a trust.[203] The *Yturria* court ruled that such matters as property valuation and division of the tracts are, by statute, issues for the commissioners to determine, and not findings of fact susceptible to determination by a jury.[204] However, factual findings with regard to the accuracy and fairness of the commissioners' report are subject to a jury trial in the third phase of Texas' three-phase statutory partition procedure.[205] In some partition cases, there are two jury trials. The first jury trial considers the partitionability in kind of the jointly owned property and the joint owners' respective interests in it. Then, if partition is ordered in kind, there may be a second jury trial with regard to the allotments made by the commissioners to the partitioning joint owners.

Texas' three-phase process of partition, potentially involving two jury trials and two separate appeals, can make partition of possessory mineral, oil and gas interests a lengthy and technical process. Even in an equitable proceeding for partition, without the appointment of commissioners, the compulsory partition process can be time-consuming and expensive. For example, in *MAPCO, Inc. v. Carter*[206] an equitable partition action discussed above, the partition action began in 1986 and did not conclude until after two Court of Appeals' rulings and the Texas Supreme Court's final remand in 1991. Since Texas has a quite modem single form of common law joint ownership, it is surprising to find Texas courts following such an old-fashioned and cumbersome procedure for partition in kind.

V. CONSEQUENCES OF PARTITION

Although the main objective of both voluntary and compulsory partition is to divide up undivided possessory rights, partition can also have a number of other practical and legal consequences. With regard to partitioning mineral, oil and gas interests, the most important of these consequences are related to title and taxes. In addition, partition can also have other, title-related, consequences, such as ouster, owelty and accounting. The nature of these consequences in any particular case will depend on a number of factors, such as whether partition is in kind or by sale,[207] and whether the jointly owned property is real or personal property.

When partition is voluntary, all joint owners agree either to divide up jointly owned property and to allocate particular parts to each of the former joint owners or to sell the jointly owned property and to divide the proceeds.[208] To a considerable extent, joint owners who agree to partition can

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203. Id. at *340.*

204. *Id.* at 343.

205. Id. at 344.

206. 817 S.W.2d 686 (Tex. 1991).

207. As noted earlier, there is a presumption that all types of jointly owned property will be partitioned in kind. Partition by forced sale is allowed by statute, but limited to circumstances where partition in kind is not equitable or feasible, as is considered the case with regard to jointly owned mineral, oil or gas properties.

208. See text *supra* at notes 116-132; 57 TEX. JUR. 3d, *Partition* §§ *6,* 8-15. As noted *supra* note 124,

control many of the consequences of partition through the provisions of their partition agreement. However, once a partition agreement has been acted upon, for example by executing cross-deeds, it is generally not possible to rescind or to change the partition, even if the agreed partition has generated unforeseen results or was based on mistaken assumptions or even fraud.[209]

In *Goldring v. Goldring*,[210] the Court of Appeals rejected a suit by four children against their father, Phidias. The children sought cancellation of partition deeds and rescission of a partition agreement on the grounds of fraud perpetrated by their father. The partition agreement and subsequent conveyances divided a farm which had been owned by Emma Goldring, the plaintiffs' grandmother and the defendant's mother. The voluntary partition agreement had allotted large parts of the farm to Phidias.[211] Emma Goldring's somewhat ambiguous will was later interpreted to have bequeathed the farm to the four children, and not to have bequeathed to Phidias any interest in the farm, other than the role of serving as trustee for the four children during his life.[212] The Court of Appeals rejected the children's effort, more than a decade after they had agreed to the partition, to set aside the voluntary partition.[213] Finding that there was valid consideration recited in the several cross-deeds and agreements involved in the case, the court was unwilling to unravel the agreed partition, even when the assumptions regarding the joint ownership interests underlying the partition agreement had turned out to have been unfounded.[214] When joint owners agree to break up undivided ownership through voluntary partition, the allocation of the parts of the property has permanent consequences.

A. Title Consequences of Partition in Kind

Partition in kind disentangles joint owners' undivided rights to possession of a whole property into individually owned separate parts. But partition in itself does not directly affect the land title. The Texas Property Code states that, "Except as provided by this chapter, a partition of real property does not affect a right in the property.""[215] In *Hammill & Smith v. Ogden, the Court* of Civil Appeals insisted with regard to a voluntary partition in kind that "[i]t is the established law in this state that a deed of partition does not convey title to the property involved, but merely partitions possession and dissolves tenancy in

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Texas does not apply the Duhig Rule based on an estoppel by deed to partition agreements and partition deeds. Zapatero v. Canales, 730 S.W.2d 111, 116-117 (Tex. App. 1987, writ ref'd n.r.e.); Hamilton v. Hamilton, 280 S.W.2d 588, 593-94 (Tex. 1955). See Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940).

209. *Cf.* Rcdkey v. Rees, 527 P.2d 1150 (Okla. Ct. App. 1974) (One of the joint owners was a trustee without power of sale.); Strait v. Fuller, 334 P.2d 385 (Kan. 1959); Marla E. Mansfield, *A Tale of Two Owners: Real Property Co-Ownership and Mineral Development, 43* ROCKY MTN. MIN. L. INST. § 20.08[2] (1997).

210. 523 S.W.2d 749 (Tex. Civ. App. 1975, writ ref'd n.r.e.).

211. *Id.* at 752.

212. *Id.*

213. *Id.* at 761.

214. *Id.* at 760.

215. TEX. PROP. CODE ANN. § 23.004(c) (West 1995).

common."[216] With regard to compulsory partition, the Court of Civil Appeals in *Bankston* v. *Bankston* emphatically stated that "In a partition suit it is never the intention of a Court to render a judgment which affects-that is, which changes-the title of the parties. The intention of the Court in such a case is always merely to segregate the undivided interests of the parties according to their share, leaving the title unaffected."[217] After partition, the same "conditions and covenants that applied to the property prior to the partition" remain applicable to each part allotted to a former joint owner.[218]

Moreover, Texas courts repeatedly insist that partition actions are not substitutes for actions to try title.[219] Actions to try title and for partition are often brought together in the same suit; but partition is not intended to be a substitute for normal processes for quieting title. Nevertheless, in the decree ending the initial phase of partition in kind, Texas courts usually exercise equitable discretion to determine title issues necessary to decide whether the property can be partitioned in kind, as well as what are the proportionate shares of the joint owners.[220]

Under Texas Property Code § 23.004, a final decree of partition of real property has the effect of warranty deeds to the separated parts from or to each of the former joint owners."[221] If the jointly held title turns out to have been defective in whole or in part, such title warranties will result in all of the former joint owners shouldering proportionate risks of title failure with regard to any part of the partitioned property. Although regulatory matters such as well-spacing, unitization and various regulatory actions of the Texas Railroad Commission affect how practically useful for the purposes of actual mineral, oil or gas production each of the allocated shares will be, Texas courts have not considered the regulation of oil and gas production to be relevant to compulsory partition allocations.

If partition in kind is voluntary, the partition agreement among the joint owners transfers equitable title in severalty to the divided share allotted to each of the former joint owners. Formal conveyances are necessary before the legal title to a separate part allocated by the agreement transfers to the former joint owner to whom it was allotted. Since oral partition agreements are valid in Texas and the Texas title registration statute does not apply to partition agreements, there is no requirement that a partition agreement be recorded. However, recorded cross-conveyances are customary both to preserve clear title and to prevent a bona fide purchaser from later acquiring an undivided interest in the

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216. 163 S.W.2d 725,728 (Tex. Civ. App. 1942). See *also* Houston Oil Co. of Texas v. Kirkindall, 145 S.W.2d 1074 (Tex. 1941).

217. 206 S.W.2d 839, 842 (Tex. Civ. App. 1947, writ ref'd).

218. TEX. PROP. CODE ANN. § 23.004(a) (West 1995).

219. See, e.g., Green v. Churchwell, 222 S.W. 341 (Tex. 1920).

220. TEX. R. CIV. PRO. 760. "Upon the hearing of the cause, the court shall determine . . . all questions of law or equity affecting the title to such land which may arise." *Id.*

221. The Property Code provides that the "court decree confirming a report of commissioners . . . gives a recipient of an interest in the property a title equivalent to a conveyance of the interest by a warranty deed from the other parties int he action." TEX. PROP. CODE ANN. § 23.004(b) (West 1995).

control many of the consequences of partition through the provisions of their partition agreement. However, once a partition agreement has been acted upon, for example by executing cross-deeds, it is generally not possible to rescind or to change the partition, even if the agreed partition has generated unforeseen results or was based on mistaken assumptions or even fraud.[209]

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215. TEX. PROP. CODE ANN. § 23.004(c) (West 1995).

partitioned property from a former joint owner. Such concerns may also lead to the inclusion of express disclaimers of owelty in partition deeds.

When property is partitioned in kind, the shares allocated to the former joint owners are supposed to be equal in value to the former joint owners' proportionate shares of undivided ownership. However, a variety of factors, such as physical features of the property being partitioned, homestead rights, equitable considerations and the like, can make proportional division impossible. To equalize the value of the partitioned shares, partitioning courts have the power to order payment of an equalizing charge known as owelty?" Partition agreements, which voluntarily allocate shares of jointly owned property may also provide for owelty payments to equalize the shares determined by voluntary agreement.[223] After partition, if the owelty payment was not made at the time of partition, a lien for unpaid owelty attaches to the share partitioned subject to owelty. Although court-ordered owelty appears as part of a final partition decree, when partition is by voluntary agreement, it is more difficult to determine the presence of a lien for owelty unless a partition deed expressly attaches or disclaims owelty.

The Supreme Court of Texas recently considered the application of the concept of owelty in the context of partitioning mineral interests in *MAPCO,* Inc. v *Carter,* discussed above.[224] The trial court had found that the jointly owned tract of land could be partitioned in kind, including a part of the property where an artificial hydrocarbon storage cavern had been created within a salt dome. The portion of the property where the cavern was located was allotted to the successor to the joint owner which had created the cavern. But that allotment was subject to an owelty lien of $450,000. Moreover, the trial court entered an owelty judgment for $450,600 against the parent corporation of the joint owner which created the cavern. The lien could be foreclosed if the owelty judgment was not paid by the parent corporation of the former joint owner which had created the cavern.[225] The Supreme Court of Texas reversed this owelty payment order because the parent corporation had not been a party to the partition action and there was no basis for entering judgment against the parent corporation under alter ego, piercing the corporate veil or agency theories.[226] The Supreme Court remanded "to the trial court solely to determine against whom the owelty award may properly be entered.'"[227]

Several factors can affect the allocation of title to particular parts of property partitioned in kind to particular joint owners. Three of the more important are the doctrine of equitable partition, improvements and homestead rights. As

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222. See Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942).

223. *Id.* at 772.

224. MAPCO, Inc. v. Carter, 817 S.W.2d 686, 687-88 (Tex. 1991), *aff'g* in part 808 S.W.2d 262 (Tex. App. 1991, writ granted). See discussion *supra* at notes 73-74.

225. *Id.* at 687.

226. *Id. at 688.*

227. *MAPCO, Inc.,* 817 S.W.2d at 688.

discussed above,[228] the doctrine of equitable partition is sometimes the basis for allocating title to a particular portion of the jointly owned property to one of the former joint owners. The purpose of this remedial doctrine is to enable a joint owner to "make good" an earlier unilateral sale of a physical portion of the jointly owned property to a person outside the joint ownership arrangement. If that previously sold portion is greater in value than the selling joint owner's proportionate share of the undivided property, an award of owelty may result. *Larrison* v. *Walker*[229] provides one of the clearest explanations of the Texas doctrine of equitable partition:

> [T]he deeds of a tenant in common to specific parcels of the land are not absolutely void. They are always good as against the grantor. Such deeds do not convey or destroy any of the title of the nonjoining cotenants to their undivided interest to the lands described in the deeds. The nonjoining cotenants may avoid such deeds, if and to the extent only they are injured by such deeds. Though one cotenant has no power to divest the title of other cotenants by selling specific parts of the common property, yet under the well-settled doctrine of equitable partition the court in adjusting the equities of all the interested parties will protect such purchasers by setting aside to them the particular parts purchased, if it can be done without injury to the other owners, where, as here the acreage of the common property is of equal and uniform value; and will set aside to the nonjoining cotenants the equivalent of their interest in all the unsold tract if it is sufficient to satisfy same . . . .[230]

The doctrine simply causes a specific portion of what was once jointly owned property to be allocated as the share of a joint owner who had already sold that portion of the property.

The Supreme Court of Texas in *Thomas v. Southwestern Settlement & Dev. co.*,[231] ruled that the doctrine of equitable partition may also apply to conveyances of mineral estates. The Texas Supreme Court explained in *Thomas* that the doctrine of equitable partition: "[I]s an equitable doctrine which concerns itself primarily in protecting the vendee in the part of the land conveyed to him, when and to the extent that this can be done without prejudice to the cotenants of the whole tract, and which in the attainment of such primary object undertakes fairly to adjust the equities of all of the interested parties."[232] The name, "doctrine of equitable partition," has caused much confusion because, as discussed above, Texas also recognizes a non-statutory process for compulsory partition as "equitable partition."[233] In rejecting a claim to a portion of a mineral estate based on equitable partition doctrine, the Court of Appeals in

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228. See text *supra* accompanying notes 130-32.

229. 149 S.W.2d 172, 177 (Tex. Civ. App. 1941, writ ref'd.)

230. Id. at 177.

231. 123 S.W.2d 290,300 (Tex. 1939).

232. Id. at 296.

233. Under Texas Rule of Civil Procedure 776, "No provision of the statutes or rules relating to partition shall . . . preclude partition in any other manner authorized by the rules of equity, which rules shall govern in proceedings for partition in all respects not provided for by law or these rules." See, e.g., MARCO, Inc. v. Carter, 817 S.W.2d 686 (Tex. 1991).

Barfield v. *Holland*, noted that "We have not found a case . . . that defines the doctrine of equitable partition."[234]

Occasionally, improvements made by one joint owner may affect the allocation of title to particular parts of jointly owned property to particular joint owners. With regard to improvements, partitioning courts will adjust the equities among joint owners by allocating the portion of the property where the improvements are located to the improving joint owner if that can be done without prejudicing the rights of *the* other joint owners.[235] In *White v. Smyth*,[236] the trial court did not consider the pit rock asphalt mine to be an improvement which would affect the allocation of that part, even if the mineral estate had been partitioned in kind. However, improvements can affect the allotment of particular parts of partitioned property to particular former joint owners who have built structures or made other such improvements.

Homestead property, which is protected under the Texas Constitution,[237] can also lead to allocation of title to the portion of the jointly owned property where a homestead has been claimed to the former joint owner claiming the homestead. Such a partition allocation protects the right to occupy which is at the core the homestead right. When more than one joint owner claims a homestead in jointly owned property, adjusting the allocation of partitioned shares can become complicated. Mineral estates and mineral leases are unlikely to be subject to homestead claims. But when full fee ownership or the surface estate are partitioned, the allocation of title to specific parts can be affected by homestead rights to occupy the surface. Were protection of the homestead rights of one of the joint owners to require allocation in kind of a share disproportionate to the undivided interest of the joint owner who claims the homestead, owelty could an be awarded to equalize the values of the allocated shares.[238]

In addition, as noted above, among the more peculiar potential title consequences of partition in kind is the possibility of ouster of a joint owner who was not included in a partition agreement.[239] As noted above, in *Republic Production Co. v. Lee*,[240] the Commission of Appeals ruled that voluntary partition in kind had ousted a nonparticipating joint owner and started the statute of limitations running against the nonparticipating joint owner for the purposes of adverse possession. Although usual rules with regard to adverse possession normally make it difficult for one joint owner to adversely possess against another, repudiation of a joint owner's title "in such a manner as to bring such repudiation to the notice of the other cotenants" is sufficient to start the statute

234. 844 S.W.2d 759,763 (Tex. App. 1992, writ denied).

235. See Cleveland v. Milner, 170 S.W.2d 472 (Tex. 1943).

236. 214 S.W.2d 967 (Tex. 1948).

237. TEX. CONST. art. XVI, § 50.

238. See discussion in text *supra* notes 222-27.

239. When partition in kind is ordered by a court, the procedures in Rules of Civil Procedure 758 and 759 provide for service by publication and appointed representation if there ate joint owners whose identities or residences are unknown. However, voluntary partition does not contemplate representation of all absent or unknown joint owners and can result in ouster.

240. 121 S.W.2d 973 (Tex. Comm'n. App. 1938). See discussion *supra* notes 125-29.

of limitations running for the purposes of adverse possession in Texas.[241]

B. Title Consequences of Partition by Sale

Because of Texas' known-mineral-lands rule discussed above in connection with *White v. Smyth,* statutory partition of property which is producing minerals or oil and gas, will in most cases be accomplished by sale.[242] In the initial phase of the three-phase statutory partition process outlined above, the initial decree of partition is likely to determine that jointly owned mineral or oil and gas property is not partitionable in kind. Under Texas Rule of Civil Procedure 770, the court is then directed to order an execution or receiver's sale,[243] which transfers title to the jointly owned property to a new owner in exchange for money, which is divided proportionately among the former joint owners.[244] After deducting the expenses of the sale, the sales proceeds are allocated among the former joint owners in proportion to their joint ownership interests. From the point of view of a joint owner, partition by sale transforms an undivided right to real property into money.

A glimpse of how this process applies to a mineral lease is provided in *L&M Oil Co. v. Richey*,[245] in which the Court of Civil Appeals affirmed a trial court's confirmation of a receiver's sale of jointly owned oil and gas leases to the highest bidder. The title to the leases transferred to the purchaser at the sale. The proceeds of the partition sale were returned to the court and, after deducting expenses, allocated among the former joint owners according to their respective interests. In some cases, the property is purchased at the partition sale by one or more of the former joint owners.

Because partition will not be allowed to destroy homestead rights, compulsory partition by sale can be blocked if one or more of the joint owners claims a homestead in the jointly owned property.[246] Homestead property cannot not be sold as long as the homestead persists. In *Patterson v. First Nat'1 Bank of Luke Jackson,*[247] the Court of Appeals held that summary judgment was proper against an action for partition by sale of a residence which became jointly owned by the two former spouses after their divorce. Eventually, the interest of one of the former spouses was purchased by a creditor bank at the foreclosure sale of that undivided interest. The court ruled that, because the Texas Constitu-

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241. Spiller v. Woodward, 809 S.W.2d 624 (Tex. App. 1991).

242. But see MAPCO, Inc. v. Carter, 817 S.W.2d 686 (Tex. 1991) (finding partition in kind of a mineral estate to be possible).

243. "Should the court be of the opinion that a fair and equitable division of the teal estate, or any patt thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shah be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests." TEX. R. CIV. PRO. 770.

244. Occasionally, one or more of the joint owners will purchase the property at the sale. See discussion *infra* notes 281-83.

245. 618 S.W.2d 956 (Tex. Civ. App. 1981, writ ref'd. n.r.e).

246. See, e.g., Schultz v. Schultz, 45 S.W.2d 312 (Ct. App. 1931).

247. 921 S.W.2d 240 (Tex. App. 1996).

tion protects a homestead against forced sale, 'The homestead character of a residence is an affiiative defense to a claim for partition by sale."[248] In the case of mineral or oil and gas interests, homestead issues should be rare. However, any surface estate or unsevered fee property could be affected by homestead rights, the existence of which would prevent partition by sale. Were the mineral or oil and gas property already determined to be not partitionable in kind, the joint ownership title would remain in the joint owners until the homestead right was terminated, such as by transfer to other property.

C. Tax Consequences of Partition

Even though joint owners of oil and gas interests, or other mineral interests, are usually concerned about tax consequences, Texas courts do not consider tax consequences in deciding whether and how to partition these jointly owned interests. In *Moseley v. Hearrell*, Mrs. Hearrell objected to forced partition by sale of her jointly owned oil and gas working interest on the grounds that "she would be compelled to pay a large federal income tax out of her receipts from the sale."[249] But the Supreme Court of Texas rejected her argument and held that even a large potential tax liability does not make partition inequitable. The court reasoned that since partition is an absolute, positive right of any joint owner of a possessory interest, the risk that joint ownership interests will be partitioned by sale is inherent in jointly owning possessory interests in Texas oil and gas properties, irrespective of the tax consequences.[250] In contrast, the application of federal tax law often depends on Texas law regarding the nature of joint ownership interests and partition. The United States Supreme Court recognized the impact of state property law regarding oil and gas interests on Federal *tax* law *in Burnet v. Harmel*: *"The* state law creates legal interests, but the federal statute determines when and how they shall be taxed."[251] In *Helvering v. Stuart,* the Supreme Court reminded that whether a taxable "event may or may not occur depends upon the interpretation placed upon the terms of the instrument by state law. Once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability."[252]

This article is not intended to provide an exhaustive treatment of all of the potential tax consequences of partition for any particular joint owner of a Texas mineral or oil and gas property. Tax consequences in individual cases depend on the exact circumstances of the taxpayer and the property. Tax liability can be affected by the nature of the person or entity holding the joint ownership interest, by how long the interest has been held and by other factors. Depending

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248. Id. at 243 (citing Bennet v. State Nat'1 Bank, 623 S.W.2d 719, 722 (Tex. Civ. App. 1981, writ ref'd n.r.e.).

249. Moseley v. Hearrell, 171 S.W.2d 337, 338 (Tex. 1943).

250. White v. Smyth, 214 S.W.2d 967 (Tex. 1948) (holding that known mineral lands should not be partitioned in kind because of the unpredictability of mineral deposits).

251. 287 U.S. 103, 110 (1932).

252. 317 U.S. 154, 162 (1942).

on the situation of a particular joint owner, partition can generate recognition of income or loss and, among other tax consequences, can also affect deductions for depletion and for intangible drilling costs. These and other tax matters are likely to be of great practical importance to a particular partitioning joint owner. Nevertheless, this discussion can point out on some of the more general factors which can affect tax consequences resulting from partition of oil and gas and other mineral interests in Texas.

The most important factor directly affecting the federal tax consequences of partitioning Texas mineral, oil and gas interests is whether partition will be treated as a taxable event or a nontaxable transaction. Although simple partition in kind is often treated as a nontaxable transaction, even partition in kind, if it is a complex partition, can be treated as a potentially taxable exchange, the results of which may or may not qualify for nonrecognition. On the other hand, partition by sale is almost by definition a taxable event, although in some cases, income or gain may not be recognized if the partition sale is structured appropriately. This discussion of the tax consequences of partition focuses primarily on these differences in tax treatment resulting from partition in kind as opposed to partition by sale. The first portion of the discussion will consider the tax consequences of simple partition in kind and then look into more complex partitions in kind, before turning to the tax consequences of partition by sale. A concluding section will address some other tax-related concerns.

1. Tax Consequences of Simple Partition in Kind

For most federal tax purposes a simple partition in kind is not considered a taxable event. The notion that a taxable event is necessary to trigger potential tax liability is implicit in § 1001(a) of the Internal Revenue Code, which refers to gains and losses from "the sale or disposition of property."[253] The transformation of a joint owner's undivided fractional interest in the whole of a jointly owned property into sole ownership of a part of that same property is normally not treated as a disposition of property for tax purposes, unless other factors, such as exchanges of interests in multiple jointly owned properties or owelty awards or reallocation of mortgage liability, accompany the partition in kind.

A 1978 General Counsel Memorandum explains that

> In a partition, the co-owners sever their joint interests. They do not acquire a new or additional interest as a result of a partition. . . . Thus, if the transaction in question is an exchange, each party has given up property in return for other property while if the transaction is a partition, each party has merely severed his interest from the jointly held property.[254]

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253. For a discussion of the concept of a taxable event, see B. BITTKER AND L. LOKKEN, 2 FEDERAL TAXATION OF INCOME, ESTATES GIFTS § 40-4 (2d ed. 1990). Bittker and Lokken explain that although in most cases sales are quite clearly taxable transactions, "Occasionally, it is more difficult to determine whether a 'sale or other disposition 'has occurred within the meaning of § 1001(a)." Among the categories of "ambiguous transactions," the authors include "division of property between co-owners" *Id.* at § 40-44.

254. Gen. Couns. Mem. 37714 (Oct. 5, 1978). This 1978 memorandum modified two earlier memoranda, G.C.M. 23022 and G.C.M. 23757, which had treated divisions of multiple jointly owned properties into sepa-

For example, Revenue Ruling 56-437 determined that eliminating survivorship or changing joint tenancy ownership of corporate stock into two separate stock certificates in the names of each of the joint tenants is a "nontaxable transaction," and "not a sale within the meaning of the income tax law."[255] In *Carrier-es* v. *CIR*, a case involving division of community property, the Tax Court described the treatment of partition as a nontaxable event as a "nonstatutory nonrecognition rule."[256] Whether partition is conceptualized as a nonevent for federal income tax purposes, which does not result in recognition of income or loss, or as "nonrealization,"[257] simple partition in kind is usually not a tax-generating event.

There is remarkably little direct guidance from the courts or from the Internal Revenue Service with regard to tax treatment of partition in kind of oil and gas working interests or other possessory mineral interests.[258] However, private letter rulings with regard to other types of property continue to take the position that "A partition of jointly owned property is not a sale or other disposition of property where the co-owners of the joint property sever their joint interests, but do not acquire a new or additional interest as a result thereof."[259] In short, simple partition in kind is usually viewed as making no real change in ownership when a taxpayer's undivided share of a larger asset is transformed by partition into a solely owned divided share in the same proportion of the same asset.

2. Tax Consequences of Complex Partition in Kind

More complicated instances of partition in kind may, however, be treated as taxable events. When there are multiple parcels of jointly owned real property and joint ownership interests in all of them are exchanged for separate ownership of particular parcels by each of the joint owners, this more complex partition in kind is treated as a potentially taxable exchange, rather than as a nontaxable transaction. This complex type of partition is treated as a taxable event because it involves exchanging one type of interest for a different type of

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rately owned properties of equal value as nontaxable partitions. The Service now treats this type of transfer of joint ownership interests in mom than one property in exchange for sole ownership of a single property as exchanges, which may or may not qualify for nonrecognition treatment under Section 1031(a).

255. Rev. Rul. 56-437, 1956-2 C.B. 507.

256. 64 T.C. 959,963 (1975) *acq., aff'd per curiam*, *552* F.2d 1350 (9th Cir. 1977).

257. Jonathan D. Kaney, Jr., *Federal Income Taxation of Exchanges in Partition of Commonly* Owned *Property: Realization vs. Realism, 8* FLA. ST. U. L. REV. 629 (1980).

258. One exception is a Technical Advice Memorandum, in which the Service provided guidance with regard to percentage depletion deductions under the independent producers' and royalty owners' exemption when community property is partitioned at divorce. Tech. Adv. Mem. 84-29-003 (Match 21, 1984). The memorandum notes that, for qualified oil and gas properties, partition would result in the loss of percentage depletion only to the extent that one of the divorcing spouses acquired more than fifty percent in any particular property. *Id.*

259. Priv. Ltr. Rul. 9709028 (February 28, 1997) (citing Rev. Rul. 56-437, 1956-2 C.B. 507). This private letter ruling involves a revocable trust; but it discusses a number of issues, including recognition of gain or loss under section 1001.

interest. A. frequent example of complex partition in kind occurs when undivided interests in several jointly owned properties are exchanged for sole ownership of a particular property. At one time, the Internal Revenue Service took the position that divisions of this type, which resulted in ownership of property equal in value to the joint ownership interest of each of the joint owners before the partition, were nontaxable events because they were not really exchanges at all.[260] However, Revenue Ruling 79-44 treats such complex partitions as exchanges which are potentially taxable unless the exchange qualifies for nonrecognition under section 103 1 .[261] A General Counsel Memorandum discusses Revenue Ruling 73-476 and the treatment of such conversions of joint ownership of multiple properties into separate ownership of particular properties as exchanges which are "disposition[s] of property" under section 1001(a).[262] This General Counsel Memorandum also considers the potential treatment of such complex partitions as like-kind exchanges for which income is not recognized under section 103 1. With regard to the partition of each of two jointly owned parcels of farmland into two separately owned parcels, the memorandum concludes that this type of complex partition-exchange of multiple properties in which there is "an exchange of interests in real estate held for productive use in the taxpayers' farming business qualifies a like-kind exchange under section 103 1."[263]

Because mineral, oil and gas interests are real property, there is a broad category of potentially "like-kind" real property which may qualify for like-kind-exchange treatment. For example, in the well-known Fifth Circuit decision, *Commissioner v. Crichton*, the court considered a tax case in which, in exchange for her children's one half interest in an improved city lot, Mrs. Crichton transferred "as of equal value an undivided 3/12 interest in the 'oil, gas and other minerals, in, on and under, and that may be produced' from" a tract of unimproved country land.[264] Under the sections of the Internal Revenue Code in effect at the time, the issue was whether the exchange was "solely in kind."[265] The court ruled that "under Louisiana law, mineral rights are interests not in personal but in real property, and . . . the rights exchanged were real [property] rights."[266] The court concluded that there was "no doubt that no gain or loss is realized by one, other than a dealer, from an exchange of real estate, and the distinction intended and made by the statute is the broad one between classes and characters of properties, for instance, between real and

260. Gen. Couns. Mem. 23022 (Dec. 5, 1941) and Gen. Courts. Mem. 23757 (May 28, 1943).

261. Rev. Rul. 79-44, 1979-1 C.B. 265. Section 1031 is concerned with "[e]xchange of Property Held for Productive Use or Investment." Subsection (a) provides for "[n]onrecognition of Gain or Loss from Exchanges Solely in Rind" and states that "No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held for productive use in a trade or business or for investment." I.R.C. §1031(a)(1).

262. Gen. Coun. Mem. 37714 (October 5, 1978).

263. *Id.*

264. *122* F.2d 181 (5th Cir. 1941).

265. *Id.* at 182.

266. *Id.*

personal property. It was not intended to draw any distinction between parcels of real property however dissimilar they may be in location, in attributes and in capacities for profitable use."[267]

A similar Fifth Circuit decision considered the exchange of "an undivided fractional oil, gas and other mineral interest in Ector County, Texas, for overriding royalty and mineral interests in and to the oil in and under named leasehold estates in Gregg County, Texas, until grantee had received oil of the value of $43,000."[268] The Fifth Circuit ruled that this exchange qualified as a like-kind exchange. Both interests were real property mineral interests. "Both were therefore interests in land, interests not in personal but in real property, in short, real [property] rights."[269]

Although the Internal Revenue Service has not expressly addressed the treatment of complex partition of multiple jointly owned oil and gas or mineral interests, the Service's position with regard to unitization provides some indication that application of similar rules would be the probable treatment of such partitions. Unitization is in some ways functionally the reverse of complex partition in kind, since multiple solely owned oil and gas properties are conveyed into the unit which operates the properties jointly. The Internal Revenue Service applies a pool-of-capital or exchange theory with regard to federal tax treatment of unitization as a like-kind transfer under Internal Revenue Code Section 103 1. The Internal Revenue Manual discusses unitization in Sub-Section 460 of § 4232.8:

> The Internal Revenue Service position follows the exchange theory (Rev. Rul. 68-186, 1968-1 C.B. 354). Under this theory, the formation of a unit will fall under the single property provision of IRC 614(b)(3) and constitutes a tax-free exchange of property under the provisions of IRC 1031. IRC 1031 provides that no gain or loss shall be recognized if property held for productive use in a trade or business is exchanged solely for property of a like kind. Therefore, the exchanges of property interests will be deemed to be exchanges of property for like kind, even though one property may be developed and the other property undeveloped. Gain will be recognized only to the extent of any boot received, whether in the form of cash or other property of unlike kind. [IRC 1031(c)] Loss from such an exchange will not be recognized. If the property exchanged was held for more than the required holding period, the recognized gain would qualify for capital gain treatment under IRC 1231. However, the taxpayer will realize ordinary gain if the property exchanged qualifies as IRC 1245 property.[270]

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267. Id. at 182.

268. Fleming v. Campbell, 205 F.2d 549 (5th Cir. 1953).

269. Id. at 550.

270. I.R.M. 4232.8 HB 460, para.5. The Manual notes that the House Ways and Means Committee Report regarding Internal Revenue Code § 1254 recapture (IDC), contains the reminder that, "Also, for purposes of this [IDC recapture] provision, a unitization or pooling arrangement (within the meaning of IRC 614(b)(3)) is not to be treated as a disposition." The Manual also remarks that "[V]ery little has been written dealing with the subject of recapture of IRC 1254 property if boot is received. For details of IRS position, see proposed regulations relating to IRC 1254."

A later paragraph notes that:

> Unitization usually includes not only the mineral interest but also depreciable equipment. Generally, a party to a unitization agreement will have a leasehold cost, which will become his/her basis for the participating interest in the new unit. If the working interest owner has depreciable equipment, the adjusted basis of the depreciable equipment becomes the basis of his/her interest in the unitized equipment. Boot received upon the unitization exchange is considered to be for a sale of property. Gain must be allocated between the equipment and the leasehold.[271]

A General Counsel Memorandum has observed that "tax problems in this area will flow from a characterization of the unitization as an exchange of properties. That it is the proper characterization of the transaction should finally be settled.'"* Since the Service takes a pragmatic approach to the realities of unitization, it would be likely to take a similar approach to a complex partition of multiple jointly owned oil and gas or mineral properties.

Another type of complex partition-in-kind situation involves receipt of additional property or consideration, sometimes called "boot," by a partitioning joint owner, in addition to a proportional part of the jointly owned property. This could occur, for example, when owelty accompanies partition in kind. If partition in kind is accompanied by other transactions or payments, such as reallocation of depletion, owelty payments, or an accounting, then the partition may constitute an exchange not solely in kind under Section 1031(b).[273] An instance of an offsetting note and mortgage liability in connection with partition of farmland is discussed in General Counsel Memorandum 37714,[274] discussed above, and in Revenue Ruling 79-44. In Revenue Ruling 79-44 the Service concludes, "Gain on the exchange is recognized only to the farmer receiving the note and only to the extent of the fair market value of such note."[275] Oil and gas or mineral property has not been specifically addressed in this connection by the Internal Revenue Service. However, compensating property or payments

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271. *Id.* at para. 7.

272. Gen. Coun. Mem. 33536 (June 19, 1967). A footnote to the memorandum provides the following somewhat puzzling explanation of the theories underlying tax treatment of unitization:
Them am three theoretical characterizations of a unitization. Two may be termed exchange theories. The Service adheres to the theory that the participant exchanges all of his interests in his property for an undivided interest in the unit. The other exchange theory is that the participant retains an interest in his own property equal to his percentage interest in the unit, and exchanges the remainder of the interest in his property for his share of the properties contributed by other participants. The third theory may be termed the production arrangement theory. This has had unanimous acceptance by the courts and it concludes that a unitization is merely a convenient arrangement for the production of oil which accomplished not change in the property unit held by the participant. However, under the production arrangement theory when formal cross-conveyancing is involved the courts would presumably agree that an exchange has taken place. *Id.* footnote 1.

273. I.R.C. § 1031(b) provides, with regard to "Gain from Exchanges not Solely in Rind" that "If an exchange would be within the provisions of subsection (a) . . . if it were not for the fact that the property received in exchange consists not only of property permitted by such provisions to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall e recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property."

274. See *supra* note 25 1.

275. Rev. Rul. 79-44, 1979-1 C.B. 265.

would probably be treated as "other property or money" for purposes of section 1031(b), and subject to recognition to the extent of the gain realized on the exchange.[276]

3. Tax Consequences of Partition by Sale

Partition by sale is by definition a taxable event, subject to recognition of gain or loss under section 1001, unless nonrecognition rules can be made to apply.[277] When partition is accomplished by sale, the only realistic basis for nonrecognition is the exception for like-kind exchange under Internal Revenue Code § 1031(a) discussed above.[278] Since in Texas, jointly owned mineral, oil and gas interests are generally partitioned by sale, under the known-mineral-lands rule of *White v. Smyth*,[279] partitions of such interests will usually result in tax treatment as a sale. A partitioning joint owner will realize income under Section 1001, unless a deferred like-kind exchange, under section 1031(a)(3) and the applicable regulations, is arranged. Such a partition transaction would require advance arrangement for a "qualified intermediary" so that the partitioning joint owner never receives any of the cash from the partition sale. If the proceeds from the partition sale are channeled through such an intermediary into a qualifying like-kind real property interest, recognition of income, or loss, may be avoided. But the disposition of the proceeds of the partition sale should be structured to qualify under the highly complex safe-harbor like-kind exchange rules established in Internal Revenue Regulations § 1.103 1 (k)- 1 .[280]

Moreover, when partition by sale results in a joint owner repurchasing her own interest, the partition sale has been treated as not a sale with regard to the repurchased interest.[281] For example, *in Hunnicutt v. Commissioner*,[282] *the*

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276. *Cf.* I.R.M. 4243.8 HB 460, para. 7.

277. Partition is unlikely to be considered an involuntary conversion under Section 1033, although it is theoretically possible for a taxpayer, who has reinvested the proceeds of a partition sale in accordance with the requirements of IRC § 1033, to seek to avoid recognition of income under this section. The sparse decisional law regarding partition in the context of Section 1033 seems to indicate that forced partition against the wishes and over the protests of one or more of the joint owners would not constitute an involuntary conversion permitting nonrecognition of gain or loss. See, e.g., Roth v. Commissioner, 36 T.C.M. (CCH) 82 (1977) (holding that Section 1033(a) did not apply). *Roth* involved a voluntary partition of teal property by sale to which eight joint beneficiaries agreed after the termination of a trust: "[T]he evidence clearly indicates that no such destruction, theft, or seizure occurred." *Id.* The Tax Court went on to advise, "Nor do we believe the court-ordered partition by sale of the property and division of the proceeds among the eight beneficiaries of the trust constitute a requisition or condemnation within the meaning of section 1033(a). It is well established that the term 'requisition or condemnation' as used in the statute means the taking of the property by a governmental authority for the use of the taker." *Id.* In short, partition is unlikely to qualify as an involuntary conversion under Internal Revenue Code § 1033(a).

278. See Internal Revenue Code Section 1031(a) (providing for "[n]onrecognition of gain or loss from exchanges solely in kind."). See discussion *supra* at notes 261-69.

279. 214 S.W.2d 967 (Tex. 1948).

280. 26 C.F.R. § 1.1031(k)-1 (1997), 59 Fed. Reg. 18747 (1994).

281. Rev. Rul. 55-77, 1955-1 C.B. 339. This ruling considered a forced partition sale the purpose of which was to buy-out one of five joint owners of improved teal property. Four of the joint owners, including the Taxpayer, joined in purchasing the property at the partition sale. "Held, under these circumstances, the partition proceedings constituted a nontaxable transaction for Federal income tax purposes. The taxpayer neither realized a taxable gain nor sustained a deductible loss on the sale of the undivided interest in the property which he owned immediately prior to the proceedings. The Taxpayer still owns the interest which he owned

Board of Tax Appeals considered a partition sale involving some jointly owned cotton land in Georgia. Mrs. Mary Hunnicutt owned a two-thirds joint ownership interest, with the other one-third owned by R.L. Moss. Eventually relations between Hunnicutt and Moss soured and resulted in a sale of the land at auction. At the auction Hunnicutt purchased 379.1 acres of the land she had formerly jointly owned with Moss. The Board ruled that:

> [t]he petitioner could not derive a profit from this sale of 379.1 acres, neither could she sustain a loss, because she sold nothing as far as they are concerned The only effect at the auction as to this acreage was to establish the price at which the petitioner purchased the undivided interest of Moss therein."[283]

This pragmatic approach to evaluating actual ownership interests before and after partition has been a consistent feature of the relatively rare court decisions and other guidance regarding the tax consequences of partition by sale.

4. Other Tax-Related Concerns

Attracting the interest of tax assessors or other tax authorities can be among the more worrisome practical consequences of partition. The poignant case of Dr. Lucci illustrates some of the collateral tax problems which partition can generate.[284] A 1986 voluntary partition resulted in Dr. Lucci becoming sole owner of the surface estate of two parcels of land in Bexar County. The tract out of which the two parcels were partitioned had qualified for an agricultural use exemption under Texas Tax Code § 23.5 1.

Two years after the partition, the county tax appraiser denied Lucci's two tracts the agricuhural use exemption and imposed an additional agricultural rollback tax for the previous five years. No notice of the denial of the exemption was required under the statute, only a statement that additional taxes were owed. Unfortunately, the statement regarding additional taxes was sent to one of Lucci's former joint owners, despite Lucci's repeated requests that the assessor carry the two tracts under his name rather than under the name of one of the prior joint owners. According to the Court of Appeals, "Lucci first learned of the denial of the agricultural use exemption-and the taxing unit's claim that he owed almost $20,000 in taxes-in September 1989, when Bexar County and other taxing units filed two suits . . . seeking to collect delinquent taxes, penalties, interests, and costs."[285] Dr. Lucci counterclaimed for denial of his due process rights under 42 U.S.C. § 1983. Eventually, Dr. Lucci prevailed and was awarded his attorney fees and costs. However, he would never have had to

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prior to the sale; hence, he sold nothing. The effect of the sale was to establish a price at which the taxpayer could purchase the undivided interest of one of the other tenants in common." In other words, this repurchase at a partition sale was treated as an acquisition by the taxpayer of an additional undivided interest, but not as a sale of his pre-partition joint ownership interest.

282. 10 B.T.A. 1004, (Bd. Tax App. 1928).

283. *Id.* at 1007.

284. See State v. Southoaks Dev. Co., Inc., 920 S.W.2d 330 (Tex. App. 1995, writ denied).

285. *Id.* at 333.

engage in such litigation had the apparently amicable partition not, as a practical matter, attracted the attention of local authorities and started a chain of adverse tax consequences.

VI. NO-PARTITION AGREEMENTS

Although under Texas law, an unconditional right to partition is a fundamental aspect of joint ownership, Texas courts are also remarkably accommodating when joint owners agree not to partition jointly owned property, especially mineral, oil and gas interests. This favorable attitude toward no-partition agreements appears to reflect a more general policy underlying Texas court decisions which readily enforce various other types of agreements among joint owners.[286]

By the early 1940s no-partition agreements had become such a common feature of Texas mineral, oil and gas practice that the Supreme Court of Texas tartly remarked in connection with a partition sale of an oil and gas lease that, "[i]t may sometimes be inequitable to one or more of the joint owners if another co-owner is permitted to enforce partition of the jointly owned property; but this is one of the consequences which one assumes when he does not provide against it by contract, he may expect his cotenant to exercise his statutory right of partition at will."[287] The legality of no-partition agreements is rarely questioned in Texas. Rather, in Texas partition litigation, a much more frequently litigated issue is whether or not joint owners have impliedly entered into such an agreement not to partition.

A. Express Restrictions on Partition

Sometimes wills devising property to joint owners contain express provisions restricting partition. For example, a testator may direct that particular property bequeathed to joint owners "will be held intact and not partitioned" for a period of time, often the lifetime of one or more of the joint devisees.[288] It is more common for joint owners to sign an express written agreement not to partition. Such agreements can take a variety of forms. Often express agreements not to partition are fairly short. "Joint owner, X, agrees with joint owner, Y, that neither will seek voluntary or judicial partition of [identified jointly owned property] for a period of [specified] time."[289]

A no-partition agreement sometimes recites reasons for restricting partition in an effort to substantiate the agreement's reasonableness were the agreement to be challenged. However, Texas court decisions virtually never consider the reasons behind express agreements among joint owners to partition or to restrict

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286. See discussion *supra* notes 8-13.
287. Moseley v. Hearrell, 171 S.W.2d 337,339 (Tex 1943).
288. 14 AM JUR LEGAL FORMS 2d (Rev) §193.97 (1994).
289. *See* 14 AM JUR LEGAL FORMS 2d (Rev) $193.96 (1994)

partition of their jointly owned property. Since each joint owner has an intrinsic and unconditional right to partition, preventing partition requires the agreement of each of the joint owners. Without 100% agreement, any joint owner who did not participate in the no-partition agreement could still bring a compulsory partition action. As a result, the only way to prevent partition is by reaching complete consensus among all of the joint owners.[290]

Although no-partition agreements restrain alienation, Texas court decisions usually find limited restrictions on partition to be reasonable.[291] Whether a complete restriction on partition unlimited in time would be considered reasonable remains to be decided by Texas courts. In the context of no-partition agreements, only one reported Texas appellate decision has expressed qualms about restraining partition for an unreasonable period of time.[292] Older Texas court decisions regarding unreasonable restraints on alienation were somewhat variable.[293] However, recently the Supreme Court of Texas has held valid contractual provisions which indirectly affect the alienability of real property.[294] Since jointly owned oil and gas and other mineral property, as well as the joint ownership interests in it, remain transferrable under a no-partition agreement., a similar finding of validity in response to unreasonable-restraint-on-alienation objections might be expected with regard to no-partition agreements.

Texas practice seems to avoid elaborate versions of no-partition agreements. Only rarely are no-partition agreements formal recorded real covenants which run with the land.[295] A typical no-partition covenant of the more formal variety would begin with a declaration of the fractional interests of the joint owners with regard to identified jointly owned property.[296] After reciting consideration, usually based on mutual promises, such a no-partition covenant may provide that each joint owner "for himself and his heirs and assigns, covenants and agrees that he will not institute or cause to be instituted any partition or division of the property without the written consent of the other" joint owners who are parties to the agreement, or their heirs or assigns.[297] Usually such a real covenant is limited to a specified period of time, such as twenty years or the lifetime of one or more of the joint owners. If no time period is stated, Texas courts will usually imply a reasonable time.[298]

More formal no-partition agreements may also include a management provision which delegates management authority regarding the jointly owned

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290. See Moseley v. Hearrell, 171 S.W.2d 337,339 (Tex 1943).

291. *See* Davis v. Davis, 44 S.W.2d 447 (Tex. Civ. App. 1931).

292. See Spires v. Hoover, 466 S.W.2d 344 (Tex Civ. App. 1971). *Cf.* 1 SMITH & WEAVER, *supra* note 20, at § 2.3(A)(4).

293. See, e.g., Citizens State Bank of Houston v. O'Leary, 167 S.W.2d. 719 (Tex. 1942); O'Connor v. Thetfotd, 174 S.W. 680 (Tex. Civ. App. 1915, writ ref'd.).

294. See Sonny Arnold, Inc. v. Sentry Savings, 633 S.W.2d. 811 (Tex. 1982) (upholding a due on sale clause against a challenge that the clause unreasonably restrained alienation).

295. See Westland Oil Dev. Corp. v. Gulf Oil Cap., 637 S.W.2d 903,907 (Tex. 1982).

296. If the joint owners' percentages of ownership ate uncertain or subject to dispute, the covenant may simply identify the jointly *owned* property and the joint owners who are patties to the no-partition covenant.

297. 14 AM JUR LEGAL FORMS 2d (Rev) $193.95 (1994).

298. See Davis v. Davis, 44 S.W.2d 447,450 (Tex. Civ. App. 1931).

property to one of the joint owners. One joint owner can be empowered to manage the property and to distribute the net profits from the property among the joint owners according to their proportionate shares. Occasionally, formal no-partition covenants also establish preemptive rights to purchase any joint ownership interest offered for sale. Such a covenant may, for example, include a provision such as the following:

> This restriction against partition during such period does not deprive any party of his right to convey or transfer his interest in the property to any other person or entity. Such right is subject to the limitation, however, that should any party desire to sell all or any part of his interest in the property and find one or more third persons ready, able, and willing to purchase the same, the other parties shall have the option to purchase."[299]

the selling joint owner's interest for the amount of any bona fide offer made by such third person or persons. Such a covenant may be recorded in county land records to prevent bona fide purchasers from taking title free of the no-partition covenant.

Many express agreements not to partition are contained in operating agreements, which are frequently not recorded in Texas. According to the Texas Supreme Court, "[i]t is not unusual for an operating agreement . . . to not be placed of record."" However, the court also noted that broad inquiry notice is imposed on assignees, when assignments of mineral interests refer to earlier equitable titles. "[R]eferences made in documents appearing in one's chain of title bind a purchaser to what is contained in 'every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims.'"[301] A more recent decision of the Texas Supreme Court emphasizes the importance of thoroughly checking recorded mineral interest titles. In *Day & Co., Inc., v. Texland Petroleum, Inc., the court* found that the lessee of a second mineral lease was not a bona fide purchaser.[302] The first mineral leasehold had been recorded, although the recorded lease did not contain any indication that the lease might have been forfeited. Recorded references to operating agreements may well provide inquiry notice with regard to the terms of such operating agreements, including the frequently included provisions in such agreements which restrict or waive partition.[303]

With regard to oil and gas interests, operating agreements and unitization agreements present the most common context for no-partition agreements. A typical provision in a unit agreement is reflected in the following "Waiver of

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299. 14 AM JUR LEGAL FORMS 2d (Rev) §193.95 (1994).

300. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 907 (Tex. 1982).

301. *Id.* at 908, *citing* Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex. Civ. App. 1952, writ ref'd.).

302. Day & Company, Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990).

303. See, e.g., MBank Abileen, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex. App. 1986, no writ). *C"* McSwain, *Westland Oil Development Corp. v. Gulf Oil: New Uncertainties as to Scope of Title Search*, 35 BAYLOR L. REV. 629 (1983).

Rights to Partition" from West's Texas Forms: "Each party hereto agrees that, during the existence of this Agreement, it will not resort to any action to partition the Unitized Formations or the Unit Equipment, and to that extent waives the benefits of all laws authorizing such partition."[304] The A.A.P.L. Model Form Operating Agreement (Form 610- 1982) contains a partition waiver in Article VIII. E: "Waiver of Rights to Partition: If permitted by the laws of the state or states in which the property covered hereby is located, each party hereto owning an undivided interest in the Contract Area waives any and all rights it may have to partition and have set aside to it in severalty its undivided interest therein.""[305] In Texas, the legality of such no-partition agreements and provisions waiving partition in operating and unit agreements is rarely questioned. When questioned in other contexts, Texas no-partition agreements have virtually always been upheld and enforced.[306]

B. Implied Agreements Not to Partition

Most of the reported Texas cases with regard to no-partition agreements in the context of jointly owned oil and gas and other mineral interests are concerned with whether such a no-partition agreement should be implied. Most Texas decisions which uphold and enforce implied agreements not to partition in this context rely on *the* 1931 case of *Elrod v. Foster*.[307] In *Elrod the Court* of Civil Appeals approved a trial court's refusal to partition a mineral estate in 60 acres of land, "because a partition of the same, either in kind or by sale and division of the proceeds, would have worked a cancellation of the oil and gas lease contract, thereby depriving all parties to it of their respective rights in the premises."[308] The joint owner requesting partition had earlier agreed as part of a lease contract to pay a proportionate part of drilling and development expenses on the jointly owned property.[309] Because the agreements between the joint owners concerned not only joint ownership, but also the joint development of the jointly owned property, the court pragmatically concluded that the deal made by the joint owners impliedly included a restriction against partition during that joint development."[310]

The Court of Civil Appeals found that a joint owner who sought partition was estopped *in Elrod.* The Court noted:

> We think the proposition needs no extended discussion that a part owner of a mineral estate in land, who has contracted with others having interests to pay his proportionate part of expenses of drilling and developing the premises for oil and gas, cannot demand a partition of the mineral estate so as to work a cancellation of the drilling contract, and thereby

304. 7A WEST'S TEXAS FORMS (J.S. Lowe, ed. 1997) § 14.2, Article 13.2.
305. 7 WEST'S TEXAS FORMS (J.S. Lowe, ed. 1997) § 13.2, Art. VIIIE.
306. See Lichtenstein v. Lichtenstein, 442 S.W.2d 765 (Tex. Civ. App. 1969).
307. 37 S.W.2d 339 (Tex. Civ. App. 1931, writ ref'd.).
308. *Id.* at 342.
309. *Id.* at 341.
310. *Id.* at 342.

> relieve himself of his proportionate part of the expenses of developing the lease.[311]

The estoppel against the joint owner who sought partition was based on two particular contractual aspects of the joint ownership arrangement. First, the court noted that the joint owner seeking partition knew about the drilling contract and participated in it by accepting $1,500 for reassignment of a 3/128 interest assigned to him as security for a debt. Second, the court pointed to the fact that the joint owner seeking partition failed to mention the unrecorded contract until shortly before assignees of one of the original joint owners began to drill a second well on the property.[312]

Moss *& Urschel* v. *Clark*[313] followed the *Elrod* decision in finding an implicit agreement not to partition. In Moss *& Urschel*, the partition action arose out of a dispute among joint owners over the drilling of an offset well.[314] As *in Elrod*, in Moss *& Urschel*, the relationship between the parties involved more than joint ownership. It was a mining partnership to jointly operate a jointly owned lease, The court found that contractual agreements among the joint owners affected and restricted the otherwise implicit rights of the joint owners to partition. [315] Again, the nature of the deal made by the joint owners with regard to the jointly owned property was an important factor in the court's finding that there was an implied agreement not to partition.

Similarly, *in Odstrcil v. McGlaun*,[316] the appeals court considered a deed which reserved one-half of the minerals to the grantors, the McGlauns. The deed also conveyed a power of attorney to the grantee, Birdwell, to execute oil and gas leases with regard to the grantors' reserved half interest in the miner- & . [3] " When Birdwell later executed an oil and gas lease, the lease provided that the delay rentals were to be paid directly to the lessor, Birdwell. This lease was later assigned to Odstrcil and another person. The court decided that by granting the power of attorney to lease all of the jointly owned minerals, the McGlauns had irnpliedly agreed not to partition. The court noted that, although "the right to partition is absolute it was never intended to interfere with contracts that expressly or hnpliedly denied or limited that right."[318] The court concluded that:

> To now compel a partition of the minerals owned jointly . . . would be to abrogate the contract between them and deprive Birdwell of his right under that contract to lease both his own and McGlaun's interest in the minerals. By said contract McGlaun impliedly agreed not to partition and

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311. Id. at 342.
312. See *id. at 342.*
313. 82 S.W.2d 1090 (Tex. Civ. App. 1935, writ ref'd).
314. *Id.* at 1091-1092.
315. *Id.* at 1092.
316. 230 S.W.2d 353 (Tex. Civ. App. 1950).
317. *Id.*
318. *Id.* at 354. The court also decided that Birdwell's lease was not authorized under the power of attorney, and therefore it did not lease the McGlauns' half interest in the minerals.

he is now estopped to assert such a right.[319]

The nature of the deal between the joint owners again involved more than merely joint ownership. The agreement not to partition was implied from the other collateral agreements between the joint owners.

In *Sibley v. Hill*,[320] an operating agreement between joint owners of two oil and gas leases contained a preferential right to purchase, if any party to the operating agreement wanted to sell its interest.[321] The court's decision again followed the distinctive Texas two-step pattern. First the court saluted partition as an inherent and absolute right of joint owners. Then the court abrogated that right to partition based upon other contractual relationships among the joint owners. In *Sibley*, the court noted that "It is true, as argued by appellants, that the right of partition is absolute unless there is an expressed or implied agreement not to partition."[322] But because of the particular arrangement created by the joint owners in the operating agreement, partition was impliedly waived.[323] The court's opinion focused on three features of the operating agreement which indicated an implied agreement not to partition. First, the operating agreement contained a preferential right to purchase. Second, the operating agreement was long-term ("so long as oil, gas or other minerals were produced"). Third, the operating agreement provided that notices were to be given by registered mail.[324] Since there had been no registered mail notice or offer of sale, the court concluded that "Any partition by the trial court, either in kind or by sale and division of the proceeds, would have worked a cancellation of the oil and gas lease contract or, as in this case, the operating agreement."[325] The Court of Appeals relied on the *Elrod* decision, supra, as stating the law in Texas.

Contractual agreements to pay proportionate shares of the expenses of drilling and developing oil and gas property are an appropriate basis from which to imply an agreement not to partition. The *Sibley* court concluded, "The provisions in the operating agreement of preferential right to purchase, and the provision indicating a desire of the parties to retain the cotenancy status and operational status during the life of the leases indicates to us a clear implication that the absolute right of partition had been contracted away."[326] Again the court looked beyond the simple fact of joint ownership to the larger objectives and agreements shared by the joint owners.

Occasionally the nature of a joint owner's interest in oil, gas or other minerals will lead a court to imply an agreement not to partition. In *Hulsey v. Keel*, the Court of Appeals held that partition of a mineral lease should be denied because there was an express agreement between the joint owners that one joint

319. *Id.* at 354-355.
320. 331 S.W.2d 227 (Tex. Civ. App. 1960).
321. *Id.* at 228-29.
322. *Id.* at 229.
323. *See id.*
324. *See id.*
325. *Id.*
326. *Id.*

owner would have an assignable 1/16 free-carried interest which would continue for the duration of the lease.[327] Since the lease was not yet fully developed, the court pointed out that partition "would deprive Keel and his assigns of their 'free-carried' rights and at the same time relieve Hulsey and the other joint owners of their obligation to develop, and the expenses of drilling, completion and equipping."[328] Such a result would defeat the purposes of the agreement between the joint owners and abrogate one joint owner's contractual right to a free carried interest. The nature of this joint ownership interest was a proper basis for finding an implied waiver of the joint owners' rights to partition.

The extent to which Texas courts will go to find an implied agreement not to partition is illustrated in *Long v. Hitzelberger*.[329] In this case, the joint owners had deliberately deleted from their operating agreement an express provision waiving partition.[330] But the appeals court nevertheless found an implied agreement not to partition based on an agreement between the joint owners with regard to well drilling. In *Long*, the implied agreement not to partition was based on a drilling contract which required two wells to be drilled within four years. The appeals court concluded that "[I]t must be inferred by such clear language [in the drilling contract] that the parties did not intend for their estate to be partitioned.""' The court explained simply that, "[S]ince the drilling of the second well is to be performed for the retention of Appellants' interest in the leases, an agreement against partition must be implied."[332] In dissent, Justice Dickenson, pointed out that it was odd to imply an agreement which the joint owners had themselves deleted from their written agreement. He suggested that it would be more appropriate to partition the property by sale of the jointly owned working interests in the oil and gas leases. After the sale, leases would remain subject to the overriding royalty interests and to all of the provisions of the operating agreement, including the contractual right of reassignment to one of the joint owners if the required wells were not drilled.[333] But the majority was undeterred from implying an agreement not to partition from the collateral agreements among the joint owners with regard to drilling wells on the jointly owned property.

C. When Agreements Not to Partition are Not Implied

In a rare decision refusing to imply an agreement not to partition, the appeals court *in Warner v. Winn*[334] found that, because a damage remedy for breach of contract was available, it was unnecessary to imply an agreement not to partition. The court explained, "It seems reasonably clear that when parties

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327. 700 S.W.2d 255,256 (Tex. App. 1985, writ ref'd. n.r.e).
328. *Id.* at 258.
329. 602 S.W.2d 321 (Tex. Civ. App. 1980).
330. *Id.* at 323 (Dickenson, J. dissenting).
331. *Id.*
332. *Id.*
333. *Id.* at 324 (Dickenson, J., dissenting).
334. 191 S.W.2d 747 (Tex. Civ. App. 1945, writ ref'd n.r.e.).

contract for the drilling of wells, and such drilling is either made the consideration for the transfer of a mineral estate or is necessary to extend or perpetuate a lease, it must be inferred that the parties to the drilling agreement did not intend for the estate to be partitioned."[335] But the joint ownership arrangement before the court was different, since partition would not abrogate the parties' collateral contractual agreements nor eliminate all remedy for breach. The court offered this explanation:

> [I]t can hardly be said that each and every covenant or provision relating to property held in common carries with it the implication that no partition shall be had. Consequently, it is necessary in each case to examine the particular contract involved and from the provisions thereof determine whether or not the parties impliedly contracted against partition. If they did not then the right of partition is absolute.[336]

Because breach by one of the joint owners of his contractual promise to manage and to operate the leases and well "is compensable in damages, an agreement not to partition the property held by the parties will not be implied."[337]

Aside from *Warner,* Texas appellate courts have very rarely discussed the circumstances under which a no-partition agreement should not be implied. In *Benson v. Fox,*[338] the Court of Civil Appeals ruled that two sisters who purchased a vacant lot together and moved trailer homes into the center of the lot and installed common utility lines, had not impliedly agreed not to partition. In refusing to imply an agreement not to partition from the physical circumstances, the court noted that "[T]here is no testimony by any witness that the partition decreed by the court would destroy the estate sought to be partitioned."[339]

Moreover, in *Spires v. Hoover,*[340] the appellate court refused to imply an agreement not to partition from a "joint tenancy agreement" which provided for survivorship rights in the joint owners. The court recognized the legitimacy of such survivorship agreements among joint owners, but was unwilling to imply a waiver of partition rights from the terms of the survivorship agreement. Although the court expressed concern that partition might abrogate the contractual rights of the joint owners with regard to survivorship, ultimately the appeals court decided that partition would not interfere with the parties' reasonable expectations with regard to survivorship. The court explained, "Partition of lands means a division according to quantity and value. . . . There is no estate or contractual interest involved to be increased or diminished. The partitioning court can adjust the equities."[341] The court was particularly concerned that were the survivorship agreement construed as an agreement not to partition, it might restrain partition for an unreasonable period of time. "[T]here is no time

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335. *Warner,* 191 S.W.2d at 751.
336. *Id.* at 751.
337. *Id.*
338. 589 S.W.2d 823 (Tex. Civ. App. 1979).
339. *Id.* at 826.
340. 466 S.W.2d 344 (Tex. Civ. App. 1971).
341. *Id.* at 345, *citing* Zanderson *v.* Sullivan, 44 S.W. 484 (Tex. 1898).

limit imposed either express or implied," the court noted, citing Alabama and Pennsylvania decisions for the proposition that "agreements for the perpetual forbearance of a suit for partition are contrary to the policy of the law which maintains the right of partition as an absolute right."[342] Noting that partition "clearly diminishes the estate of the appellee and certainly diminishes his contractual interest," a dissenting Justice pointed out that the survivorship agreement was limited to the lives of the two joint owners.[343]

In Texas court decisions, disputes over whether there is an implied agreement not to partition jointly owned property are usually resolved by considering the full context of the joint ownership arrangement, especially any contractual or other relationship among the joint owners, beyond simply joint ownership. In considering whether to imply an agreement not to partition, the approach of Texas courts is typically pragmatic. Partition will be restrained if the court is convinced that partition either would defeat the purposes of joint owners engaged in a joint enterprise or would otherwise unreasonably devalue the jointly owned property. Nevertheless, if restraining partition is of great importance to joint owners, express no-partition agreements are a much more certain way to avoid the otherwise nearly absolute right on the part of any joint owner to partition.

VII. CONCLUSION

Breaking up joint ownership of oil and gas or mineral property through partition can have serious consequences for joint owners, particularly with regard to title and taxes. Indeed, Texas courts' enthusiastic enforcement of express and implied agreements not to partition undoubtedly reflects the understanding that compulsory partition can involve archaic, cumbersome and unpredictable processes. Texas' multi-phased statutory partition-in-kind process, with two appealable judgments and sometimes two jury trials, can be a particularly costly, time-consuming and disruptive ordeal.. Still, a joint owner's absolute right to partition remains a fundamental attribute of joint ownership. Partition provides an essential exit option for uncooperative joint owners who would otherwise find themselves inextricably yoked together in joint ownership. It is a vital escape route designed to prevent joint ownership from becoming a trap.

In light of the great value of mineral, oil and gas resources, Texas law quite sensibly tailors partition of jointly owned oil and gas and other mineral property in the distinctive ways described in this article. Instead of enforcing the traditional, and in Texas statutory, presumption that jointly owned property will be partitioned in kind, Texas courts usually partition jointly owned mineral land and oil and gas property by sale. This preference for accomplishing partition through selling the whole of a jointly owned mineral estate or oil and gas

342. *Id.* at 347.
343. *Id.* (Preslar, J. dissenting).

property avoids breaking up these scarce natural resources into potentially uneconomic, as well as possibly unequal, pieces.

Many joint owners of possessory oil and gas or other mineral interests agree among themselves to restrict or to forego partition. They prefer to relinquish their partition rights in order to avoid the unpredictability, not to mention the hardships and undesirable consequences, of partition. Given that the possibility of partition is an inherent risk which automatically accompanies joint ownership, Texas law has encouraged joint owners to control this risk through the types of joint owner agreements discussed in this article.

Potential problems posed by partition seem not to have deterred the proliferation of joint ownership arrangements with regard to oil and gas and other minerals in Texas. Risks that partition will break up joint ownership seem to be well-managed through ready enforcement by Texas courts of even very informal agreements not to partition. After all, sharing in the profits from development of oil and gas or of other mineral resources usually makes joint ownership of these resources an attractive proposition.