

## CO-OWNERSHIP

### The Nature of Co-ownership

Co-ownership describes the legal relationship where more than one person owns a thing at the same time. The basic principle is that each of the owners does **not** own a specific part or piece of the thing. Their interest is an **undivided share**.

So, for example, imagine that Shoeshoe, Max and Delores are co-owners of a 100 acre farm. None of them owns any particular piece of the farm. Each has a proportion of the ownership interest. (Think back here to our earlier lectures in which it was emphasised that it is misleading to think of real rights being attached to a physical thing, but rather to interests which form part of the “dominium” over that thing).

Co-owners need not own property in equal shares. In our example above, each of the co-owners could own a third. Alternatively, Shoeshoe could own 90%, Max 8% and Delores 2% - and any other numerically possible combination. Everything depends on the nature and extent of the interest acquired by each co-owner. That, whatever it is, becomes their undivided share.

### “Bound” and “Free” co-ownership

Much also depends on the manner in which co-ownership is established. Where co-ownership is the result of another pre-existing relationship, it is **bound** co-ownership. For example, a person who marries in community of property automatically obtains an equal undivided share in his or her spouses’ property (and vice versa). Their relationship as co-owners is, however, an incident of their marriage. Other examples include partnerships and non-universal associations (an association of persons without a legal personality separate from the persons themselves).

**Bound** co-ownership is so-called because the underlying legal relationship determines the extent of a co-owner's rights. In the case of marriage, for example, a spouse as co-owner may not alienate the property without the consent of the other spouse. The law of matrimonial property determines the co-owners' use rights, and co-ownership cannot be terminated without terminating the marriage. The same goes for a partnership, where the relationship between partners and co-owners is determined by the partnership agreement and the partnership must usually be dissolved before the property can be divided.

**Free** co-ownership is co-ownership in the strict sense. It is a relationship, created by contract, in which the co-owners take a joint ownership interest in a thing. As a result, a co-owner can alienate or encumber his or her undivided share independently of the other co-owner(s). He or she can terminate the co-ownership relationship freely. The exercise of a co-owner's use rights is governed by the principle of reasonableness. (I return to this principle below).

The distinction between free and bound co-ownership is illustrated in **Oblowitz v Oblowitz**. In that case, the applicant applied for an order compelling the respondent to join with him in making an application to the Rent Board in relation to property they co-owned. The applicant alleged that he was the respondent's partner. The respondent denied this and brought an application to strike out the allegation that there was a partnership between the parties. In the course of deciding that application, the Court set out the difference between a partnership (a form of **bound** co-ownership), and co-ownership in its **free** form.

The Court held that –

- “1. Co-ownership is not necessarily the result of agreement while partnership is. [Think, for example, of the situation in **Ex Parte Geldenhuys**, where a farm was bequeathed to heirs as co-owners of undivided shares. The relationship between the heirs was not created by agreement. In addition, co-ownership can arise when property is mixed].*
- 2. Co-ownership does not necessarily involve community of profit and loss while partnership does.*
- 3. One co-owner can without the consent of the others alienate his interest in the property jointly owned, whereas a partner cannot.*
- 4. One co-owner is not the agent of the others, whereas a partner is.*
- 5. Co-ownership need not exist for the sake of gain or profit, whereas that element is fundamental to the legal conception of a partnership.”*

After distinguishing between partnership and co-ownership, De Villiers JP held that the allegation that the applicant and respondent were partners effectively introduced a new cause of action, not foregrounded or sustained in the applicant’s notice of motion. The allegation was accordingly struck out.

**Free** co-owners will normally just agree how a thing is to be used. However, in the case of disagreement, the fundamental principle is that a co-owner is entitled to use a thing reasonably and in accordance with the size of his or her share.

A useful discussion of reasonable use is contained in **Pretorius v Nefdt and Glas**. There, a farm was co-owned in undivided shares. Pretorius had a usufruct over one of the shares. Glas was the owner of the other share. Nefdt was a neighbouring farm owner.

Glas and his co-owner had built a road across the farm to transport lime sourced from the farm to market. Glas also used the road to transport lime from a source on Nefdt’s land on the neighbouring farm. Glas, in addition, had given permission to Nefdt to use the road to transport lime himself.

Pretorius applied for an interdict restraining Glas (the co-owner of the other undivided share in the farm) from using the road to transport lime from Nefdt's land to market and restraining Nefdt from doing so himself.

In discussing the concept of reasonable use, Mason J stated the following –

*“The petitioner’s counsel contended very strongly that a co-owner has an absolute right of veto on any use of the farm at all (citing Voet 10, 3, 7); but this passage refers, I think, to the right which a co-owner has to prevent and innovation or change in the nature of the occupation of the land. The case in which the rights of co-owners inter se has been most fully discussed seems to be that of De Beers Consolidated Mines, Ltd v McKay (16 CLJ 121), where the court of the late Republic laid down the general law with reference to this subject. There was no difference as to principles, though one of the Judges dissented as to their application. Each co-owner, it was said, could use the common property in accordance with the use to which it was intended to be put, [but] must refrain from any acts by which the like right of the user of the others might be infringed.”*

From this, Mason J distilled the following principles –

**First**, Glas, as a co-owner, may use land for his own purposes, within reason, however he likes. The consent of one co-owner is not required when the other co-owner is simply using the property for his own benefit in accordance with the existing use and occupation rights recognised by both co-owners. Where, however, one co-owner seeks to change the nature of the property, or fundamentally alter the nature of the use and occupation rights that come with it, the consent of the other co-owner is required. **Second**, however, Glas may not allow others to use his rights, in a manner that imposes an additional burden upon Pretorius because the idea of co-ownership is really one of joint use between the co-owners themselves.

Accordingly, Pretorius' application for an interdict against Glas failed, because Glas' use of the road, as co-owner, was within reasonable bounds. The mere fact that he was using the road to transport lime from Nefdt's farm was not relevant. It was an

entirely reasonable use of his land. However, the application against Nefdt succeeded, because the permission granted to him by the second respondent had the result of imposing an additional burden on Pretorius, beyond the scope of the co-ownership arrangement.

The situation would be different, of course, if Glas had leased, sold or donated his use rights over the road to Nefdt. That would have been an encumbrance or an alienation of his rights. Nefdt would then have been entitled to use the road **instead of** Glas. It was the additional burden placed on Pretorius by Glas in giving Nefdt permission to use the road in addition to him, that gave rise to Pretorius' complaint.

### **The Right to Claim Subdivision**

Where the property is divisible a co-owner may at any time claim the subdivision of the property in accordance with the shares held by each co-owner. The owners must first try to agree upon a division themselves. However, if this is not done a court may order an appropriate subdivision by way of the *actio communi dividundo*. Where dividing the property would seriously reduce its usefulness or value, a court may order that the property be sold and the proceeds of the sale be distributed according to each co-owner's share.