Rights of Co-Tenants (and Adverse Possession of Minerals)

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Overview

An issue to consider when setting up an estate plan is whether it is beneficial to leave assets in co-equal ownership to the children. In a farm setting, the issue can come up when the parents have traditional bypass, credit shelter trust arrangements set up, as well as in the less complex estates where farmland is left outright in co-equal ownership to the children. But a drawback of co-equal ownership is the right of partition of a co-owner. That's a particularly acute problem when parents have both on-farm and off-farm heirs.

Another issue that can come up involves the rights of a co-owner with a minority ownership percentage to terminate a lease or capitalize on mineral interests without the consent of co-owners. That was indeed what was involved in a recent case, and it's the topic of today's post.

O'Malley v. Adams

228 N.E.3d 379 (Ill. Ct. App. 2023)

This case presented the interesting issues of whether a tenant in common that owns at least one-half interest in mineral rights can drill for oil and gas without the permission of the cotenants, and whether the mineral interest can be adversely possessed.

Here, the "Prather Trust" and the "O'Malley Trust," because of various estate planning strategies, ended up as cotenants of farmland. The trustee of the O'Malley Trust held a 50 percent interest in the mineral estate in farmland and claimed it had acquired the Prather Trust's 50 percent interest in the mineral estate by adverse possession. The trial court issued summary judgment for the Prather Trust on the adverse possession issue. Prather Trust filed counterclaim for an accounting, claiming that O'Malley trust had removed and sold oil and natural gas from the mineral estate without the Prather Trust's knowledge or consent and that the title insurance company issued a title policy falsely declaring that the O'Malley Trust had merchantable title to 100 percent of the minerals in the mineral estate. The Title Company moved for summary judgment on the basis that removal and sale of minerals by a tenant without permission of cotenant is not a tort under Illinois law, but the court denied the motion.

The trustees of the "Prather Trust" sued the title insurance company for slander of title to the trust's 50 percent interest in the mineral estate and for conversion of the trust's share of proceeds from the sale of extracted minerals. The title company sought summary judgment on the basis that removal and sale of minerals by a tenant in common, without consent of a co-tenant, is not a tort under Illinois law. The trial court denied the title company's motion and certified three questions of law to the

Illinois Court of Appeals. However, the title insurance company sought leave to appeal to the Illinois Supreme Court. The appellate court denied leave to appeal, but then it was allowed by means of a supervisory order from the Illinois Supreme Court. As a result, an interlocutory appeal allowed.

Three questions were certified to the Illinois Court of Appeals: 1) Does Illinois law provide a tenant in common owning at least one-half of the mineral interest in land an unfettered right to drill for oil and gas without cotenant permission?; 2) Whether Illinois law (stat. 765 ILCS 520/2) impose a mandatory requirement that a co-tenant must always seek court permission before drilling for oil and gas?; and 3) whether Illinois case law preclude a nondrilling cotenant from bringing a conversion claim against a drilling cotenant when the drilling cotenant removes oil and gas from property without the nondrilling cotenant's permission, and preclude a nondrilling cotenant from brining a slander of title claim against their cotenant after the cotenant's decision to grant a lease to a third party to drill for oil and gas on the property?

The title insurance company claimed that a tenant in common owning at least 50 percent of the mineral interest in land can drill for, remove and sell the minerals from the mineral estate without permission of other cotenant(s), and that the only remedy of the nondrilling cotenant is an accounting. As such, a 50 percent or more owner doesn't have to follow the Oil and Gas Rights Act as a precondition to drilling and that failing to follow the procedure is not a tort. Conversely, the Prather Trust claimed that permission of a cotenant(s) is required before removal and sale of minerals or a valid court order must be obtained, and that drilling cotenant is liable for trespass and conversion.

The appellate court answered the certified questions in the negative. Illinois law does not provide a tenant in common owning at least one-half of the mineral interest in land an unfettered right to drill for oil and gas without cotenant permission. As to whether Illinois law (stat. 765 ILCS 520/2) imposes a mandatory requirement that a cotenant must always seek court permission before drilling for oil and gas, the appellate court said court permission was only necessary when a cotenant objects. The appellate court also determined that Illinois case law did not preclude a nondrilling cotenant from bringing a conversion claim against a drilling cotenant when the drilling cotenant removes oil and gas from property without the nondrilling cotenant's permission. Illinois law also does not preclude a nondrilling cotenant from brining a slander of title claim against their cotenant after the cotenant's decision to grant a lease to a third party to drill for oil and gas on the property.

Adverse Possession?

The appellate court did not address the adverse possession issue. Perhaps it will be discussed as the case heads back to the trial court for further proceedings. But let's take a closer look at the issue of whether mineral interests can be adversely possessed.

Example – Kansas approach. The Kansas statute on adverse possession is typical:

Kan. Stat. Ann. §60-503. Adverse possession. No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years.

Other state adverse possession statutes may also include a requirement of "hostility" (e.g., without permission of the true owner). Once the elements of the state statute are satisfied for the statutory period (15 years in Kansas), the adverse possessor can bring a quiet title action to acquire legal ownership of the disputed property.

Does adverse possession apply to minerals? The answer can be complicated. The bifurcation of surface and mineral rights (oil, gas, coal and metals) raises a question of how adverse possession applies when the property at issue (mineral rights) is subsurface and cannot be seen or accessed from the surface, and can be owned by a party different than the surface owner. Does acquiring title to the surface also mean that the subsurface minerals are adversely possessed? The answer is "no" unless there has been exploration or exploitation of the minerals that satisfies the adverse possession statute. Indeed, some states have statutes that bar acquiring title to minerals by adverse possession. However, if the adverse possessor of the surface uses or occupies the subsurface minerals, a claim of ownership of the minerals might be possible via adverse possession. Actual possession of the minerals is the key. As applied, that concept means that if the mineral estate has been severed from the surface estate such that the two estates are owned by different parties, the adverse possession of the surface estate doesn't constitute adverse possession of the mineral estate absent actual possession (i.e., usage by drilling and production) of the minerals. *See, e.g., Natural Gas Pipeline Company of America v. Pool, 124 S.W.3d 188 (Tex. 2003).* This also means that a royalty interest cannot be adversely possessed because it is a no-possessory interest – there is no royalty until production occurs. This is also the result with respect to a non-participating royalty interest and an overriding royalty interest. *See, e.g., Connaghan v. Eighty-Eight Oil Company, 750 P.2d 1321 (Wyo. 1988).* But an operating working interest is a possessory interest that can be adversely possessed. As for a non-operating working interest, the caselaw is either non-existent in jurisdictions or unclear as to whether adverse possession applies.

So, what can a mineral interest owner do to protect against a possible adverse possession claim? Leasing the mineral rights to an active company would be a good approach as it would establish a visible use of the mineral rights that is ongoing.

Conclusion

Co-ownership of farmland among the children after the parents are gone rarely works out well. The recent Illinois case points out some of the issues that can arise. Perhaps on remand the Illinois court will address the adverse possession issue with respect to minerals.