

EXAMINERS' ANALYSIS OF QUESTION NO. 7

This question raises various issues related to concurrent ownership of real property as a *tenancy in common*, which is the default tenancy in Michigan. See MCL 554.44. Each co-tenant in a tenancy in common is said to own an undivided share of the whole. Thus, each tenant is entitled to possession of the whole subject to the identical rights of the other co-tenant(s). This *unity of possession* is the primary incident of the tenancy in common. Addressing the particular issues raised in this fact pattern, a proper resolution of this dispute would likely conclude:

First, Dave and Brad likely may not force Greg to cease renting the cottage in the manner in which he is currently doing it. As noted, tenants in common share possession rights, and one co-tenant may not exclude other co-tenants from the possessory rights to which they are equally entitled. Where a tenant in common is wrongfully dispossessed or excluded by another co-tenant, this is said to constitute an *ouster*. *Highstone v Burdette*, 61 Mich 54 (1886). Thus, Greg may not exclude his brothers from the use or possession of the property. Similarly, Greg cannot rent the cottage in a way that would exclude Brad or Dave from using the property. However, Greg can lease to third parties the possessory rights that he owns. See *Shell Oil Co v Estate of Kert*, 161 Mich App 409 (1987). And if he does so, Brad and Dave may not exclude the renters from shared use of the property, nor may the renters exclude Brad and Dave. See *Quinlan Inv Co v Meehan Companies, Inc*, 171 Mich App 635 (1988). The facts here do not indicate that Brad and Dave are being excluded from the property, only that they object to having to share the property with non-related third parties. Indeed, the facts specifically indicate that the renters possessed only a non-exclusive right to use the property. This is likely permissible under the tenancy that exists in this case.

Second, Greg is liable to disburse to Dave and Brad their proportionate shares of profit arising from rental income made as a result of the ownership. A co-tenant who collects rent from a third party is liable to account to the other co-tenants for their share of the net rent after reasonable expenses. *Diel*

v Diel, 298 Mich 127 (1941); *Miner v Lorman*, 70 Mich 173 (1888). Greg may argue that the actual costs spent maintaining the property must be proportionally shared by all co-tenants and thus may be deducted from any rental profits owed to Dave and Brad. *Eighmey v Thayer*, 135 Mich 682 (1904); *Falkner v Falkner*, 58 Mich App 558 (1975). Ultimately, though, Brad and Dave are entitled to an accounting and to collect their proportionate share of the net profits resulting from Greg's rentals of the property.

Third, as suggested in the preceding paragraph, Dave and Brad are liable to contribute for the costs of the septic system. The doctrine of *contribution* is an equitable doctrine requiring co-tenants in common to contribute their proportionate share of a common burden. *Strohm v Koepke*, 352 Mich 659 (1958); see also *Eighmey*, *supra*. There can be little dispute that replacing a broken septic system is a necessary expense to maintain the property for the joint use of all co-tenants. Thus, Greg is within his rights to require that his brothers proportionately share the cost of replacing the septic system.

Finally, one incident of concurrent ownership is the *right to partition*. A partition occurs where the co-tenants either divide a property into shares pursuant to their respective interests in the property ("partition in kind"), or *sell the property* for the best obtainable price and appropriately divide the proceeds. *Albro v Allen*, 434 Mich 271 (1990); *Metcalf v Miller*, 96 Mich 459 (1893). The partition may occur by voluntary agreement of the co-tenants, or may be completed by judicial action if one of the co-tenants insists on a partition against the wishes of any other co-tenant(s). *Albro*, *supra*. Although partition in kind is favored, where a property is not susceptible to division, a sale is appropriate. *Id.* In this case, any brother may move to partition the property, and because the property at issue here is a single, non-divisible cottage, a sale is the likely outcome. Thus, although Greg cannot unilaterally sell the cottage, *Kay Inv Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432 (2006) ("no party holding title to the property as a tenant in common may sell the entire property to a third party without the consent of all other cotenants"), he may file an action for partition.