

A woman convinced her younger friend to purchase undeveloped land with her. The friend contributed 30 percent of the purchase price, and the woman contributed 70 percent. They took title to the property based on the percentage of their contributions. Subsequently, the friend, purporting to own the property outright, obtained a loan and gave a mortgage on the property to the lender. When the friend defaulted on the loan, the bank initiated a foreclosure action on the property.

The jurisdiction follows the lien theory of mortgages.

To what interest, if any, would the purchaser of the property at the foreclosure sale be entitled?

- A. The entire property, because the friend, as a co-owner, is deemed to be the woman's agent.
- B. A 30 percent interest, because that is the friend's ownership interest in the property.
- C. A 30 percent interest, because the applicable jurisdiction follows the lien theory of mortgages.
- D. No interest, because a co-owner of property needs the consent of the other co-owners to mortgage it.

Explanation:

Consent between cotenants in common

(common examples)

Consent required	Convey entire co-owned property
	Obtain exclusive possession over part of property
	Bind other cotenants' interests in contract with third party
No consent required	Sell, lease, or devise personal ownership interest
	Possess entire co-owned property
	Extract minerals from co-owned property (unless committing waste)

Tenancy in common is a type of **concurrent estate** (ie, cotenancy) where each cotenant has a possibly unequal ownership interest in the property, an equal right to possess the whole property, but no right of survivorship. A tenant in common is **free to bind his/her individual interest** in the property (eg, by mortgaging it) without the other cotenant(s)' consent. However, a tenant in common has **no right to bind other cotenant(s)' interests** in the property. Any **attempt to do so** will **not affect** the other cotenant(s)' interests.*

Here, the woman and the friend shared the property as tenants in common, as evidenced by their unequal interests in the property. Although the friend was free to bind her 30 percent interest in the property, she had no right to bind the woman's interest in the property. As a result, the friend's attempt to give the lender a mortgage on the *entire* property was ineffective as to the woman's interest. This means that the purchaser at the foreclosure sale would only be entitled to the friend's 30 percent interest in the property.

*This is true unless the other cotenant(s) authorize or later ratify the transaction (not seen here).

(Choice A) The mere existence of a cotenancy does not create an agency relationship between the cotenants, so the friend is not deemed to be the woman's agent simply because the friend co-owns the property.

(Choice C) The friend was free to mortgage her 30 percent interest in the property regardless of which **mortgage theory** the jurisdiction follows.

(Choice D) In a tenancy by the entirety, neither spouse can mortgage the property without the other spouse's consent. But here, the woman and her friend were not spouses who shared the property as tenants by the entirety. Instead, they shared the property as tenants in common, and each was free to mortgage her interest in the property without the other's consent.

Educational objective:

A tenant in common can bind his/her own interest in the co-owned property without the other cotenants(s)' consent but has no right to bind the other cotenant(s)' interests in the property.

References

20 Am. Jur. 2d Cotenancy and Joint Ownership § 93 (2020) (ability to bind other cotenants).

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