EXPANDING THE FIDUCIARY RELATIONSHIP BESTIARY: DOES CONCURRENT OWNERSHIP SATISFY THE FAMILY RESEMBLANCE TEST?

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INTRODUCTION

If Able and Baker own Blackacre in equal shares as tenants in common, Baker has the right to occupy the entire Blackacre without any obligation to pay rent to Able.[1] If, during the course of his occupancy, Baker happened to discover gold in the subsurface rock formation and thereafter mined the gold, Baker would be obligated to pay Able half the profit Baker realized from the sale of the gold.[2] Similarly, Baker would be obligated to pay Able half the net income Baker receives from licensing a third party to mine the gold.[3]

Accordingly, it might occur to Baker that his industry and good fortune would better be rewarded by first acquiring Able's half interest in Blackacre, and thereafter mining the gold himself or licensing a third party to mine the gold. Conscience and honor will inform Baker's decision whether to disclose his knowledge to Able or to respond expansively if asked by Able, "So, Baker, tell me: have you discovered oil on Blackacre yet?"

When Able and Baker initially acquired Blackacre, they probably obtained mortgage financing for most of the purchase price. If problems thereafter arise in connection with their plans for the property, Able may seek out new investors. With their help, Able may be able to acquire Blackacre upon a foreclosure sale of the property without notifying Baker, or offering him an opportunity to participate in the restructuring arrangements, or restoring Baker's title to an undivided half interest in Blackacre upon Baker's reimbursement of half of Able's expenditures.[4]

Whether these scenarios present legal, as well as moral and

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1 CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 216 (2d ed. 1988).

2 *Id.*

3 *Id.*

4 RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 493-94 (1988).

ethical problems for Baker, depends upon whether Baker owes fiduciary duties to Able and, if so, the scope of his fiduciary relationship with Able. By now it would seem that there should be definitive answers to these problems from a legal perspective, but there are not.[5]

Concurrent ownership as a fiduciary relationship poses a challenge to legal taxonomy.[6] It is unlikely to appear among numerous conventional relationships commonly regarded as attracting fiduci-

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[5] J. C. SHEPHERD, THE LAW OF FIDUCIARIES 24 (1981).

[6] In some respects, the attempt to categorize fiduciary relationships is reminiscent of the medieval bestiary, a pseudoscientific compendium of the animal kingdom, complete with moralistic parables, religious allegory, and pious reflection. *See, e.g.*, T. J. ELLIOTT, A MEDIEVAL BESTIARY (1971). A homiletic flavor characterizes the discourse on the law of fiduciary relationships. *See, e.g.*, Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539 (1949); *see also* M.L. Stewart & Co. v. Marcus, 207 N.Y.S. 685, 691 (N.Y. Sup. Ct. 1924) (suggesting that fiduciary law seeks "to harmonize the necessities of a competitive industrial system of business with the teachings of morality"); DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY AND PARTNERSHIP 11 (1991) (opining that "judicial opinions interpreting and applying fiduciary norms sound at times like sermons"); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-32 (1983) (noting the moral theme in fiduciary law); Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 21-22 (1992) (footnote omitted) ("[F]iduciary law supplies a moral (not to say moralistic) dimension to the body of law that regulates economic activity.").

A leading contemporary scholar in the field of fiduciary relationships argues that fiduciary duty is itself a challenge to legal taxonomy, i.e., the process of classifying particular types of things into general categories constructed with some purpose or system in mind, in that this duty defies easy classification within larger systems of law, such as contract or tort. Deborah A. DeMott, *Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal*, 30 OSGOODE HALL L.J. 471 (1992) [hereinafter *Contemporary Challenges*]. Elsewhere, Professor DeMott is an articulate critic of the tendency of courts to substitute rhetoric for analysis in decisions involving fiduciary obligation. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879 [hereinafter *Beyond Metaphor*]. Here, however, she inadvertently demonstrates the difficulty of writing about the law of fiduciary duty without lapsing into overstatement: "Whether a particular type of event constitutes a tort as opposed to a contract matters greatly: among other consequences, remedies and limitations periods are apt to differ depending on how the event is classified. In biology, in contrast, taxonomic decisions matter, but fewer practical consequences turn on them." DeMott, *Contemporary Challenges*, *supra*, at 473-74 (footnote omitted). Although it is true that the consequences of a lapsed statute of limitations are customarily characterized in some circles as "fatal," *see, e.g.*, Schiavone v. Fortune, 477 U.S. 21, 30 (1986); Horn v. Citizens Hosp., 425 So. 2d 1065, 1071 (Ala. 1982), how that compares in importance with the practical consequences that "turn" on the proper classification of mushrooms, ivy, and snakes probably depends upon how much time one spends outside of the law library and courthouse. Indeed, even within a strictly legal frame of reference, biological taxonomy can be outcome determinative. *See, e.g.*, Laglia v. Commissioner, 88 T.C. 894, 895, 900 (1987) (stating that because the bean produced by the jojoba plant is a seed, rather than a nut or fruit, taxpayers properly deducted expenses in connection with jojoba plantation, notwithstanding an Internal Revenue Code provision requiring the capitalization of expenditures incurred in planting fruits or nuts). Ultimately, Professor DeMott concludes that taxonomic anal-

ary obligation.[7] Some commentators expressly deny that common law tenancy in common properly belongs among the fiduciary relationships.[8] Most commentators, however, are equivocal[9] and euphemistic.[10]

Holdings relying on the premise that tenants in common occupy a fiduciary relationship may be found in most U.S. jurisdictions.[11] These opinions are too heavy on rhetorical hyperbole[12]

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ysis is inadequate in the evaluation of fiduciary norms. DeMott, *Contemporary Challenges, supra*, at 497.

7 A non-exhaustive list of these relationships would include: "Trustees, corporate directors, agents, guardians, attorneys, partners, commercial lenders, marriage counsellors and spies . . . ." DeMott, *Contemporary Challenges, supra* note 6, at 472. The word "spies" is presumably a reference to former CIA agent Frank Snepp, who published a book about CIA activities in South Vietnam without submitting it to the Agency for prepublication review. Finding Snepp in violation of his fiduciary obligation to the Agency, the Supreme Court imposed a constructive trust on his royalties from book sales. Snepp v. United States, 444 U.S. 507 (1980). *Cf.* GEORGE T. BISPHAM, PRINCIPLES OF EQUITY § 93 (1874) (identifying the tenancy in common as being among the relationships giving rise to fiduciary duty, and apparently describing the limited situation where a cotenant's acquisition of an outstanding title inures to the benefit of his cotenants). *See infra* notes 138-55 and accompanying text.

8 *See, e.g.*, William G. Hart, *The Development of the Rule in* Keech v. Sandford, 21 LAW Q. REV. 258, 261-62 (1905).

9 *See, e.g.*, 1 AMERICAN LAW OF PROPERTY § 4.03[1][b] (A. James Casner ed. 1952); OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 309 (5th ed. 1989). Another commentator noted:

> One of the legal consequences that ensues from the existence of a cotenancy, whether a joint tenancy, a tenancy in common, or a tenancy by the entireties is the existence of a fiduciary relationship of a certain nature between the cotenants . . . . Other cases, however, hold to the rule that the mere fact that persons are tenants in common does not give rise to a fiduciary relationship. A relation of mutual trust and confidence does not exist, as a matter of law, between tenants in common, not in joint possession, who came into their cotenancy by different conveyances, at different times . . . .

4 THOMPSON ON REAL PROPERTY § 1801 (1979).

10 For example, William E. Burby pointed out that

> [t]echnically, neither a fiduciary nor a confidential relationship arises out of the concurrent ownership of property. . . . But even in the absence of a fiduciary or confidential relationship, it does not follow that there is not a 'guide of conduct' that regulates transactions by and between cotenants that relates to ownership of the property.

WILLIAM E. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 99 (3d ed. 1965).

11 Foster v. Hudson, 437 So. 2d 528, 529-30 (Ala. 1983); Stoltz v. Maloney, 630 P.2d 560, 563 (Ariz. Ct. App. 1981) (dicta); Edwards v. Farm Bureau Mut. Ins. Co., 823 S.W.2d 903, 906 (Ark. 1992); Aaron v. Puccinelli, 264 P.2d 152, 154 (Cal. Ct. App. 1953); Jennings v. Bradfield, 454 P.2d 81, 82 (Colo. 1969) (en banc) (dicta); McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1562 (M.D. Ga. 1992) (dicta) (applying Georgia law); Fuller v. McBurrows, 192 S.E.2d 144, 146 (Ga. 1972); City of Honolulu v. Bennett, 552 P.2d 1380, 1390 (Haw. 1976); Givens v. Givens, 387 S.W.2d 851, 853 (Ky. Ct. App. 1965) (dicta); Salter v. Quinn, 134 N.E.2d 749, 751 (Mass. 1956); Hoverson v. Hoverson, 12 N.W.2d 501, 504 (Minn. 1943); Kennedy v. Bryant, 252 So. 2d

and metaphor,[13] however, and too light on analysis and rationale[14] to justify any attempt to distill some central thrust or judicial intent.

Upon close analysis, it is probably a fair interpretation of decided cases to say that most courts have long recognized concurrent ownership of property as something of a near or limited

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784, 788 (Miss. 1971); Quates v. Griffin, 239 So. 2d 803, 809 (Miss. 1970); Gilliam v. Gohn, 303 S.W.2d 101, 105 (Mo. 1957) (dicta); White v. Roberts, 637 S.W.2d 332, 334 (Mo. Ct. App. 1982); Colby v. Colby, 79 A.2d 343, 344-45 (N.H. 1951) (dicta); Colquhoun v. Colquhoun, 88 N.J. 558, 563, 443 A.2d 1045, 1048 (1982); Smith v. Borradaile, 227 P. 602, 607-08 (N.M. 1922); Birnbaum v. Birnbaum, 539 N.E.2d 574, 575 (N.Y. 1989); Minion v. Warner, 144 N.E. 665, 666 (N.Y. 1924); Van Horne v. Fonda, 5 Johns. Ch. 388, 406-07 (N.Y. Ch. 1821); Goergen v. Maar, 153 N.Y.S.2d 826, 831 (N.Y. App. Div. 1956); Dolan v. Cummings, 102 N.Y.S. 91, 93 (N.Y. App. Div. 1907) (Gaynor, J., concurring); Rider v. Phillips, 178 N.Y.S. 142, 145-47 (N.Y. Sup. Ct. 1919); Bailey v. Howell, 184 S.E. 476, 478 (N.C. 1936); Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982); Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350, 1353 (Okla. 1988); Kennedy v. Rinehart, 574 P.2d 1119, 1121 (Or. 1978); Lund v. Heinrich, 189 A.2d 581, 583 (Pa. 1963) (dicta); Beers v. Pusey, 132 A.2d 346, 348 (Pa. 1957); Duff v. Wilson, 72 Pa. 442, 447-48 (1872); Rebelo v. Cardoso, 161 A.2d 806, 810 (R.I. 1960); Mountcastle v. Baird, 1988 WL 5682, 2 (Tenn. Ct. App. 1988) (dicta); Watson v. United Am. Bank, 588 S.W.2d 877, 882 (Tenn. Ct. App. 1979) (dicta); Cecil v. Dollar, 218 S.W.2d 448, 450 (Tex. 1949); Jolley v. Corry, 671 P.2d 139, 141 (Utah 1983); United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975) (applying Washington law); Cummings v. Anderson, 614 P.2d 1283, 1288 (Wash. 1980) (en banc); Preston v. United States, 696 F.2d 528, 537 (7th Cir. 1982), *reh'g denied*, 709 F.2d 488 (1983) (applying Wisconsin law).

For courts reaching a different conclusion, see Streeter v. Shultz, 52 N.Y. Sup. Ct. 406, 409 (N.Y. App. Div. 1887); *In re* Freeman, 101 B.R. 698, 701 (Bankr. E.D. Okla. 1989) (applying Oklahoma law); Scott v. Scruggs, 836 S.W.2d 278, 282 (Tex. Ct. App. 1992); Donnan v. Atlantic Richfield, 732 S.W.2d 715, 717 (Tex. Ct. App. 1987); Hamman v. Ritchie, 547 S.W.2d 698, 706 (Tex. Ct. App. 1977); Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 506 (Utah 1980).

In Louisiana, the civil law analogue to the common law tenancy in common is ownership in indivision. LA. CIV. CODE ANN. art. 797-822 (West 1992). Co-owners in indivision do not have a fiduciary relationship. Jeanne M. Gravois, Comment, *The Revision of the Louisiana Co-Ownership Law*, 65 TUL. L. REV. 1261, 1271 (1991).

[12] DeMott, *Contemporary Challenges*, *supra* note 6, at 472. One commentator believes that the excessive rhetorical force used in promulgating fiduciary doctrine is a necessary control mechanism that results from the imprecision of the standard. J. A. C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 (1987) ("Ambiguity breeds vehemence.").

[13] For example, in *Beers v. Pusey*, the Pennsylvania Supreme Court declared that:

> Anyone who owns an undivided portion of a common treasure is guardian and protector of the entire fortune . . . . A tenancy in common is like a tapestry with multiple owners. No one can remove or add to his own individual share of threads. Any change in the design can only be accomplished with unanimous approval of all owners . . . .

Beers, 132 A.2d at 348.

[14] *See* L. S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 74 (1962) ("Indeed, in very few cases has there been anything more than a ruling that the situation is or is not 'fiduciary. . . .'").

fiduciary relationship. A recurring formulation denies the existence of fiduciary obligation between cotenants generally, except in the flamboyant rhetorical flourishes, but goes on to acknowledge a more limited obligation to act in good faith in a small number of fairly narrow fact patterns.[15] These fact patterns have included situations involving acquisition of an outstanding tax title[16] or encumbrance on the common property[17] and its assertion against a cotenant who, within a reasonable time, offers to contribute his share of the expense of gaining the adverse title. Acquisition at the same time by conveyance from a common grantor, or by descent from a common ancestor, is frequently cited, albeit without explanation, in these contexts as important in imposing fiduciary obligation on cotenants.[18]

This Article will develop the proposition that the legal relationship existing between or among a number of people, each having the simultaneous right to control the same resource, is so intermingled and intertwined that it deserves admission into the fiduciary obligation family, either as a matter of sound policy or because it bears a sufficiently close family resemblance to more conventional categories of fiduciary relationships. The hypothesis will then be tested against decided cases in a variety of factual contexts to determine its practical utility in predicting results of future judicial decisions.

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15 RALPH E. BOYER ET AL., THE LAW OF PROPERTY 122 (4th ed. 1991); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 323-24 (2d ed. 1988); Moynihan, *supra* note 1, at 218; SHEPHERD, *supra* note 5, at 307; Allan W. Vestal, *"Ask Me No Questions and I'll Tell You Lies": Statutory and Common-Law Disclosure Requirements Within High-Tech Joint Ventures*, 65 TUL. L. REV. 705, 728 (1991) ("The general pronouncements of the courts merely set the stage for the more tightly focused holdings . . . .").

16 *See infra* notes 140-50 and accompanying text.

17 *See infra* notes 151-55 and accompanying text.

18 *See, e.g.*, Goergen v. Maar, 153 N.Y.S.2d 826 (N.Y. App. Div. 1956). *See also* JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 348 (1990). Professor Cribbet suggests that

> it should not be supposed that cotenants will always be regarded as having a fiduciary relationship which will prevent one from acting for himself to the possible disadvantage of another. It has been suggested that where the cotenants acquire their interests simultaneously by the same conveyance, or by a testate or intestate succession, the relationship should be recognized; otherwise not - e.g., where one cotenant conveys his undivided interest to an outsider, the latter may well be regarded as having no fiduciary duty to the other cotenant(s).

Id.; *cf.* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.10, at 217 (2d ed. 1993) (footnote omitted) ("When co-tenants acquire their concurrent interests at the same time, either by the same instrument or by inheritance from a common ancestor, they are held to be subject to fiduciary duties with respect to their dealings with the common property.").

I. THE ABSTRACTION OF UNDIVIDED OWNERSHIP

The common law we inherited from England recognizes three distinct forms of collective ownership:[19] joint tenancy, tenancy in common, and tenancy by the entireties.[20] The fundamental nature of the joint tenancy and its essential distinguishing characteristic is that, when one joint tenant dies, whether testate or intestate, his or her share of the property passes to the other joint tenant(s) by right of survivorship, or *jus accrescendi.*[21] Tenants in common, on the other hand, are said to own separate undivided shares of the whole property, subject to the concurrent ownership interest of the other(s). The respective ownership interests are undivided in the sense that the property in which their shares subsist is undivided.[22] In other words, each tenant has an equal right to possess and enjoy every part of the property.[23] Conversely, no one cotenant has the right to exclusive possession of any particular part of the property.

Unity of possession, and the abstraction of undivided or fragmented ownership, are the principal attributes and essential dynamic of the tenancy in common.[24] Each cotenant has the theoretical right to possess and enjoy the entire property, limited only by the concurrent exercise of that same right by other

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19 By concurrent ownership it is meant that the owner of an interest in land is entitled to possession not alone, but simultaneously in conjunction with other persons. All such persons are said to hold title concurrently, or in co-ownership, and to have concurrent interests. E. H. BURN, CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY 207 (14th ed. 1988).

20 Tenancy by the entireties and, to almost the same extent, joint tenancy, involve spousal or other close familial relationships which attract fiduciary obligation for other reasons and are, therefore, outside the scope of this inquiry. CUNNINGHAM ET AL., *supra* note 18, § 5.10, at 217 & n.1 ("The requirements for a fiduciary relationship are, of course, always satisfied in a tenancy by the entirety or a joint tenancy.").

A fourth form of co-ownership, coparcenary, existed in England at early common law where land descended from the ancestor to two or more females in default of a male heir. The estate in coparcenary was not generally recognized in this country, and it is now obsolete as a separate form of co-ownership. MOYNIHAN, *supra* note 1, at 224-25.

21 CUNNINGHAM ET AL., *supra* note 18, § 5.3, at 199.

22 Tenants in common all occupy "promiscuously." BURN, *supra* note 19, at 216. If A and B are tenants in common, A has an equal right with B to possession of the whole land. This united right to possession is the only one of the four unities that tenancy in common shares with joint tenancy. Unlike joint tenants, tenants in common may each hold different interests (i.e., one may be entitled to two-thirds and the other to one-third), acquired under different titles (i.e., one may have purchased and the other inherited his or her share), and at different times. *Id.*

23 Porter v. Porter, 472 So. 2d 630 (Ala. 1985); Muslow v. Gerber Energy Corp., 697 P.2d 1269 (Kan. 1985).

24 Merritt v. Nickelson, 287 N.W.2d 178, 182 (Mich. 1980) (Moody, J., concurring in the result).

cotenants.[25]

Unlike joint tenants, the undivided interests of tenants in common need not be equal fractional shares.[26] Further, tenants in common need not have obtained their interests at the same time or from the same source.[27] In summary, there may be several cotenants, some having larger fractional shares than others, and having received their interests from different grantors at different times, all having an equal right to the use and enjoyment of the property.

Although a cotenant's interest is undivided, each cotenant owns a separate property interest. Unlike joint tenancy, the tenancy in common carries no right of survivorship.[28] When a tenant in common dies, her interest passes through her personal representatives to her heirs. Each cotenant is free, without the permission (and notwithstanding the express objection) of the others, to transfer her interest by deed,[29] or by lease.[30]

Common law rules of construction since feudal times favored joint tenancy because operation of the right of survivorship led eventually and inevitably to the vesting of title to the property in a single person.[31] But courts of equity, in the interest of justice, would reverse the constructional preference to favor tenancy in common.[32] The presumption that a transfer to two or more unmarried grantees creates a tenancy in common, absent expression of the grantor's intention to the contrary, has now been codified by statute in every American jurisdiction.[33]

Other situations exist in which more than one person owns an interest in the same property (e.g., landlord and tenant, life tenant and remainderman). It is the conflict between fragmentation of

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25 MOYNIHAN, *supra* note 1, at 214.

26 Where a deed or will does not specify the shares of each cotenant, however, there is a presumption of equality. Caito v. United Cal. Bank, 576 P.2d 466 (Cal. 1978).

27 MOYNIHAN, *supra* note 1, at 214. However, the circumstances may be significant in determining whether tenants in common are in a fiduciary relationship. *See infra* notes 143-45 and accompanying text.

28 Wolfe v. Wolfe, 42 So. 2d 438 (Miss. 1949).

29 Wilk v. Vencill, 180 P.2d 351 (Cal. 1947).

30 Sun Oil Co. v. Oswell, 62 So. 2d 783 (Ala. 1953); Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

31 Spessard v. Spessard, 494 A.2d 701, 705 (Md. Ct. Spec. App. 1985); BURN, *supra* note 19, at 209; CUNNINGHAM ET AL., *supra* note 18, § 5.3, at 198.

32 BURN, *supra* note 19, at 209 ("Equity aims at equality, a feature that is conspicuous for its absence if the survivor becomes the absolute owner of the land.").

33 1 AMERICAN LAW OF PROPERTY, *supra* note 9, § 4.02[1][a]; CUNNINGHAM ET AL., *supra* note 18, at 189.

ownership and unity of possession[34] that is unique to the tenancy in common, and distinguishes it from other types of concurrent ownership. Each of the cotenants has a separate and distinct interest in the common property; but the right of possession is common to all.

A high degree of trust and loyalty underlies the reciprocal rights of cotenants regarding possession. Each cotenant has an equal right to possess and enjoy all or any portion of the property as if he were the sole owner,[35] but only because possession by one is deemed possession by and for the benefit of all.[36] One court has held that the concurrent right to possession itself gives rise to fiduciary obligation.[37]

II. HISTORICAL DEVELOPMENT

The notion that tenants in common owe fiduciary duties was first expressed in 1821 by New York's Chancellor James Kent, a legendary figure in American law.[38] Chancellor Kent held that one tenant in common could not divest the other of property acquired by devise from a common ancestor by acquiring an outstanding adverse title. Rather, the purchase by one cotenant inures to their common benefit, subject to contribution by the other to the expense of acquisition.[39] According to Kent, "Community of interest produces a community of duty . . . to deal candidly and benevolently with each other . . . ."[40] Notwithstanding the rhetorical breadth of the opinion,[41] Kent was careful to limit himself to the case of two cotenants in possession under a title derived from a

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34 Mastbaum v. Mastbaum, 126 N.J. Eq. 366, 9 A.2d 51, 55 (1939) ("Two men cannot plow the same furrow.").

35 1 AMERICAN LAW OF REAL PROPERTY § 4.03[1][b] (Arthur R. Gaudio ed. 1991).

36 *Id.* § 4.03[1][a].

37 Smith v. Borradaile, 227 P. 602, 608 (N.M. 1922).

38 *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993).

39 Van Horne v. Fonda, 5 Johns. Ch. 388, 407 (N.Y. Ch. 1821).

40 *Id.* at 407-08.

41 The Chancellor stated:

> It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created.

Id. at 407.

common ancestor,[42] a distinction since widely adopted in this context.[43]

On the other side of the Atlantic, the House of Lords was presented with the opportunity to follow Chancellor Kent in the leading case *Kennedy v. DeTrafford.*[44] In 1877, Carswell and Dodson, tenants in common of property in Manchester, executed a mortgage to DeTrafford to secure a loan of £60,000. By 1886, Carswell had been adjudicated bankrupt, and Kennedy had been appointed trustee. The DeTrafford loan went into default, and, in 1889, the mortgagee exercised the power of sale. Unbeknownst to Kennedy or Carswell, Dodson purchased the property at foreclosure for the unpaid principal balance, plus interest and costs, of £54,000.[45]

In 1891, Kennedy discovered that Dodson had acquired the property and, in 1895, sued to set aside the sale and for redemption. Finding that Dodson occupied a fiduciary relationship with Kennedy, the vice chancellor ordered that, upon paying Dodson his share of the amount owing, Kennedy be restored to his interest as cotenant of the property. The vice chancellor's decision was subsequently reversed by the Court of Appeal.

Kennedy appealed the Court of Appeal decision to an unsympathetic House of Lords.[46] Kennedy relied upon *Van Horne v. Fonda* for the proposition that tenants in common stand in a fiduciary relationship, but acknowledged that there was no English decision to this effect.[47] Lord Herschell clearly was unwilling to allow New York authority to carry the day in the House of Lords.[48] Lord Herschell observed:

> No authority has been cited in support of such a proposition. The only authority, if it can be so called, which has been cited is the case before Chancellor Kent; but he commences his observations by saying that he is not going to lay down a general rule which would be applicable to such a case as this. He deals with

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42 *Id.*

43 *See infra* text accompanying note 148.

44 1897 App. Cas. 180.

45 *Id.* at 181.

46 *Id.* at 183. Forsaking characteristic English understatement, Lord Herschell observed: "I confess I think this as hopeless an appeal as has ever been presented to your Lordships." *Id.*

47 *Id.* at 182.

48 *Id.* at 190. Lord Herschell stated: "It is enough to say that even if it is to be taken as enunciating a rule of law which would be as applicable in this country as in America, it does not enunciate any rule of law which would be sufficient for the appellant in the present case." *Id.*

> the particular case, the circumstances of which were peculiar and of immense complication, and he certainly does not lay down any rule or doctrine of law which supports the argument which has been addressed to your Lordships.[49]

The English courts revisited the fiduciary duty of tenants in common six years later.[50] A landlord named Stone leased property in Westminster to John Biss for seven years for use as a lodging house. At the expiration of the term, Stone refused to renew the lease, but allowed Biss to remain as a periodic tenant from year to year at an increased rent. Biss died intestate, survived by his widow, two adult children by his first wife, and an infant child. The widow, as administratrix, and the two adult children continued to operate the house as before. Each of them applied unsuccessfully to Stone for renewal of the lease for the benefit of the estate. Finally, Stone agreed to grant a new three-year lease "personally" to the son.[51] The administratrix filed suit seeking to have the lease declared to be held by the son for the benefit of the estate. Believing himself bound by long-standing precedent,[52] the trial judge reluctantly granted her application.[53]

The Court of Appeal reversed.[54] Only after the landlord's absolute refusal to deal with the estate,[55] and full opportunity for the

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49 *Id.* at 189-90.

50 *In re* Biss, [1903] 2 Ch. 40.

51 *Id.* at 42.

52 In Keech v. Sandford, 25 Eng. Rep. 223 (1726), a trustee had renewed for himself a valuable lease held as part of the trust corpus after the landlord had refused to renew the lease in the name of the trust because of the sole beneficiary's infancy. Holding that a fiduciary may not take the renewal of a lease which he holds on behalf of another, Lord Chancellor King ordered that the lease be held on constructive trust for the beneficiary.

In *Ex parte* Grace, 90 Rev. Rep. 917 (C.P. 1799), leasehold property devolved jointly on an administratrix and her infant son. After she remarried, her new husband, Grace, acquired a renewal of the lease in his own name. The court required Grace to hold the lease as trustee for the infant son.

53 *In re* Biss, [1903] 2 Ch. at 43.

54 The appellate court explained and distinguished *Grace.* Having married the administratrix of the deceased owner of the leasehold, Grace held the term on her behalf, subject to the same trust on which she had held the estate. Thus, Grace was in no better position than she would have been had she herself obtained the renewal which, under the authority of *Keech v. Sandford,* would not be very good. Furthermore, Grace was in possession of the property. *Id.* In *In re* Biss, the son was not a trustee for the others, nor was he a party in possession.

55 Landlord Stone had made it abundantly clear that he would not deal with John Biss' estate. He was aware that the son had assisted his father in the business, however, and was desirous of helping him earn a livelihood, for his father's sake. Stone wrote as follows to the court appointed receiver for the estate:

> With regard to your inquiry as to renewal of the above premises, I beg to inform you that I positively decline any negotiations for renewal either to Mrs. Biss or to any one representing the estate of the late Mr. John

widow to attempt to procure renewal for the estate, did the son accept a proposal made to him by the lessor.[56] Under these circumstances, the son was entitled to renew the lease for his own benefit. Not content to rest the opinion on its narrow factual context,[57] Master of the Rolls Collins indulged himself in the hyperbolic proposition for which *Biss* would thereafter be cited: "Tenants in common do not stand in a fiduciary relationship to each other."[58]

Subsequent development of English land law came through legislation. Compared with the accidental outcomes of the litigation process, legislative reform was planned and purposive.[59] As we have seen,[60] each tenant in common owns a separate, though undivided, interest in the common property. Accordingly, a purchaser of land from tenants in common or a mortgage lender extending credit on the security of tenancy in common property must obtain the concurrence of all tenants in common and investigate the status of title to each cotenant's share. Whereas the survivorship feature of joint tenancy avoids division of tenures,[61] tenancy in common results in the fragmentation of land into successively smaller interests. Over time, each original share may become vested in numerous other persons. So many separate titles could exist in the same piece of land for it to be more expensive to investigate than the land is worth.[62]

> Biss. I have already rejected Mrs. Biss' application in this connection, and if I let the premises again it will be for the express purposes of offering it to Mr. J. E. Biss, junior, as a matter of respect for him and his late father; but this, of course, is entirely a matter between Mr. J. E. Biss, junior, and myself.

Id. at 42.

56 *Id.* at 58.

57 Even within the context of a fiduciary relationship, a party is generally considered to be free to pursue an opportunity after the other party has had an equal chance, or that would not be available to the other for various reasons. Meinhard v. Salmon, 164 N.E. 545, 547 (N.Y. 1928) (dicta); ROBERT C. CLARK, CORPORATE LAW 241-42 (1986).

58 *In re* Biss, [1903] 2 Ch. at 57.

59 *See generally* J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW 1832-1940 (1992). For England, the Great War "was a watershed after which nothing was the same again." *Id.* at 281. The radical reform of English land law in 1925 reflected "a general post-war desire to set the nation's social life in order." *Id.*

60 *See supra* notes 22-23 and accompanying text.

61 *See supra* note 31 and accompanying text.

62 F. H. LAWRENCE & BERNARD RUDDEN, THE LAW OF PROPERTY 111 (2d ed. 1982). The tendency of title to fragment in just two generations may be illustrated by the following real-life example: Husband conveys to his wife, for life, remainder to his children and their heirs. The couple had 10 children, one of whom died during the widow's life, leaving a similar will, seven children and a widow. Upon the widow's death, title to the property vested in the following 17 people:

> Each of testator's nine living children,
> or their assigns 7/70

Intended to remedy this situation, the Law of Property Act of 1925 revolutionized the joint ownership of land.[63] The Act abolished the tenancy in common as a legal estate.[64] Since 1925, a conveyance in undivided shares to more than one person operates as if the legal estate has been conveyed "in trust for sale" to the grantees, holding as common law joint tenants.[65] Upon payment of the purchase price, a purchaser of the legal estate from the trustees takes title free of the equitable interests of the beneficial co-owners. From the purchaser's perspective, the interests of the beneficial co-owners are said to be "overreached," although they have corresponding rights against the trustees to the purchase money.[66] In an ironic final analysis, after the English judiciary rejected the concept of fiduciary duty among tenants

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Each of the seven children of the deceased child, subject to the prior life estate of their mother 1/70

BURN, *supra* note 19, at 218.

63 *See generally* J. G. RIDDELL, INTRODUCTION TO LAND LAW (4th ed. 1988).

64 *Id.* at 153.

65 A devise to two or more persons in undivided shares operates to vest legal title to the property in the trustees under the will or, if there are none, in the personal representative, in trust.

In a conveyance or devise to more than four persons, the first four named in the conveyance hold as common law joint tenants. Thus, if land is conveyed or devised in fee simple to A, B, C, D, and E in equal shares, A, B, C, and D become joint tenants of the legal estate as trustees for the five equitable co-owners. The equitable owners are entitled to the rents and profits, and the proceeds of sale.

66 The following example serves to illustrate this concept: Assume that fee simple title to Blackacre is held by A, B, C, and D, as tenants in common. In 1990, A died leaving all his property to his four children, E, F, G, and H. In 1992, C died intestate leaving six children, I, J, K, L, M, and N. In 1993, D, in need of money, is offered a fair price for Blackacre by P. "I will be happy to sell," says D, "if I can obtain the consent of my fellow co-owners." "Who are they?" P inquires. "Well," says D, "there's E, F, G, and H, who each own 1/16, B owns 1/4, and I, J, K, L, M, and N each own a 1/24 share." D proceeds to make contact with each cotenant except B. D's letter to B is returned marked "Addressee Unknown". Upon further inquiry, D learns that B died intestate in 1991, shortly after his third marriage was dissolved, leaving numerous children and grandchildren. After months of correspondence, D learns that C's daughter, N, died leaving her property among 14 nephews and nieces. Title to the land by now will have become fragmented among so many persons that, even if D could somehow trace them all and obtain their consent to the sale, P would surely have lost interest in buying Blackacre.

Under the Law of Property Act 1925, legal title to Blackacre was vested in A, B, C, and D, as joint tenants on trust for sale for A, B, C, and D as tenants in common. As a result of the operation of the joint tenancy, after the deaths of A, B, and C, legal fee simple title vested in successively fewer people. P's investigation of title to Blackacre will be limited to the chain of conveyances into A, B, C, and D, and the death certificates of A, B, and C. P will take a valid legal title free of the equitable interests of the beneficial co-owners, whose interests are relegated to the purchase money. In deciding to sell the land, the trustees are obliged to consult the beneficiaries and obtain the consent of a majority of them. If the consent of a majority was not obtained, P still takes a valid legal title free of the beneficial co-owners, whose remedy lies in an action against the trustees for breach of trust. RIDDELL, *supra* note 63, at 164-66.

in common,[67] Parliament legislated the law of trusts into the relationship.

III. CRITERIA FOR ADMISSION TO THE FAMILY OF FIDUCIARY RELATIONSHIPS

Something about the law of fiduciary obligation seems to impede precision of thought and clarity of expression on the part of courts and commentators.[68] The fiduciary concept is widely regarded as among the most indefinite, imprecise, and elusive legal abstractions.[69] The term "fiduciary" is appropriately derived from the Latin "fiducia," meaning trust. In declaring (as opposed to analyzing) whether a relationship is a fiduciary one, courts often require the exercise of faith and trust.[70]

In judicial usage, the term "fiduciary" was adopted in the 19th century to describe situations falling short of the well-defined relationship of trustee and beneficiary, but were regarded as similar.[71] The category of relationships that gives rise to fiduciary duty is not an exclusive or closed set.[72] However, there is widespread disagreement concerning the identity of the members[73] and a shared sense

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67 Hart, *supra* note 8, at 261-62.

68 Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991). The uncertain parentage cannot help. *See* J. C. Shepherd, *Towards a Unified Concept of Fiduciary Relationship*, 97 LAW Q. REV. 51 (1981) ("Fiduciary relationships are children of the forced marriage of agency law and trust law.").

69 *Id.* at 69, 72. *See also* DEMOTT, *supra* note 6, at 2; SHEPHERD, *supra* note 5, at 4; Demott, *Beyond Metaphor*, *supra* note 6, at 879.

70 J.R. Maurice Gautreau, *Demystifying the Fiduciary Mystique*, 68 CAN. BAR REV. 1, 2 (1989) ("A legal paraleipsis has lurked about the courts when it comes to stating what constitutes a fiduciary relationship.").

71 *See, e.g.*, *In re* West of England and South Wales District Bank, 11 Ch. D. 772, 778 (1879) ("What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust."); DEMOTT, *supra* note 6, at 12.

72 Vargas v. Esquire, Inc., 166 F.2d 651, 653 (2d Cir. 1948) ("[E]quity has not set any bounds to the facts and circumstances out of which a fiduciary relationship may arise . . . ."); Schaumann, *supra* note 6, at 22. Indeed, the earliest use of the term "fiduciary" by a judge appears to have been by Lord Chancellor Cowper in what might be described as an "unconventional" context: suit by a landlord for an accounting of copper ore from a mine opened and thereafter extracted by a tenant without the landlord's consent. Bishop of Winchester v. Knight, 24 Eng. Rep. 447, 448 (1717) ("[T]he tenant is a sort of fiduciary to the lord, and it is a breach of the trust which the law reposes in the tenant, for him to take away the property of the lord.").

73 Trustees, agents, partners, corporate officers, and directors appear in enumerations with sufficient regularity to be classified among the "conventional" category of persons owing fiduciary duties. Attempts by one party seeking to recharacterize as fiduciary an otherwise arm's length commercial relationship result in the recognition

of mystery in English-speaking countries surrounding the criteria for admission of new or "unconventional" members.[74] A certain vagueness in fiduciary law may be essential to the purposes served by the doctrine.[75] Courts clearly are keeping the circumstances under which fiduciary duty arises a moving target.[76] Whether this is inadvertent, unavoidable, or a conscious judicial shell game, is open to debate.[77]

A high barrier for admission of new members to the fiduciary

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of "unconventional" fiduciary relationships. *E.g.*, Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979) (franchisor/franchisee); Consolidated Oil & Gas, Inc. v. Ryan, 250 F. Supp. 600 (W.D. Ark. 1966) (vendor/purchaser), *aff'd per curiam* 368 F.2d 177 (8th Cir. 1966); Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa Ct. App. 1986) (lender/borrower). *But see* W.K.T. Distrib. Co. v. Sharp Elecs. Corp., 746 F.2d 1333 (8th Cir. 1984) (rejecting the theory that parties to franchise relationship owe fiduciary duty); Ritchie Enters. v. Honeywell Bull, Inc., 730 F. Supp. 1041, 1052-54 (D. Kan. 1990) (refusing to impose a fiduciary duty in product liability case against seller of computer technology based on a long-standing relationship with a customer). *See also* Lee A. Rau, *Implied Obligations in Franchising: Beyond Terminations*, 47 BUS. LAW. 1053, 1061 (1992).

74 Hospital Prods. Ltd. v. United States Surgical Corp., 156 C.L.R. 41, 68 (Austl. 1984) ("The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the fiduciary relationship may be established.").

As one commentator noted:

> [I]t has often seemed as if some sort of mystical invocation were necessary to determine if the new relationship was a fiduciary relationship; and if it was, there then followed some sort of internal laying on of hands which imposed a raft of immovable obligations and duties on to the shoulders of the fiduciary but precisely how this happened remained a mystery.

Gautreau, *supra* note 70, at 2.

75 Even if it were feasible, it might not be desirable for courts to closely define the demarcation line showing the exact transition point where a relationship that does not attract fiduciary duty passes into one that does. Gautreau, *supra* note 70, at 3. *See also* Hetherington, *supra* note 12, at 11 (footnote omitted) ("By obscuring the limits of fiduciary obligation under moralistic rhetoric and by verbally chastising those who are found to have violated the standard, or come close to doing so, the courts seek to maintain the standard by discouraging marginal behavior which might or might not violate it."); Schaumann, *supra* note 6, at 24 (footnote omitted) ("The concern is that if fiduciary law were more clear, it would encourage conduct adhering to the letter of the rule while violating its spirit.").

76 Patton v. Shelton, 40 S.W.2d 706, 712-13 (Mo. 1931) (courts deliberately avoid defining the scope of fiduciary relationship to allow for possible new cases); Schaumann, *supra* note 6, at 24.

77 One commentator compares the reluctance of our legal system to define or confine the fiduciary relationship to the attitude of primitive people to cameras:

> They believe that the fixing of a human image on paper takes away from the human subject some of his soul. . . . [W]e must also recognize that our reluctance to a large extent results from a fear that by defining the concept we will rob it of its dynamics and therefore its soul.

SHEPHERD, *supra* note 5, at 3.

relationship bestiary may be justified by the competing values at stake. The altruistic norm of fiduciary duty runs counter to cherished principles of rugged individualism. Indeed, the general welfare may be better promoted when all strive to advance their own self-interest.[78] A standard of conduct allowing people engaging in transactions in good faith to retain the fruits of their efforts encourages individual initiative and economic activity, and conforms with the probable expectations of the parties. That a primary purpose of law is to protect weaker transactors against allegedly exploitive behavior by the stronger may not be a self-evident proposition.

There are costs to be paid for each expansion of the fiduciary relationship family. According to one critic of the expansion of fiduciary duty, "it is possible to interpret much of the changing face of the law as an attempt to charge a variety of relationships with a fiduciary character. . . . Standards, rather than rules, become the norm, and resulting imprecision prompts litigation."[79] Another warns against allowing fiduciary norms to become "overstretched" lest they "lose their bite."[80]

Judicial decisions generally have sought to avoid the task of developing a principled framework for recognition of new fiduciary relationships.[81] Instead, reasoning by analogy has been the principal analytical mechanism by which fiduciary doctrine has developed through the common law.[82] The resemblance of an arm's length relationship to established fiduciary prototypes determines whether fiduciary norms should apply in the new context.[83] In the

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78 JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 95 (3d ed. 1989).

79 JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 20-21 & n.* (1981). For example, the requirement that a cotenant who wants to share in the purchase of an outstanding adverse title by a fellow cotenant must reimburse the purchaser for his share of the cost of acquisition within a reasonable time has spawned considerable litigation. *See infra* note 146 and accompanying text.

80 *See* DeMott, *Contemporary Challenges*, *supra* note 6, at 497 ("If fiduciary norms are overextended, that vitiates their force and their undergirding of commitments to act loyally, leaving a residue of empty, albeit emphatic, rhetoric.").

81 For example, the High Court of Australia observed:

> I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types . . . . and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.

Hospital Prods. Ltd. v. United States Surgical Corp., 156 C.L.R. 41, 68 (Austl. 1984).

82 *See* DeMott, *Beyond Metaphor*, *supra* note 6, at 891 (footnote omitted) ("The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully that most bodies of law, the power of analogy in legal argumentation.").

83 *Id.*

classic case of *Meinhard v. Salmon*,[84] Chief Judge (and later Justice) Cardozo imposed "the punctilio of an honor the most sensitive"[85] as the standard of behavior governing the relationship of joint venturers by analogy to the relationship among members of a general partnership.[86] Courts considering the duties of corporate directors reason by analogy to trustees, agents, and managing partners.[87]

Though judges may fear to tread, commentators have risen to the challenge to define the central concept that identifies a relationship as "fiduciary." A Toronto barrister and solicitor identifies control by one person over property of which another is the beneficial owner as a principal theory underlying fiduciary relationship.[88] According to another observer, access in relation to assets and the potential for abuse that results attracts fiduciary duty in order to maintain the integrity of the relationship between the parties.[89] Possession of commonly owned property by one cotenant under this analysis would clearly evoke a fiduciary obligation not to use that possession for purposes inimical to the relationship among the parties.[90] The opportunity presented by possession to act against the interests of other tenants in common attracts an obligation to act with loyalty.[91] The confidence reposed on the cotenant in possession by those at a distance may give rise to fiduciary obligation.[92]

Does the law of fiduciary obligation accommodate variations in intensity of fiduciary relationships, perhaps with the trust requiring the most extensive duties and more limited fiduciary relationships following on a sliding scale of intensity of duty? Or is this simply to say that the rules that define a particular fiduciary relationship are whatever is required to maintain the integrity of that relationship? In other words, the reason fiduciary duties of trustees appear to be so much broader than those of fiduciaries in other relationships is because of the wide variation of factual situations that tend to recur. For example, in the agency and partner-

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84 164 N.E. 545 (N.Y. 1928).

85 *Id.* at 546.

86 In his dissent, Judge Andrews's argument also was by way of analogy. He compared the relationship of joint venturers with that of tenants in common, neither of which he considered to be fiduciary in character. *Id.* at 550 (Andrews, J., dissenting).

87 Frankel, *supra* note 6, at 805 (footnote omitted).

88 SHEPHERD, *supra* note 68. Professor Sealy has also identified control over property that belongs to another as giving rise to fiduciary duty. Sealy, *supra* note 14.

89 Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 307-10 (1989).

90 *Id.* at 309.

91 *See id.* at 310 ("A person with access is fixed with a fiduciary obligation in order to deter mischievous conduct.").

92 Sealy, *supra* note 14, at 74.

ship contexts, there is nothing comparable to the trustee's allocation function which imposes a corresponding fiduciary duty to treat beneficiaries fairly. Undue influence may be less of a factor in contexts other than trusts. The expansive fiduciary duties that apply to trustees (e.g., the prohibition against self-dealing) apply because they are relevant.[93]

Or does the concept of limited fiduciary obligation mean something more than applying only that which is applicable to particular relationships? Does it mean, for example, that some fiduciary relationships are more comprehensive in scope than others? The concept of qualified or limited fiduciary duty was expressed by Lord Eldon as early as 1821.[94] The essence of the concept is that a relationship may properly be described as "fiduciary" for some purposes, but less than all.[95] This concept is helpful in the sense that it eliminates the need to search quixotically for a general definition of fiduciary relationship.[96] The scope of fiduciary norms is context-dependent.[97] For example, unless the terms are intrinsically fair and reasonable, a trustee may not deal with the beneficiary even with the beneficiary's consent. Corporate directors, on the other hand, may engage in self-dealing if independent directors

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93 Flannigan noted that

> [t]he content of the obligation imposed in a particular case . . . . depends on the factual structure of the relationship . . . . The judges have recognized these factual differences and, over time, have fashioned particular fiduciary obligations which reflect the assumed nature of the particular structures. They have taken whatever components of a comprehensive fiduciary obligation are required and applied them where they are relevant. The core content of the fiduciary obligation remains the same; it is just not applicable in full to every relationship.

Flannigan, *supra* note 89, at 319.

94 Lord Eldon noted:

> You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que trust*; and yet you cannot deny, that to some intents and some purposes one is a *cestui que trust* and the other a trustee.

Cholmondeley v. Clinton, 4 Bli. 1, 96 (1821).

95 Sealy, *supra* note 14, at 81.

96 Sealy noted that

> [t]he word 'fiduciary,' we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. . . . [T]he mere statement that John is in a fiduciary relationship towards me means no more than in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.

Id. at 73.

97 DeMott, *Contemporary Challenges*, *supra* note 6, at 477; Scott, *supra* note 6, at 541.

approve the transaction.[98] Elsewhere in real property law, the limited fiduciary relationship concept explains the narrow scope of the duty owed by a mortgagee to the borrower.[99] For example, a leasehold mortgagee who renews the lease for its own account is deemed to hold the renewal for the benefit of the borrower, subject to reimbursement for its expenditures.[100] Limited fiduciary duty is a recurring characterization in recent decisions involving the fiduciary duty of pension plan trustees under the Employment Retirement Income Security Act.[101]

IV. RESEMBLANCE OF COTENANCY TO THE FAMILY OF FIDUCIARY RELATIONSHIPS

Under a jurisprudence of analogy from the decided to the undecided, it is necessary to compare the relationship between persons with legally protected interests in common property to conventional fiduciary relationships to determine whether the resemblance is sufficient to support an extension of fiduciary obligation to tenants in common. Tenancy in common bears little if any resemblance to the consensual fiduciary relationship of agency.[102] Tenants in common generally do not agree to act for, or under the direction or control of, one another.[103] Nor does the relationship of tenants in common resemble that among joint venturers. Tenancy in common may be involuntary and does not necessarily contemplate a sharing of joint profits.[104]

Although the partnership relationship provides the closest analogue, there is considerable doubt that rules which are appropriate for governing ongoing commercial enterprises would necessarily be appropriate for relationships involving passive common ownership of property.[105] Indeed, the existence of fiduciary

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98 DeMott, *Contemporary Challenges, supra* note 6, at 477.

99 Boatmen's Bank v. Wilson, 833 S.W.2d 879 (Mo. Ct. App. 1992).

100 Rushworth's Case, 2 Free. 13 (1676).

101 *See, e.g.*, Richman v. Aetna Life Ins. Co., 974 F.2d 1331 (4th Cir. 1992); United Mine Workers 1950 Benefit Plan and Trust v. Bituminous Coal Operators' Ass'n Inc., 898 F.2d 177, 182 (D.C. Cir. 1990).

102 Joint ownership of property as tenants in common does not create an agency relationship. Merritt v. Nickelson, 287 N.W.2d 178, 181 (Mich. 1980); Masick v. City of Schenectady, 564 N.Y.S.2d 569, 570 (N.Y. Sup. Ct. App. Div. 1991); 20 AM. JUR. 2D, *Cotenancy and Joint Ownership* § 2 (1965). *But see* McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1559 (M.D. Ga. 1992).

103 RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

104 Taylor v. Brindley, 164 F.2d 235, 240 (10th Cir. 1947).

105 For cases holding that mere community of interest in the ownership of property, such as exists between tenants in common, does not make them partners or raise a presumption that a partnership exists, see *In re* Wildman, 859 F.2d 553 (7th Cir.

duty among partners, and its absence from the relationship among tenants in common, may be of the essence in distinguishing between the two forms.[106]

Notwithstanding the differences, the law of partnership does offer a ready-made body of law to which reference may be made in resolving problems that arise in the relationship among concurrent property owners.[107] Fiduciary obligation is designed to effectuate the presumed intention of parties to a relationship as to matters on which they have not reached express agreement.[108] People entering into partnership are presumed to have a general expectation that they will treat each other fairly. As members of a partnership, they become obligated to behave in a manner consistent with their presumed intention.[109] Because the right to partition traditionally has been regarded as automatic,[110] tenants in common who remain together are engaged in a voluntary mutual undertaking not unlike that of partners.

Like those of partners, the legal rights of concurrent property owners are so intermingled and intertwined that any exercise of rights by one co-owner has the potential to endanger or hinder others.[111] Like members of a partnership, cotenants have the ability to inflict significant liability on each other. Tenants in common are jointly and severally liable for torts committed on common property.[112] Because property ownership alone is sufficient to

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1988); Maloney v. Pihera, 573 N.E.2d 1379 (Ill. App. Ct. 1991); Singer v. Singer, 634 P.2d 766 (Okla. Ct. App. 1981); Troy Co. v. Perry, 228 N.W.2d 169 (Wisc. 1975).

106 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.06 (1991) ("The most important category of activities excluded by the definition of partnership is the mere co-ownership of property as distinguished from the carrying on of a business by the co-owners.").

107 Lawrence Berger, *An Analysis of the Economic Relation Between Cotenants*, 21 ARIZ. L. REV. 1015, 1022 (1979).

108 WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 78 (5th ed. 1993).

109 *Id.* at 74.

110 *See infra* notes 194-98 and accompanying text.

111 Beers v. Pusey, 132 A.2d 346, 348 (Pa. 1957).

112 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 10.1 (2d ed. 1986). The rule that tenants in common are jointly and severally liable for torts committed on the common property poses the unacceptable risk of virtually unlimited liability to individual owners in the condominium context, where each unit owner also owns a fractional interest in the common areas of the building as tenant in common. PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS 571 (3d ed. 1993). In some jurisdictions the traditional common law rule has been altered by judicial decision limiting a unit owner's liability to its pro rata interest in the common elements. See e.g., Dutcher v. Owens, 647 S.W.2d 948 (Tex. 1983). In other jurisdictions, by amendment to state condominium statutes, plaintiff may be required to sue the unit owners' association rather than individual unit owners. UNIF. CONDOMINIUM ACT § 3-

render a co-owner liable for injury to a third party,[113] actions or omissions by a cotenant in possession can expose nonpossessory cotenants to joint and several tort liability.[114]

Similarly, because the category of "potentially responsible parties" includes any person who owned *or* operated property at which hazardous substances were released,[115] property ownership alone triggers strict liability under Federal environmental law,[116] even though an owner may not have actively participated in generating or disposing of hazardous waste.[117] Recent decisions raise the spectre of exposure of absentee co-owners to unlimited joint and several environmental liability, far in excess of the value of a cotenant's interest in the common property, regardless of nonparticipation in the release of hazardous substances.[118]

The relationship among tenants in common is characterized by the same separation of ownership from control underlying the fiduciary duty of corporate directors and managers to stockholders.[119] The fragmentation inherent in tenancy in common[120] and

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111, 7 U.L.A. 517 (1985). *See generally* Eric T. Freyfogle, *A Comprehensive Theory of Condominium Tort Liability*, 39 U. FLA. L. REV. 877 (1987).

113 Lansky v. Goldstein, 233 S.E.2d 437, 438-39 (Ga. Ct. App. 1977).

114 Morden v. Mullins, 153 S.E.2d 629 (Ga. Ct. App. 1967). Co-owners of property are subject to the rule that imposes joint and several liability on each of a number of persons who fail to perform a duty owed to the plaintiff, although their interests in the property causing the harm may be unequal and, as between themselves, only one co-owner has the burden of fulfilling the duty. RESTATEMENT (SECOND) OF TORTS § 878 (1977); HARPER ET AL., *supra* note 112, § 10.16.

On the other hand, where one cotenant has exclusive possession and control of common property, the other may not be held liable in tort for the possessor's negligence. Merritt v. Nickelson, 287 N.W.2d 178 (Mich. 1980) (where one tenant in common had complete control over operation of drag-strip race track, other tenant in common of property on which track was located held not liable to estate of spectator who died from injuries sustained after being struck by fragment from steel flywheel of racing car). Because the exclusive possessor, by consent or acquiescence of his cotenants, is not required to share the profits from a venture on the common property, fundamental fairness would seem to dictate that he be solely responsible for liabilities resulting from profit-making activities. *Id.* at 183 (Moody, J., concurring); *see also* Sowers v. Birkhead, 157 N.E.2d 459 (Ohio Ct. App. 1958).

115 By its terms, the statute imposes liability on "the owner *and* operator" of contaminated property. However, the phrase "owner and operator" has been interpreted in the disjunctive, based on legislative history and logic. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("[B]y no means does Congress always follow the rules of grammar when enacting the laws of this nation.").

116 Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607(a) (1988).

117 First Capital Life Ins. Co. v. Schneider, Inc., 608 A.2d 1082 (Pa. Super. Ct. 1992).

118 United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Moore, 698 F. Supp. 622 (E.D. Va. 1988).

119 Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 48 (1991).

the further division of ownership and management give rise to a duty owed by a party or parties in possession to deal fairly with nonpossessory cotenants.

Access itself is a valuable property right leaving nonpossessory co-owners vulnerable.[121] Exposure of nonpossessory cotenants to potentially staggering tort and environmental liability highlights the extreme vulnerability inherent in the situation. Imposition of fiduciary duty tends to arise in relationships characterized by vulnerability of one party to another.[122]

It has been suggested that the family resemblance test is being used to disguise a judicial reasoning process that more accurately may be described as instrumental.[123] According to this view, fiduciary obligation is nothing more than a device by which the law responds to situations in which one party's discretion ought to be controlled because of the nature of the party's relationship with another.[124]

Is it self-evident that tenants in common should behave fairly toward one another? The answers to questions about who tenants in common tend to be and how the relationship tends to arise supply reasons for imposing fiduciary norms on concurrent owners. Property ownership in tenancy in common rarely arises as the considered result of thoughtful real estate planning. Grantees who take title to real property by design tend to execute agreements governing their relationship, thus becoming partners. In most instances, tenancy in common is thrust upon the parties, usually as takers of a class devise or intestate disposition.[125] Accordingly, although they will have become opposing litigants by the time the issue arises, tenants in common overwhelmingly start out as family members and friends.

It is appropriate to impose fiduciary norms on co-owners if they conform to rules that the parties themselves probably would have chosen to govern their relationship.[126] Utmost fairness and

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120 *See supra* note 62 and accompanying text.

121 *See* Singer, *supra* note 119, at 41 ("The freedom to use or possess limited resources implies a correlative vulnerability in others.").

122 Frankel, *supra* note 6, at 810.

123 DeMott, *Beyond Metaphor*, *supra* note 6, at 909-10.

124 *Id.* at 915. DeMott added: "This instrumental description is the only general assertion about fiduciary obligation that can be sustained." *Id.*

125 CHUSED, *supra* note 4, at 484-85.

126 Jordan v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir. 1987) ("[F]iduciary duty is a standby or off-the-rack guess about what parties would agree to if they dickered about the subject explicitly . . . ."). *See also* Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 468 (1991) ("A default rule that

good faith are implicit expectations within circles of family and friendship, as are more expansive fiduciary norms of selflessness and protection of the vulnerable against exploitive behavior. The idea of wheeling and dealing behind the backs of fellow owners is foreign to relationships governed more by the golden rule than by the law of the jungle.[127] "[F]orms of conduct permissible in a workaday world for those acting at arm's length"[128] are out of context in these circles.[129] "Such feelings arise out of ethical notions about how family and friends should deal with each other."[130]

Implicit expectations of family and friends are reflected in decisions enforcing fiduciary duty among tenants in common, where title was derived from a common source at the same time.[131] Limiting fiduciary obligation to these situations excludes successor tenants in common. Though not family, and perhaps not even friends, co-owners by succession are more than strangers, and even more than neighbors. They own the same property, at the same time, and in the same way. If not norms of selflessness, at least intense cooperation would seem to be required if the parties expect to maintain a successful, continuing relationship. Imposition of fiduciary duty tends to arise in relationships in which extremely close cooperation is the norm.[132]

V. TESTING HYPOTHESIS AGAINST CASE LAW

Ad hoc judicial decisions in a wide variety of factual contexts enforce expansive fiduciary norms against tenants in common, including duties of care,[133] loyalty,[134] cooperation,[135] and against en-

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accurately reflects implicit agreements tends to save people the cost of drafting agreements and also tends to avoid unexpected results.").

127 KLEIN & COFFEE, *supra* note 108, at 71. *But see* Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988) (declaring that public policy does not prevent farm lessee from going behind the back of one tenant in common to obtain more favorable lease from his father).

128 Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

129 RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY (TEACHER'S GUIDE) 111 (1988).

130 *Id.*

131 *See supra* text accompanying note 42.

132 Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 91 (1987).

133 Montcastle v. Baird, 1988 WL 5682 (Tenn. Ct. App. Jan. 29, 1988) (finding a tenant in common liable for interest and penalties arising from failure to file Federal income tax returns).

134 Birnbaum v. Birnbaum, 539 N.E.2d 574 (N.Y. 1989) (declaring that fiduciary duty of undivided loyalty owed by cotenants requires avoidance of conflicts of interest).

135 Bartz v. Heringer, 322 N.W.2d 243 (N.D. 1982) (holding that a co-optionee, a

richment at the expense of other cotenants.[136] A cause of action for breach of fiduciary duty to subordinate personal interest is available to remedy usurpation by one cotenant of an "opportunity" properly belonging to the tenancy in common.[137] This section analyzes cases arising in recurring factual patterns to determine whether fiduciary norms influence the judicial decision-making process in a predictable manner.

A. *Sharing Interests Acquired From Third Parties*

New or additional rights obtained by trustees, life tenants, and parties in possession under limited or partial interests in property are deemed to be an accretion to the original property.[138] Parties to fiduciary relationships are allowed no greater rights in regard to accretions than they had in the property originally held.[139] This principle of fiduciary duty is routinely applied to tenants in common.

1. Tax Sale

The fiduciary relationship existing among tenants in common gives rise to the general rule that one cotenant cannot purchase common property for himself at a public sale to satisfy unpaid real estate taxes[140] or special assessments.[141] Purchase of an outstanding tax title inures to the benefit of all cotenants.[142] The rationale for this rule is that,

> where the property is assessed as a whole for taxation, all the

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potential cotenant, has a fiduciary duty to cooperate with fellow co-optionee in exercise of option).

136 *See, e.g.*, Edwards v. Farm Bureau Mut. Ins. Co., 823 S.W.2d 903 (Ark. 1992) (finding that where a cotenant in possession paid fire insurance premiums and was the named insured, the fiduciary relationship between tenants in common requires that the fire insurance proceeds be held for the benefit of cotenants).

137 Moore v. Bryson, 181 S.E.2d 113 (N.C. Ct. App. 1971) (suggesting that the purchase of property adjacent to common property may be regarded as having been made for the benefit of all cotenants). *But see* Donnan v. Atlantic Richfield, 732 S.W.2d 715 (Tex. Ct. App. 1987).

138 Sealy, *supra* note 14, at 77.

139 *Id.*

140 Fuller v. McBurrows, 192 S.E.2d 144, 146-47 (Ga. 1972); Smith v. Smith, 52 So. 2d 1, 7 (Miss. 1951); Bevan v. Shelton, 469 P.2d 245, 248-49 (Okla. 1970); Beers v. Pusey, 132 A.2d 346, 348 (Pa. 1957).

141 Woodard v. Carpenter, 195 P.2d 983, 985 (Wash. 1948).

142 Howard v. Wactor, 41 So. 2d 259, 261 (Miss. 1949) (en banc); Sperry v. Tolley, 199 P.2d 542, 546 (Utah 1948) (reasoning that because the purchase of a tax title inures to the benefit of all cotenants, acquisition of a tax title by one cotenant in his own name is not notice to the others that the purchaser claims adversely for purposes of commencing statute of limitations on adverse possession).

> cotenants are equally in default if the tax is not paid when it is due, and none should be permitted to cure his own default by overdue payment, thus obtaining a "tax title," without allowing the others to do the same by reimbursing him.[143]

Where the land has been assessed on the tax rolls in the names of the co-owners separately, it cannot be said that the redeeming cotenant was in default with reference to taxes assessed against the interest of other cotenants.[144] Accordingly, the cotenant generally is free to redeem for himself the shares of delinquent cotenants.[145]

To take advantage of this rule, nonpurchasing cotenants must offer to contribute their proportionate share of the cost of acquisition within a "reasonable" time. The point at which delay becomes unreasonable is the subject of considerable litigation.[146] The cases are sharply divided over whether a tenant in common is free to acquire title to the common property from a bona fide third party tax sale purchaser.[147]

Some authority continues to apply Chancellor Kent's distinction[148] and limits the rule to tenants in common claiming under the same instrument.[149] However, the clear trend of the decided cases is away from any distinction based upon the circumstances in which tenants in common acquire title.[150]

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143 CRIBBET ET AL., *supra* note 18, at 348.

144 Stoltz v. Maloney, 630 P.2d 560, 563 (Ariz. Ct. App. 1981).

145 *Id.* at 563-64.

146 *Compare* Beers v. Pusey, 132 A.2d 346, 349 (Pa. 1957) (delay of 12 years after wife of one cotenant acquired title at sale of common property for unpaid taxes was not fatal to the claim of other cotenants) *and* Massey v. Prothero, 664 P.2d 1176, 1181 (Utah 1983) (granting relief despite nine-year delay where cotenant purchaser did not assert exclusive ownership) *with* Lund v. Henrich, 189 A.2d 581, 584 (Pa. 1963) (delay of 25 years estops cotenants from questioning tax sale purchaser's title).

147 *Compare* Patterson v. Wilson, 223 P.2d 770 (Okla. 1950) *and* Hamilton v. Shaw, 334 S.E.2d 139, 141 (S.C. Ct. App. 1985) (yes, on formalistic reasoning that cotenancy, by then, has ceased to exist) *with* Adams v. Adams, 512 So. 2d 1150, 1152-53 (Fla. Dist. Ct. App. 1987) (quotation omitted) ("[W]hen the common property has been sold for taxes to a stranger, even though the time for redemption has expired, a tenant in common cannot by the purchase of such title assert it against his cotenant."); Whelchel v. Solomon, 180 So. 2d 642, 644 (Miss. 1965); Brown v. Brothers, 97 So. 2d 642, 645 (Miss. 1957); *and* O'Toole v. Yunghans, 320 N.W.2d 768, 770 (Neb. 1982).

148 *See supra* note 42 and accompanying text.

149 *See, e.g.*, Jennings v. Bradfield, 454 P.2d 81, 82 (Colo. 1969) (en banc) (finding that unless they claim under the same instrument, "tenants in common are under no greater legal obligation to protect one another's interests than would be required of strangers."). More significant to the result may be the facts that the interests were separately assessed, and 24 years had elapsed before the complaining cotenant sought relief. *Id.* at 81. *See also* Dampier v. Polk, 58 So. 2d 44, 51 (Miss. 1952); Watson v. United Am. Bank, 588 S.W.2d 877 (Tenn. Ct. App. 1979).

150 Annotation, *Right of Cotenant to Acquire and Assert Adverse Title or Interest as Against Other Cotenants*, 54 A.L.R. 874 (1928).

2. Mortgage Foreclosure

Since 1821,[151] the fiduciary duty existing among tenants in common has been held to prevent one cotenant from purchasing an encumbrance against, or outstanding adverse claim to, common property for his exclusive benefit.[152] Rather, the interest thus acquired is deemed held in trust for the benefit of other cotenants who, within a reasonable time,[153] offer to contribute their proportionate share of the cost of acquisition.[154] This rule applies even where all cotenants are adults with equal opportunity to purchase at the foreclosure sale.[155]

B. Acquiring Interests From Each Other

We have seen that the community of ownership among tenants in common limits their right to acquire from third parties outstanding interests paramount to the common title.[156] The principle which prevents a cotenant from buying an outstanding title for his own benefit does not necessarily apply to the purchase by one tenant in common of the share of another cotenant.[157] Construed narrowly, the fiduciary duty of tenants in common does

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151 Van Horne v. Fonda, 5 Johns. Ch. 388 (N.Y. Ch. 1821).

152 *See, e.g.*, Salter v. Quinn, 134 N.E.2d 749 (Mass. 1956) (where one of two cotenants purchased property at a foreclosure sale, the other cotenant had such a potential interest in property as to render title unmarketable and to warrant refusal by contract purchaser to the accept deed); *see also* Cecil v. Dollar, 218 S.W.2d 448 (Tex. 1949).

153 *Compare* Salter v. Quinn, 143 N.E.2d 749 (Mass. 1956) (delay of 17 years did not necessarily preclude cotenant from asserting claim) *and* McArthur v. Dumaw, 43 N.W.2d 924, 927 (Mich. 1950) (offer to contribute made for first time in pleadings filed two years after foreclosure and a year after redemption period expired held to be reasonable) *with* Finley v. Bailey, 440 So. 2d 1019 (Ala. 1983) (claim made 35 years after cotenant acquired property barred by laches). *See also* Colquhoun v. Colquhoun, 88 N.J. 558, 443 A.2d 1045 (1982).

154 Laura v. Christian, 537 P.2d 1389, 1391 (N.M. 1975) (election to contribute held timely even though cotenant waited to offer payment until it became apparent that exercise of option to purchase adjacent property significantly enhanced value of subject property); Rider v. Phillips, 178 N.Y.S. 142 (N.Y. Sup. Ct. 1919); Westhoff v. Klem, 436 N.W.2d 243, 244 (N.D. 1989); Knesek v. Muzny, 129 P.2d 853 (Okla. 1942) (applying rule to purchase of outstanding mortgage by spouse of cotenant); Jolley v. Corry, 671 P.2d 139 (Utah 1983). *But see* Givens v. Givens, 387 S.W.2d 851 (Ky. Ct. App. 1965) (no duty to hold for cotenants where party acquired outstanding interest before cotenancy relationship arose).

155 In *Starkweather v. Jenner*, the Supreme Court refused to apply the rule to a public sale of the common property. However, the plaintiff had delayed at least four years in claiming against the cotenant purchaser, during which time there had been substantial appreciation in value. *Starkweather*, 216 U.S. 524, 531 (1909).

156 Colby v. Colby, 79 A.2d 343 (N.H. 1951); *see also* Annotation, *supra* note 150, at 906.

157 Sharples Corp. v. Sinclair Wyoming Oil Co., 167 P.2d 29 (Wyo. 1946).

not extend to the acquisition of an interest adverse only to the undivided interest of another cotenant.[158] Rather, cotenants are free to buy from or sell to each other in good faith.[159]

In *Bissell v. Foss*,[160] the Supreme Court rejected an opportunity to adopt an expansive interpretation of the fiduciary duty of tenants in common. Hunter, Bissell, Foss, and persons called "the Missourians," were co-owners of a mine in Colorado. The Missourians wanted to sell their undivided interest in the mine. Bissell and Foss agreed that they should try to buy the Missourians' interest for the benefit of Bissell, Foss, and Hunter.[161] After this attempt failed for pecuniary reasons, Foss and Hunter purchased the interest of the Missourians, with Hunter providing most of the $15,000 purchase price.[162] Relying on the rule that one cotenant cannot purchase an outstanding title or encumbrance for his own benefit, Bissell filed suit to participate in the acquisition. The Court held that Hunter and Foss, constrained only by the morals of the marketplace, were free to purchase for themselves the interest of some of their cotenants without consulting or including Bissell.[163]

In an arm's length real estate transaction, when information has not been requested, neither party owes the other a duty to disclose material facts that the other party could have discovered by its own due diligence.[164] Although this rule has experienced consid-

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158 20 AM. JUR. 2D, *Cotenancy and Joint Ownership* § 93 (1965) (footnote omitted) ("[O]ne cotenant can purchase the share of another just as he would buy property from a stranger . . . . "). The authority cited to support this proposition, *McMahon v. McMahon*, involved an inter-familial dispute between octogenarian litigants in which plaintiff waited 14 years to complain of a cotenant's alleged fraud. McMahon v. McMahon, 157 So. 2d 494, 498 (Miss. 1963).

159 Ziebarth v. Donaldson, 185 N.W. 377, 378 (Minn. 1921) ("[I]n such transactions they deal as adverse parties."); *Colby*, 79 A.2d at 344.

160 114 U.S. 252 (1885).

161 *Id.* at 257.

162 *Id.* at 255.

163 By reason of his prior understanding with Bissell, Foss had an obligation to inform Bissell of the failure of their plan before making another with a third person. The Court added:

> But it was not a legal obligation capable of enforcement *in foro externo*, but only a natural obligation to be disposed of *in foro conscientiae*. . . . It was one of those obligations which was binding on the honor and conscience of the party, but one not the subject of a suit and not to be enforced in a court of either law or equity.

Id. at 262.

164 Chiarella v. United States, 445 U.S. 222, 228 (1980); Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 435 (7th Cir. 1987) ("Strangers transact in markets all the time using private information that might be called 'material' and, unless one has a duty to disclose, both may keep their counsel."); Tew v. Chase Manhattan Bank, 728 F. Supp. 1551 (S.D. Fla. 1990); Ray v. Montgomery, 399 So. 2d 230 (Ala. 1980); Kruse v. Bank

erable (and well-deserved) erosion in recent years in the case of sellers of residential real property,[165] it remains alive and well with regard to buyers.[166] Thus, prospective purchasers are under no duty to disclose facts or opportunities within their knowledge materially affecting value of the property.[167] To summarize, at least in the case of purchasers, silence may not be golden, but at least it does not constitute actionable fraud. Such is the state of the law in the absence of a fiduciary relationship.

The existence of a fiduciary relationship changes everything. The duty to render complete information is a hallmark of any fiduciary relationship.[168] This aspect of fiduciary obligation is more extensive than the mere duty to supply information upon demand.[169] The duty includes a self-executing obligation to make affirmative disclosure even in the absence of explicit request for information.[170] In a fiduciary relationship, nondisclosure of material fact is

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of America, 248 Cal. Rptr. 217, 225 (Cal. Ct. App. 1988), *cert. denied*, 488 U.S. 1043 (1989). The rationale for limiting liability for failure to disclose is that information is a valuable commodity and its production would be discouraged if the producer must share it with the whole world. *Jordan*, 815 F.2d at 445 (citation omitted) (Posner, J., dissenting) ("[A]n inventor is not required to blurt out his secrets, and a skilled investor is not required to disclose the results of his research and insights before he is able to profit from them.").

165 A line of cases now imposes a duty on sellers to disclose defects or conditions known to the seller which substantially affect the value or habitability of the property, the existence of which are unknown to the purchaser and unlikely to be disclosed by a reasonably diligent inspection. Failure to disclose gives rise to a cause of action in tort in favor of purchaser. Sevin v. Kelshaw, 611 A.2d 1232 (Pa. Super. Ct. 1992) (dicta); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982); Green Spring Farms v. Spring Green Farm Assocs. Ltd., 492 N.W.2d 392 (Wis. Ct. App. 1992). *But see* Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991) (limiting disclosure duty to situations in which the condition was created by vendor, and limiting relief to rescission).

166 Zaschak v. Traverse Corp., 333 N.W.2d 191 (Mich. Ct. App. 1983) (purchaser with graduate degree in geology, and aware of oil and gas exploration in area, had no duty to disclose his knowledge to seller); Harrell v. Powell, 106 S.E.2d 160 (N.C. 1958) (dicta) (no duty to disclose purchaser's knowledge of gold mine on land).

167 Annotation, *Duty of Purchaser of Real Property to Disclose to the Vendor Facts or Prospects Affecting the Value of the Property*, 56 A.L.R. 429 (1928).

168 RESTATEMENT (SECOND) OF AGENCY § 381 (1957); RESTATEMENT (SECOND) OF TRUSTS § 173 (1957). Ordinarily, a party may be expected to gain whatever knowledge he desires before buying or selling property by making diligent inquiry and examination. A relationship of trust and confidence may tend to lull even a reasonably prudent party into omitting a full investigation. Accordingly, a duty to volunteer material information arises from the expectation of the parties that they will be open and honest in their dealings with one another. Even if the parties have no such actual expectation, fiduciary duty doctrine has the effect of imposing it. BROMBERG & RIBSTEIN, *supra* note 106, § 6.06.

169 HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 189 (2d ed. 1990); Leona Bean, *The Fiduciary Relationship of a Partner*, 5 J. CORP. L. 483, 491-92 (1980).

170 BROMBERG & RIBSTEIN, *supra* note 106, § 6.06.

actionable fraud.[171] Breach of the fiduciary duty of disclosure will preclude suit for specific performance.[172]

Does their relationship require tenants in common to communicate knowledge of facts affecting price or value when dealing with each other?[173] Consider the situation where the purchaser has already received an offer from a third party for the property. An arm's length purchaser would seem to be under no obligation to disclose this material information to the seller.[174] Because of the fiduciary relationship among tenants in common, withholding information of an actual offer for resale is grounds for rescission.[175] Although Prosser cites one early decision for the proposition that tenants in common are under no duty to make disclosure,[176] recent authority subjects transfers of interests between them to especially close scrutiny to guard against fraud or overreaching.[177]

The need for close scrutiny, combined with a stubborn insistence on limiting the scope of the fiduciary duty of cotenants, can lead to some tortured analysis. In *McLendon v. Georgia Kaolin Co.*,[178] disgruntled sellers of tenancy in common interests in farmland filed suit against their purchaser for fraudulent non-disclosure of

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171 Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (finding that the purchaser of stock in a closely-held corporation owes a fiduciary duty to the seller to disclose existing arrangement for sale of assets to a third party at a substantial profit).

172 Bovy v. Graham, Cohen & Wampold, 564 P.2d 1175 (Wash. Ct. App. 1977).

173 Dean Clark has proposed a method of analysis for determining the proper scope of affirmative disclosure duties based on the notion of why fraud is wrong. Optimal resource allocation and impact on transaction costs underlie the objection to fraud. The cheapest and likeliest sources of relevant information owe a duty to disclose information to others in the interest of making markets more perfect. Misrepresentation and concealment will lead market participants to wasteful investment in costly procedures for obtaining and verifying information. CLARK, *supra* note 57, at 150-54. This view would seem to support imposing fiduciary duties of disclosure on tenants in common in their transactions *inter se*, at least on tenants in common in possession.

174 Annotation, *supra* note 167, at 446.

175 Dolan v. Cummings, 102 N.Y.S. 91, 93 (N.Y. App. Div. 1907) (Gaynor, J., concurring), *aff'd*, 86 N.E. 1123 (N.Y. 1908); *see also* Schneider v. Brenner, 235 N.Y.S. 55, 58 (N.Y. Sup. Ct. 1929).

176 Phillips v. Homestake Consol. Placer Mines Co., 273 P. 657, 658 (Nev. 1929) (in connection with the sale of interest in a mining lease, cotenant was not required to disclose the knowledge of the extraction of gold from the leased premises); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 738 n.38 (5th ed. 1984).

177 *See, e.g.*, Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350 (Okla. 1988) (observing that by describing the "advantages" to a tenant in common of the execution of assignment, cotenant became obligated to make full disclosure of facts); 1 AMERICAN LAW OF REAL PROPERTY, *supra* note 35, § 4.03[1][b].

178 782 F. Supp. 1548 (M.D. Ga. 1992).

knowledge that the property contained a large mineral deposit.[179] Ownership was fragmented among twenty-two family members, mostly uneducated[180] and living out of state, some of whom owned as little as a 1/160 share. One of the cotenants, Tommy Smith, resided on and farmed the property. He took an active role in the negotiations leading to the sale to Georgia Kaolin. The others trusted Smith's judgment and assumed the land was being sold as farmland.[181] Nor were the others aware that Smith would be compensated by the purchaser for his services in facilitating the sale.[182] In addition, the purchaser agreed that Smith would be allowed to remain on the property for life or for eight years, whichever came sooner.[183]

Acknowledging the general rule that a purchaser has no duty to disclose to a vendor facts which the purchaser knows affect the value of the property, the court considered whether a duty of disclosure arose from a fiduciary relationship. Plaintiffs offered an intriguing theory based upon Georgia Kaolin's acquisition of the interests of the various selling cotenants sequentially over a six-month period. From and after the first closing, plaintiffs argued, Georgia Kaolin became a 1/160th tenant in common with the others and, accordingly, assumed a duty to disclose its information about the property to them.

The court rejected this argument finding that Georgia Kaolin stood solely in the posture of purchaser throughout the transaction. The fact that the purchaser happened to acquire one cotenant's interest before the other cotenants', did not impose a duty upon Georgia Kaolin to disclose information. Also, the theory seemed particularly unfair to the unlucky first seller, whose claim would have to be sacrificed for the sake of the others'.[184]

Plaintiffs offered a second theory: As lessee of Tommy Smith's mineral rights in the property since 1948, Georgia Kaolin was itself a tenant in common with all sellers (except Smith), by reason of

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179 The property was rich in kaolin, a valuable clay used for coating paper.

180 *Id.* at 1552. The opinion makes pointed reference on two occasions to evidence of a Georgia Kaolin internal memorandum describing how ownership of the property was divided among "'a large number of negroe [sic] heirs.'" *Id.* at 1560 (quotation omitted).

181 *Id.* at 1556. Georgia Kaolin had become aware of the kaolin deposit because of its status since 1948 as lessee of Tommy Smith's mineral rights in the property. *Id.* at 1554. Among the cotenants, only Tommy Smith was aware that Georgia Kaolin had been drilling on the property. *Id.* at 1553.

182 *Id.* at 1556-57.

183 *Id.* at 1554.

184 *Id.* at 1562.

their simultaneous possession of mineral rights in the property. Forced to confront squarely the question of the existence and scope of the fiduciary relationship among tenants in common, the court concluded that it did not encompass a purchase by one cotenant of the interests of others.[185]

Plaintiffs' third and final theory was that, while occupying a fiduciary relationship with them, Smith was acting simultaneously as agent for Georgia Kaolin. If so, then Smith's fiduciary relationship with plaintiffs would be imputed to Georgia Kaolin through Smith's agency. The court agreed that a jury could find that Georgia Kaolin owed a duty to disclose its knowledge of the mineral deposit to sellers. For the proposition that Smith stood in a fiduciary relationship with sellers, the court relied on the tenancy in common among them (established under the same instrument and by the same event, i.e., the will and death of their common ancestor).[186] Ironically, after first rejecting the concept that a duty to disclose material facts arises from the fiduciary relationship among cotenants, the court ultimately arrived in the same place and for much the same reason.

C. *Adverse Possession*

A party claiming title by adverse possession is generally required to establish open and notorious possession sufficient to charge the owner with constructive notice of the possessor's claim. The fiduciary relationship existing among tenants in common underlies the requirement of a higher standard for adverse possession.[187] Because of their mutuality of interest,[188] possession by one cotenant of the common property is presumed to be for the benefit of all.[189] A tenant in common claiming by adverse possession

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185 *Id.* at 1562. The court added:

> Furthermore, it is the general rule that one cotenant can purchase the interest of another cotenant as if he were buying property from a stranger. . . . Thus, defendant, even though it was a cotenant with the other Smith heirs . . . was free to purchase the interests of its fellow cotenants as if it were participating in a typical real estate transaction, in which a purchaser has no duty to disclose.

Id.

186 *Id.* at 1564.

187 1 AMERICAN LAW OF REAL PROPERTY, *supra* note 35, § 4.03[1][b];JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 112 (1989); Comment, *Adverse Possession Against Tenants in Common in Tennessee*, 37 TENN. L. REV. 776, 793-94 (1970).

188 Nichols v. Gaddis and McLaurin, Inc., 75 So. 2d 625, 627 (Miss. 1954), *overruled in part by* Quates v. Griffin, 239 So. 2d 803 (Miss. 1970).

189 Simons v. Tancre, 321 N.W.2d 495, 498 (N.D. 1982).

can only overcome this presumption by clear and convincing evidence[190] of actual knowledge of the adverse possession by the cotenant out of possession.[191]

D. *Accounting*

The fiduciary relationship existing among tenants in common underlies the availability of an equitable action for accounting by one cotenant to enforce the fiduciary obligations of other co-owners to pay their respective portions of basic maintenance expenses (including taxes, insurance, and mortgage debt service) or to share rents paid by third parties with respect to commonly owned property.[192] By analogy to actions by a beneficiary against a trustee, the statute of limitations does not begin to run until termination of the relationship.[193]

E. *Partition*

The availability of partition as the remedy of choice for disgruntled tenants in common may explain the judicial reluctance to enforce expansive fiduciary duties in the co-ownership context. Courts may be interpreting "the absence of legislative regulation of co-ownership as an affirmative policy of nonintervention. Indeed, the courts' attitude towards co-ownership could best be described by the adage *if you don't like it, get out of it* (by partitioning it.)".[194]

The common law right of partition available to tenants in common has long been regarded as absolute and unconditional.[195] The availability of partition is said not to yield to hardship, inconvenience, or injury to others,[196] nor is it influenced by the motivation of the party seeking partition.[197] Recent holdings suggest that

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190 Bayless v. Alexander, 245 So. 2d 17, 20 (Miss. 1971).

191 City of Honolulu v. Bennett, 552 P.2d 1380, 1389-90 (Haw. 1976); Kennedy v. Bryant, 252 So. 2d 784, 788 (Miss. 1971); 5 THOMPSON ON REAL PROPERTY § 2556 (1979).

192 Howell v. Bach, 580 S.W.2d 711, 713 (Ky. Ct. App. 1978); Hafeman v. Gem Oil Co., 80 N.W.2d 139, 159 (Neb. 1956); Minion v. Warner, 144 N.E. 665, 666 (N.Y. 1924); JOSEPH W. SINGER, PROPERTY LAW 804-05 (1993).

193 Goergen v. Maar, 153 N.Y.S.2d 826, 830-31 (N.Y. App. Div. 1956).

194 Symeon C. Symeonides & Nicole D. Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 74 (1993).

195 Willard v. Willard, 145 U.S. 116 (1892); Saulsberry v. Nichols, No. CA 91-289, 1992 Ark. App. LEXIS 76 (Feb. 5, 1992); Cheeks v. Herrington, 523 So. 2d 1033 (Miss. 1988).

196 Heldt v. Heldt, 193 N.E.2d 7, 9 (Ill. 1963); 4 THOMPSON ON REAL PROPERTY, *supra* note 9, § 1822.

197 Davis v. Davis, 262 N.E.2d 788, 790 (Ill. App. Ct. 1970).

partition may not be granted as a matter of right in all cases,[198] and will not be available where rights of other cotenants would be defeated or curtailed if partition were allowed.[199]

While partition by public sale seems fair on its face, one party will always be in a relatively stronger position to bid on the property. Some limitation on the right to partition would afford a measure of protection of the reliance interest on continuation of the relationship by the more vulnerable party when the more powerful party seeks to end the relationship.[200] For example, a single-family house will not be readily capable of physical partition. Rather than forcing a party in residence to vacate after a failed relationship, the possessor might be allowed to take the entire property upon compensating the other with owelty.[201] Because partition is the dissolution of the relationship, perhaps it is not surprising to see an absolute rule on the theory that fiduciary duty evaporates when the relationship is in the process of being dissolved.

CONCLUSION

The concept of limited fiduciary obligation appears to explain the jurisprudence regarding the nature of the relationship existing among a number of people, each having the simultaneous right to control the same resource. At its essence, limited fiduciary obligation means that some aspects of the relationship give rise to fiduciary constraints, while other aspects of the same relationship do not. In other words, parties may be subject to fiduciary constraints in relation to particular matters or spheres (as to which they undertake to act for and on behalf of the interests of others and not their own), but remain free to act solely by reference to their own self-interest in relation to matters outside the ambit of the fiduciary relationship.[202]

Tenants in common are required to act in a representative character with regard to the sharing of interests acquired from third parties. They are constrained by fiduciary duties of loyalty

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198 Baker v. Drabik, 224 N.J. Super. 603, 541 A.2d 229, 231 (App. Div. 1988).

199 *See, e.g.*, Redick v. Jackson, No. CIV-89-0363202-S, 1991 Conn. Super. LEXIS 49 (Jan. 7, 1991).

200 Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 750 (1988). Professor Singer argues that, when relationships of mutual dependence end, a redistribution of property rights among the parties may be necessary to protect the legitimate interests of more vulnerable persons. *Id.* at 699.

201 Reitmeier v. Kalinoski, 631 F. Supp. 565 (D.N.J. 1986).

202 Hospital Prods. Ltd. v. United States Surgical Corp., 156 C.L.R. 41, 99 (Austl. 1984) (Mason, J., dissenting) ("That contractual and fiduciary relationships may coexist between the same parties has never been doubted.").

and cooperation in regard to adverse possession, accounting, and certain other matters. However, the tenancy in common jurisprudence does not enforce an expansive moral obligation to ensure that commonly owned property be used for the mutual benefit of all co-owners. In the disposition of interests in the common property to third parties and *inter se*, cotenants stand in an arm's length contractual relationship.