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NEVER STOP IMPROVING? THE UNFORESEEN IMPACT OF IMPROVING CONCURRENT ESTATES ON TAX LIABILITY OF CO-TENANTS

By Eric M. Biscopink[†]

I. Introduction

"In this world nothing can be said to be certain, except death and taxes."[1]
–Benjamin Franklin

"Let the amelioration in our laws of property proceed from the concession of the rich, not from the grasping of the poor. . . . Let us understand that the equitable rule is, that no one should take more than his share, let him be ever so rich."[2]
–Ralph Waldo Emerson

An older couple has a one-third stake in a time-share, owned as tenants in common, which they purchased many years ago with two other couples. Over the years the owners of the two other shares have changed. With this change of ownership, so too has the vision for the

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1. Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), http://www.notable-quotes.com/f/franklin_benjamin.html.

2. Ralph Waldo Emerson, Essays and Lectures 149 (2009).

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property changed. The dated property no longer suits the new owners, causing the new co-tenants to make substantial improvements to the time-share. The improvements have increased the value of the property by a large amount. These improvements have also, unbeknownst to the elderly couple, increased the property taxes owed by each of the owners. The older couple is now being asked to contribute a greater amount of taxes than they expected. With a limited budget, the couple can no longer afford to pay the property taxes and are forced to part with their share in the property due to the improvements made by the other co-tenants.

The above hypothetical poses an upsetting, yet serious, problem in property law. There is an inconsistency caused by two competing common laws that has left a gap in the law of property in regards to concurrent estates. A co-tenant is liable for costs paid by the other co-tenant that are necessary to maintain the property, specifically property taxes.[3] However, a co-tenant is not liable for the cost of an improvement made by another co-tenant.[4] But what would be the result if the improvement caused an increase in the tax liability? Would the improving co-tenant be able to recover the tax consistent with the rule for necessary costs? Or would the non-improving party be protected by the rule that a co-tenant is not liable for the costs of the improvements?

This Comment argues that a co-tenant who improves a concurrent estate without the consent of the other co-tenant should be liable for the increased tax liability caused by the improvement. Part II surveys the current law surrounding concurrent estates, providing background to the common law rules on the various types of co-tenants. This will provide context for the subsequent argument about how property taxes could have a drastic effect on the current face of concurrent estates. The Author will overview property taxes as they relate to local property, delving into the property tax rates, in particular, and how they relate to concurrent estates.

In Part III, the Author will discuss the principles of a sound state tax policy, and weigh those principles to determine what are the most important factors in creating a tax. This will illuminate the need for a concrete rule and what that rule should be.

Part IV of this Comment will set up the central problem: whether a co-tenant can improve the concurrent estate to the extent that the property tax liability is too great for the other co-tenant, essentially improving the co-tenant out of the property. The problem poses related issues with the well-established case law. If the purpose of not allowing a co-tenant the right to contribution for improvements is to

3. Jesse Dukeminier et al., Property 358 (Vicki Bean et al. eds., 7th ed. 2010).

4. *Id.*

prevent a wealthier co-tenant from ousting his or her other co-tenants, then why can he or she currently do it through a loophole of creating tax liability? However, if the non-improving co-tenant is not liable for the property tax, is the purpose behind the required contribution for necessary costs void?

Part V will offer a solution to the tax liability from improvements to concurrent property. The Author will propose to close the gap in the law consistent with the rule for improvements by a co-tenant. The improving co-tenant will be liable for the rise in tax liability for any improvement done without the consent of the non-improver. Ultimately, a co-tenant should not be in danger of being ousted from a concurrent estate by an increase in tax liability due to non-consented improvements to the property owned in joint tenancy. Therefore, the Author proposes the gap in the current law be addressed with the requisite legislation.

II. The Landscape of Property Laws in the United States

The inevitability and the necessity of taxes for the operation of our government and society are clearly evident by the current landscape of our tax system. Taxation is the backbone of the federal and local governments' attempt to raise revenue.[5] For local governments in particular, property taxes are one of the most—if not the most important taxes levied—so much so that it has shaped the rules of concurrent estates.[6] Concurrent estates have taken most of their shape under the heavy influence of common law. Similarly, the rules of contribution for concurrent estates have also been formed largely by the common law.[7] Property taxes, on the other hand, are creatures of state legislatures and are created for the purpose of producing revenue.[8] As often occurs when common law and statutes overlap in an area of the law, some issues slip through the cracks unaddressed by either.[9] In the overlap of these two areas of law, a void has been created. Non-improving co-tenants are forced to pay the property taxes for improvements they did not consent to because of mandatory property taxes combined with the common law rules of contribution for concurrent

5. *See* Walter Hellerstein et al., State and Local Taxation Cases and Materials 802 (West ed., 9th ed. 2005); Roberton Williams, *The Numbers: What are the federal government's sources of revenue?*, Tax Policy Center (Sept. 13, 2011), http://www.taxpolicycenter.org/briefing-book/background/numbers/revenue.cfm.

6. *See* Hellerstein et al., *supra* note 5, at 802; Dukeminier et al., *supra* note 3, at 358.

7. *Id.* at 319.

8. *See* Ferdinand P. Schoettle, State and Local Taxation: The Law and Policy of Multi-Jurisdictional Taxation 56 (2003).

9. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1051 (1989) (explaining that common law can be used when there is a gap left by statutory schemes).

estates. This Section will further provide a brief background of the property laws on concurrent estates in the United States.

A. *Common Law Concurrent Estates*

Concurrent ownership is when two or more people are in possession of the same property.[10] Concurrent estates can be broken down into three separate types: tenancy in common, joint tenancy, and tenancy by the entirety.[11] The three types have only slight differences, one of them being that tenancy in common does not require that the four unities—time, title, interest, and possession—be met.[12]

Tenancy in common is the default type of concurrent estate if there is no specification when the transfer of property is made.[13] Tenancy in common is also the most frequently formed type of concurrent estate.[14] As tenants in common, each tenant owns an undivided share of the whole property with most of the rights an independent landowner would have, including the right to sell their share of the property.[15] A tenancy in common does not have a right of survivorship, which is the main difference between it and the second type of concurrent estate—joint tenancy.[16] In joint tenancy, the tenants are no longer seen as separate owners of the property in the sense that when one tenant dies his or her share in the property goes to the other tenant.[17] The third type of concurrent estate is tenancy by the entirety and can only be created by husband and wife.[18] It is very similar to joint tenancy in that there is a right of survivorship. This type of concurrent estate, unlike the other two, cannot be unilaterally destroyed by one of the spouses without the other spouse's consent.[19]

As the most prevalent concurrent estate, tenancy in common will be the focus for purposes of this Comment. The rights of survivorship in joint tenancy and in tenancy by the entirety slightly affect the theory behind who should bear the burden of the tax of an improvement. Since the property is transferred in whole to the surviving tenant, the

10. BLACK'S LAW DICTIONARY 626 (9th ed. 2009).

11. *Id.*

12. DUKEMINIER ET AL., *supra* note 3, at 320.

13. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 54 (2d ed. 1984).

14. United States v. Craft, 535 U.S. 274, 279 (2002).

15. DUKEMINIER ET AL., *supra* note 3, at 319–20.

16. *Id.* The right to survivorship does not exist in tenancy in common. Instead, when a property owner dies, his share of the property is passed on to his heirs.

17. BERGIN & HASKELL, *supra* note 13, at 54.

18. DUKEMINIER, *supra* note 3, at 321.

19. *Id.* at 320. Unlike tenancy in common and joint tenancy, both parties are needed to destroy tenancy by the entirety. In either joint tenancy or tenancy in common, one of the property owners may petition for partition of the concurrent estate.

value of the property will be realized by the non-improving party assuming the non-improver outlives the improver.[20]

With the right of survivorship, there could be a stronger argument for taxing each party equally due to the non-improver having a future interest in the improver's portion of ownership. However, a tenancy in common, without the right of survivorship, could leave the non-improver and his or her heirs owning the property, paying the taxes, and never receiving the benefit of the value of the improvement, which could both potentially grow substantially over time.

B. *Rules for Contribution*

The general rule for improvements made by a concurrent tenant without the consent of other co-tenants is that there is no contribution for the cost of the improvement.[21] The improver is not without recourse though. The tenant that improves the property can get the value of the improvement added to the property at partition of the property.[22] Many jurisdictions, including Kentucky, have adopted the common law rule that there is no right to contribution for improvements that are not necessary and made without the consent of the other co-tenant.[23] One of the driving forces behind this rule is to protect the rights of the other co-tenant. There is a fear that co-tenant *A* will "improve" co-tenant *B* out of the property. This well-established rule, however, prevents a co-tenant from improving the property by a substantial amount and then forcing the other co-tenants to reimburse him or her for the improvement, or ousting the co-tenant for nonpayment.[24]

On the other hand, the general rule of property in regards to property tax is that each co-tenant is liable for their share of tax liability equal to their share of the property.[25] If one tenant pays more than his or her share of the taxes, then he or she has a right to contribution from the other tenants.[26] "The payment of taxes is generally involun-

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20. *See id.* at 320. The improvement to the property could be recognized by the non-improving party upon the death of the improving party. The right to the land passes to the other owner in the case of joint tenancy and tenancy by the entirety.

21. *Id.* at 358.

22. *Id.* In a judicial partition the improver of the property receives the value added to the property, not just the amount spent on the improvement.

23. *E.g.,* Mastin v. Mastin's Adm'r, 50 S.W.2d 77 (Ky. 1932); Bras v. Bras, 463 F.2d 413 (10th Cir. 1972); Kline v. Wright, 51 F.2d 564 (D. Idaho 1931); Higgins v. Eva, 267 P. 1081 (Cal. 1928); Middlebury Elec. Co. v. Tupper, 41 A. 582 (Vt. 1898); Stevens v. Thompson, 17 N.H. 103 (1845).

24. Helmken v. Meyer, 75 S.E. 586 (Ga. 1912).

25. *See* Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Co-Tenant Possession Value Liability and A Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 355.

26. DUKEMINIER ET AL., *supra* note 3, at 357; *see* Aiello v. Aiello, 302 A.2d 189 (Md. 1973); Conley v. Sharpe, 136 P.2d 376 (Cal. Dist. Ct. App. 1943); Cochran v.

tary."[27] Since taxes are a mandatory payment and not voluntary like that of an improvement, there is a right of action for the payor of the tax against his or her co-tenant for taxes paid on his or her behalf.[28] The theory behind allowing for contribution for taxes "is that the protection of the interest of each cotenant from extinction by a tax or foreclosure sale imposes on each the duty to contribute to the extent of his proportionate share [of] the money required to make such payments."[29] This begs the question of whether a non-improving party is liable for an increase in taxes due to an improvement that he or she did not consent to.

C. *Property Tax*

Ad valorem taxes, commonly referred to as "property taxes," have been a long-standing staple of local governments in their attempt to create revenue.[30] Property taxes "provide about one-quarter of local revenue."[31] Although the rates have decreased significantly over the years, the property tax still constitutes a large portion of states' revenues.[32] The Kentucky Constitution gives Kentucky the power to tax property.[33] Furthermore, Kentucky Revised Statutes ("KRS") section 32.020 states that there shall be an ad valorem tax paid annually, specifically on real property.[34] The statutory provisions go on to define "real property" as "all lands within this state and improvements thereon."[35]

KRS section 132.690 requires each real property parcel be assessed annually and be physically inspected no less than once every four years, but can be assessed each year.[36] The local government assesses the fair value of the property and then calculates the tax the property owner must pay on the property.[37] This is done through a property valuation administrator ("PVA") who assesses the property value, usually without any action required from the property owner.[38] Depending on the particular circumstances, some of which are under a

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Godard, 78 P.2d 692 (Okla. 1938); Kirsch v. Scandia American Bank, 199 N.W. 881 (Minn. 1924); Eads v. Retherford, 16 N.E. 587 (Ind. 1888).

27. Montgomery v. Montgomery, 78 S.W. 465, 466 (Ky. Ct. App. 1904).

28. *Id.*

29. 2 James A. Casner, American Law of Property § 6.17, at 73–74 (1952).

30. Black's, *supra* note 10, at 1594; Brown et al., Kentucky Tax Law 7 (UK CLE 2d ed. 1995).

31. Hellerstein et al., *supra* note 5, at 802.

32. *See id.* (stating that roughly one-third to one-fourth of local revenues are provided by property taxes).

33. Ky. Const. § 171; Gillis v. Yount, 748 S.W.2d 357, 358 (Ky. 1988).

34. Ky. Rev. Stat. Ann. § 132.020 (West 2012).

35. § 132.010.

36. § 132.690.

37. *See* PVA Fayette County, Ky, http://www.fayette-pva.com (last visited Mar. 17, 2013).

38. Brown et al., *supra* note 30, at 7.

property owner's control, the property value can increase and subsequently the tax liability will increase as well. Improvements to the property, which are under the property owner's control, can raise the property value.[39] There are also uncontrollable events—government need, the increased value of the neighborhood, or funding of surrounding schools—that can increase the value of property.[40]

"[T]he taxation of real property generates the largest amount of property tax revenue within Kentucky; yet it requires the least amount of taxpayer involvement. As a result, Kentucky tax officials pursue real property taxes with significantly more vigor than [other] property taxes."[41] However, for Kentucky to be able to tax the property, the property must have a taxable situs in Kentucky.[42] *Situs* is the jurisdiction that the assets are connected to for taxation purposes.[43] Determining the situs of real property, withstanding property spanning multiple jurisdictions, is relatively easy.[44] Real property's situs is the jurisdiction in which the said property lies, whether it be a city, county, or state.[45]

The tax rates levied on real property vary from locale to locale. The variations are due to the rates being set by the state as well as the local governments in each state.[46] For purposes of this Comment, the Author will use Fayette County, Kentucky's rates for illustration. The Kentucky state tax on real property alone for the year 2012 was 12.2 cents to every \$100.[47] Fayette County's seven districts, on average, taxed an additional 94.35 cents per \$100.[48] Together this equals about \$1.07 for every \$100 of real property a person owns. This tax rate is

39. *See, e.g.*, Karen E. Powell, *A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice*, 70 MONT. L. REV. 21, 23 (2009).

40. Dennis Hartman, *What Increases Property Taxes?*, SAN FRANCISCO HOME GUIDES (Sept. 20, 2012), http://homeguides.sfgate.com/increases-property-taxes-2487.html.

41. BROWN ET AL., *supra* note 30, at 14.

42. Commonwealth v. Union P.R.R., 283 S.W. 119, 121 (Ky. 1926).

43. BLACK'S, *supra* note 10, at 1513.

44. BROWN ET AL., *supra* note 30, at 15.

45. *Id.*

46. *See* Nina L. Pickering, *Local Control vs. Poor Patrol: Can Discriminatory Police Protection Be Remedied Through the Education Finance Litigation Model?*, 86 B.U. L. REV. 741, 771 (2006); John A. Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV. 421, 458.

47. Press Release, Commonwealth of Kentucky, State Property Tax Rate Remains Set at 12.2 Cents for 2012 (July 2, 2012), http://revenue.ky.gov/NR/rdonlyres/832BECB1-65A6-4ABF-A162-341B9AD25B67/0/StatePropertyTaxRateRemainsSetat122Centsfor2012.pdf.

48. *Tax Districts and Rates*, PVA FAYETTE COUNTY, http://www.fayette-pva.com/tax-districts-and-calculator (last visited Mar. 17, 2013). The average was calculated by adding the districts together, dividing the number of districts, and then subtracting the statewide tax from the quotient.

relatively moderate in comparison to the rest of the United States.[49] In a comparison of all fifty states done in 2009, Indianapolis, Indiana had an alarmingly high effective real property tax rate of 2.75%, or $2.75 for every $100 in value, and the national average was 1.4%.[50] As apparent by the comparison with the rest of the country, Kentucky has fairly bearable real property taxes. By using Fayette County's tax rates, the problem of an increased tax liability due to an improvement will be tempered, but the results will still be candid.

Local governments' need for property taxes ensures that the taxes will be collected regardless of if they are paid by the improver or the non-improver. The rule for contribution is premised on the theory that each co-tenant should pay their share of necessary costs, such as taxes. However, when an improvement is done without the consent of one of the co-tenants, the non-improving co-tenant should not be liable for the increase in the property tax. The improving co-tenant should be liable for the amount of increase in the property tax that was caused by his or her improvement. The gap in the common law rule of contribution has yet to be resolved by judicial action or legislation.

III. Increase in Property Value Equates to Increased Taxes

As seen above in the real property tax rates for Fayette County, Kentucky, a property owner could potentially have a significant tax liability each year.[51] The problem, and prevailing issue, is that a concurrent estate could be improved by one co-tenant, the improver, and the other co-tenant, the non-improver, must pay a portion of the tax liability based on the improvement. There is potential that the improvement could cause a tax liability for the non-improving co-tenant that he or she cannot afford to pay. Essentially the improver could oust the non-improver with a necessary cost, the property tax. It is established that one co-tenant cannot improve a co-tenant out of the property, and the improving tenant has no right to contribution for the improvements made to the property by said tenant.[52] However, the improving tenant has a right to contribution for necessary costs, such as taxes owed on the property.[53] Although the non-improver will not be liable for the cost of the improvements made to the property, the non-improving tenant can still be held liable for the tax liability on

49. *See Who Pays America's Highest Property Taxes*, Forbes (Jan. 23, 2009), *available at* http://www.forbes.com/2009/01/22/taxes-homes-property-forbeslife-cx_mw_0122realestate_table_6.html.

50. *Tax Rates Subject Guide*, Int'l Ass'n of Assessing Officers, http://www.iaao.org/uploads/Tax_Rates_Subject_Guide.pdf (last visited Sept. 16, 2013).

51. *Tax Districts and Rates*, *supra* note 48.

52. Dukeminier et al., *supra* note 3, at 358.

53. *Id.*

the property.[54] Therefore, the improving tenant could increase the value of the property to an amount that would create a tax liability for the non-improver that he or she is not able to pay.

To illustrate the gravity of the problem, the Author will apply the current Fayette County, Kentucky property tax rates to a hypothetical co-tenant situation where one co-tenant improves the property owned in tenancy in common without the consent of the other co-tenant.[55] For purposes of continuity and simplicity, the improving party will be Adams and the non-improving party will be Begley. Adams and Begley are tenants in common with no right to survivorship and with equal rights to the land. Adams builds an addition to the land that increases the value of the property by $10,000. Applying the real property tax rate of Fayette County of $1.07 for every $100 would create an additional annual tax liability of $107. Under the property rule of contribution for necessary costs, Adams would be entitled to $53.50 from Begley. Take this hypothetical a step further and apply the 2013 tax rate for Gloversville, New York—a city with one of the highest property tax rates in America—of $5.24 per $100.[56] The improvement would now create an additional tax liability of $524, and Adams would be entitled to $262.

Although this does not seem like a grave amount that would leave Begley in a situation where she could not afford the taxes, the improvement value can easily be amplified, especially over time. Adams may not take Begley to court for the contribution of the tax, but Adams's heirs may not have the same relationship with Begley's heirs and the value of the improvement in the future could increase to $100,000. Assuming the property tax rates in Gloversville, New York, the improvement now creates an annual liability of $2,620 for each tenant, presuming the tax rates do not increase.[57] This annual tax liability could potentially be too extreme for Begley to afford, and Adams could essentially improve Begley out of the property through the current gap in the laws of common law property. To see which direction the law should go, it is essential to examine the tax policy.

54. *Id.* at 357.

55. Due to the nature of concurrent estates and their close relationships, there are no facts from prior case law to apply the property tax rates.

56. Rick Karlin, *Survey: Taxes Sky High in State*, TIMES UNION (May 9, 2013), *available at* http://www.timesunion.com/local/article/Survey-Taxes-sky-high-in-state-4500704.php.

57. This is not to be confused with ameliorative waste found in life estates. Ameliorative waste is not used when the property is owned concurrently. *See, e.g.*, Marsha Baumgarner & Michael Hentrel, *What a Waste! What's a Prudent Lender To Do?*, 5 BUS. L. BRIEF (AM. U.) 10, 11 (2008); Note, *Liability for Ameliorative Waste*, 43 HARV. L. REV. 1130 (1930).

IV. What Makes a Good Tax?

Taxes are used to produce revenue for the federal and state governments, but people are not arbitrarily taxed. There is policy behind what is taxed and at what rate it is taxed. In David Brunori's book *State Tax Policy*, he lays out five principles of sound tax policy: provision of appropriate revenues; neutrality; fair and equitable; easy and economical to administer; and accountability.[58] In reference to whether the non-improving co-tenant should be taxed, two of these principles are in the forefront: whether taxing the non-improver would be fair and equitable and the ease to administer the tax on the parties. The other principles do not pose the same issues that arise with the principles of fairness and equitability and ease and economical to administer. But they help provide a background of why local governments tax and why those taxes are vital to the local governments' sustainability. It is imperative to analyze the principles of sound tax policy to determine whether the contribution rule for necessary costs or improvements should be followed. Examining the tax principles will expose that the improvement rule should be applied, and the increased tax base should be applied to the improver of the property.

A. *Fair and Equitable*

The principle of fairness and equitability is probably the most difficult policy goal to meet, but presumably the most important.[59] It can be broken down into horizontal equity, treating similar taxpayers equally, and vertical equity, taking into consideration the taxpayer's ability to pay.[60] Brunori goes on to explain that a lack of horizontal equity would cause similarly situated taxpayers to pay different taxes and can cause taxpayers to distrust the government. However, actually creating horizontal equity can be all but nearly impossible with tax cuts based on the class of a citizen.[61] Vertical equity, on the other hand, deals with the ability to pay the tax. The biggest concern is to not have a regressive tax—a tax burden that increases as the tax base decreases.[62] Property taxes are usually progressive taxes—taxes that increase as the tax base increases—so vertical equity is usually not an issue with real property taxes due to the nature of the flat tax.[63] As the value of the property increases, so too does the tax liability. Taxes

58. David Brunori, State Tax Policy: A Political Perspective 13–27 (2001).

59. *Id.* at 19.

60. *Id.*; State Taxation Policy 27 (Michael Barker ed., 1983).

61. Brunori, *supra* note 58, at 19–20 (explaining that the tax status of a person can potentially provide more tax breaks than other citizens; for example, a married couple will receive more favorable tax treatment than a single person in an identical situation, sans the marriage).

62. *Id.* at 21.

63. *Id.*

are designed largely with the principles behind vertical and horizontal equity.

Applying horizontal equity to the issue of who should pay the taxes on improved real property simply undercuts the long-standing property rule of contribution for taxes by a co-tenant when combined with the property rule for improvements. It is true that the non-improving co-tenant is not liable for the cost of the improvements, but the improver gets the improvements at a sale or partition.[64] This puts the improving co-tenant in a different position than the non-improving co-tenant because now the improver has a potential gain on the property that the non-improver will not have any right to. Yet, the property rule, in regards to the property tax, would subject the non-improver to pay for his or her share of the improvements even though the non-improver will not receive any benefit from the improvement.

The principle of horizontal equity, to treat taxpayers that are similarly situated the same, is void if the non-improver is forced to pay a tax on the improvement.[65] The improver is in a higher position than the non-improver in regards to the concurrent estate, in that the improver is the sole recipient of the increased value of the property at a sale or partition. The question seems to be who owns the value of the improvement. In the view of fairness and equity, the improver should bear the full burden of the tax liability created by the improvement because the improver received the value of the improvement. If the non-improver is to pay taxes, then the non-improver should receive an equal portion of the value at a sale or partition, an event that would be in total opposition to the property rule of contributions. The clear contradiction of the common law contribution rules creates a conflict in the policy behind state taxes and the property rules for concurrent estates.

B. *Easy and Economical Administration*

The other principle of a sound tax policy at issue here is the ease of administering the tax on the property. The need for an easy and economical administration of taxes can be summed up in two words: more money.[66] Easier and cheaper tax administration results in less money spent on collecting those taxes, which produces more revenue.[67] Taxes that require little to no deductions, exclusions, or credits will create less complexity. In turn, this will lower potential ligation costs and auditing costs on the government's behalf.[68] Real property taxes have been seen as very economical taxes in regard to other taxes

64. DUKEMINIER ET AL., *supra* note 3, at 358.
65. *See* STATE TAXATION POLICY, *supra* note 60, at 27.
66. BRUNORI, *supra* note 58, at 22–23.
67. *Id.* at 22.
68. *Id* at 22–23.

levied by the government.[69] Property taxes, in general, are not complex for either the taxpayer or the government. For the taxpayer, little work is involved. A PVA assesses the value of the property and then the taxpayer is simply billed and pays taxes on the assessed value.[70] On the side of the government, property taxes are hard to escape by taxpayers. The base of the tax—the real property—cannot be moved.[71] Generally, property taxes are an easy and economical tax to administer by state governments.[72]

The current stability and relative simplicity of the property tax seems to favor the opposite outcome of the fairness debate.[73] To keep the property tax simple, and therefore profitable, the improver and non-improver should pay the same tax. In reality, it would seem that the government would not delve too deeply into the matter as long as the tax is paid. The tax is on the property itself, not on the property owners.[74] If the tax is not paid then a lien can be put on the property by the government, providing the government with the land as a security until the debts are paid.[75] Since the tax is on the property itself, it would not make sense for the government to make a special rule for joint tenants so that the tax could be apportioned in proportion to the speculative value the owners would receive at partition or sale. When taking into consideration the goal of the property tax, an apportionment of the taxes would be time consuming and a burden on the government, defeating the purpose of an easy and economic administration of the tax.

C. *The Other Principles*

The "other principles," as the Author has coined them, are not inferior to the two principles which are discussed at length. These three principles—provision of appropriate revenues, neutrality, and accountability—do not pose the same controversies, but do help provide a justification for the property tax and why the increase of the property tax by an improvement should be borne by the improver.

Before the positives and negatives of a tax may be debated, first, a tax is needed which is where the principle of provision of appropriate revenues appears. State governments must raise the appropriate amount of revenue to meet their yearly expenditures, and to do this, local governments use a taxing system.[76] Appropriate revenues not only include the current year's expenses but also the future years' ex-

69. *Id.* at 27.
70. BROWN ET AL., *supra* note 30, at 7.
71. BRUNORI, *supra* note 58, at 27.
72. *Id.*
73. *See supra* Part IV–A.
74. *See supra* Part IV–A.
75. KY. REV. STAT. ANN. § 134.420 (West 2012).
76. BRUNORI, *supra* note 58, at 15.

penses.[77] Stability in revenue is necessary and can be achieved by varying the types of taxes—making sure that some are less affected by economic events. In line with stability, any significant changes in the taxing system should be calculated due to these changes causing increased administration costs.[78]

The need for local taxes is crucial to a state government. Without the appropriation of taxes, state governments would become deficient on public expenditures creating an unbalanced budget and a government riddled with debt. As stated above, Kentucky, like many other states, relies heavily on the taxing of property to raise sufficient funds. The importance of the property tax cannot be undersold, which only heightens the problem of the increase of taxes due to improving a concurrent estate. This essential revenue for the local governments will equate to the determination in which they will seek the tax. Having the current uncertainty of who is liable for the increased tax liability is paramount.

The next principle, neutrality, is based on the theory that taxes should not affect market decisions. Realistically this is not the case, but an effective tax will reduce the distortions.[79] Tax neutrality, though not often accomplished, is diminished due to the tax breaks and deductions given to corporations and individuals, creating incentives to make certain decisions. Decreases in property taxes are usually included in the tax breaks given.[80]

Although neutrality is rarely accomplished and property taxes are one of the main taxes affected by the tax breaks, the theory remains the same—market decisions should be affected as little as possible by taxes. However, a non-improver could be forced to sell his or her share of the property, a market decision, due to the increase in taxes caused by a non-consented to improvement because of the rule of contribution. The increase in the non-improver's tax liability would be in direct conflict with the principle of neutrality. By taxing the improver for the increase in the tax liability, the spirit of the principle of neutrality is satisfied.

The last of the principles, accountability, involves a variety of different roles for the state to play. The state government must enforce the laws, make sure the administration is performing its duties correctly, provide an open and transparent taxing system and, most importantly to this issue, analyze the current law to make sure it is effective and efficient.[81] Few states actually perform the last role, evaluating the existing law, "[d]espite the importance of preserving the integrity of

77. *Id.*
78. *Id.* at 16.
79. *Id.* at 17–18.
80. *Id.* at 18.
81. *Id.* at 24–26.

tax systems."[82] Since states are not required by law to evaluate their laws, many states fail to routinely evaluate the tax system. This has caused many states to overlook taxes that may be burdensome or inefficient.[83]

There is no current law regarding the specific issue of who bears the liability of an increase in property tax when one co-tenant makes an improvement to a concurrent estate without the other co-tenant's consent. This could be due to state governments' lack of evaluating their current laws or to other reasons that are inherent in relationships of concurrent estate owners.[84] Regardless of the reason, the state government should evaluate the current tax system, which lacks the requisite legislation to enforce that co-tenants cannot be forced out of their concurrent estate due to an increase in taxes caused by an improvement. The absence of this type of legislation creates inefficiency in the courts and fails the accountability principle.

D. *How They Fit Together*

Looking at the two previously discussed principles, fairness and reasonableness along with easy and economical administration, reveals a polarity in the tax policy argument. To be fair and reasonable, the non-improver should not have to pay any additional tax accrued due to the improvement. On the other hand, to keep the property tax easy to administer and, therefore, profitable, the government should not have to alter the way in which property taxes are collected to apportion for a niche in the law. In the context of tax policy alone, disregarding long-standing property rules and Kentucky's ad valorem statutes, the principles create a conundrum, making it necessary to analyze and weigh the principles while seemingly giving more importance to one over the other.

What comprises a good tax policy varies because each person will put a different emphasis on what matters the most.[85] Taxes are viewed in a variety of different aspects, from the burden they place on the taxpayer to the revenue they creates for the government.[86] That being said, strictly as a policy matter, the fairness and reasonableness of a tax outweighs the importance of its being easy to administer. The taxing of the non-improver for an improvement made without his or her consent would set a terrible precedent. The non-improver would essentially have a tax liability when he or she would have no tax base for the value. The improver, receiving all of the value of the improvement, yet only being liable for a portion of the tax, would have no

82. *Id.* at 26.
83. *Id.* at 26–27.
84. *See infra* p. 15. The close relationships that tenants in common have may incidentally cause local and state governments to see this as a non-pressing issue.
85. BRUNORI, *supra* note 58, at 13.
86. *See* STATE TAXATION POLICY, *supra* note 60, at 27.

incentive to get the consent of the other tenant. The strongest argument for taxing the non-improver is that property taxes have historically been an easy tax to administer, and changing this would be a burden on the government. In reality, local and state governments would not have to change their current practices. The route that must be taken to recover the taxes is through the judicial system as is evident by the case law regarding contributions of taxes.[87] With that being said, it is apparent that, in considering who should bear the liability of the tax, the fair and reasonable argument reigns supreme.

When viewed along with the other principles of a sound state tax policy, it is clear what direction the law should proceed. Only one principle marginally favors having an equal contribution of the increase in property taxes when an improver improves the property without consent. The four other principles clearly support the improver bearing any increase in the property tax owed due to an improvement of the property. This avenue is most in line with sound tax policy, while still embodying the spirit of the common law property rules of contribution.

V. Where to Go From Here

Currently, there is not statutory law that speaks to the problem in any state, nor is there any case law or model legislation on point. There exists a deficiency in the current law that needs to be filled. Concurrent estates are an intriguing creature, subject to archaic common law rules that have been around for over a hundred years.[88] There is a tendency for co-tenants to work things out amongst themselves. Tenancy in common is a long-term, repeat player relationship with high incentives to get along.[89] This is evident by the lack of cases that have passed through the Kentucky judicial system in recent years. One case concerning tenancy in common has been brought before the Kentucky courts in the past ten years and only three cases in the past twenty-five years.[90] The only avenue for co-tenants in a dispute is a judicial proceeding to receive contribution, a partition, or sale of the property.[91]

87. *See, e.g.*, Rose v. Holbrook, 287 S.W.2d 914 (Ky. 1956); Larmon v. Larmon, 191 S.W. 110 (Ky. 1917).

88. *See, e.g.*, *Rose*, 287 S.W.2d at 914; Mastin v. Mastin's Adm'r, 50 S.W.2d 77 (Ky. 1932); *Larmon*, 191 S.W. at 110; Conley v. Sharpe, 136 P.2d 376 (1943); Eads v. Retherford, 16 N.E. 587 (1888).

89. *See* Robert C. Ellikckson, The Household: Informal Order Around the Hearth 45 (2008) (explaining that landlords and tenants have a high incentive to get along because they frequently interact with each other).

90. Sanderson v. Saxon, 834 S.W.2d 676 (Ky. 1992); Johnson v. Envtl. & Pub. Prot. Cabinet, 289 S.W.3d 216 (Ky. Ct. App. 2009); Martin v. Martin, 878 S.W.2d 30 (Ky. Ct. App. 1994).

91. *See* Dukeminier et al., *supra* note 3, at 338.

Partition is achieved in one of two ways, a partition in kind, which is favored, or a partition by sale.[92] In a partition in kind, each co-tenant will receive a separate parcel of the property. If this cannot be done equally, then one party may have to pay the other for the difference.[93] The other type of partition is a partition by sale, which is ordered in two situations: "(1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable; and (2) the interests of the owners would better be promoted by a partition by sale."[94] Since most tenancy in common relationships are based on long-term amiability, there is a need for precedent on who is to pay the increased tax liability resulting from an improvement to the property. The solutions available at this time—judicial proceeding, sale of the land, or a partition—can be expensive and potentially lead to a court compelling the co-tenants to sell their property.[95]

It seems that it would be necessary to speculate as to what the law should be according to the current statutes and case law that stands in the areas of property and property taxes. The property laws and tax policy surrounding the tax influx, due to an improvement, weigh in both directions—taxing the co-tenants equally and taxing the co-tenants in proportion to the tax base each has in the land. These must first be weighed against each other before proposing a solution to the problem.

Taxing each of the co-tenants equally would be consistent with the long history of case law regarding the contribution of taxes. Courts have been consistent with this rule since the 1800s.[96] Since taxes must be paid on the property and are a necessary cost, the law states that a tenant has the right to contribution.[97] Keeping with that reasoning, the tax on the improvement should not be special, should be treated as any other necessary cost, and should be recoverable by a co-tenant if he or she is to pay the tax to maintain the property. Since the tax is not a voluntary payment, co-tenants should not be responsible for paying more than their share.[98] Moreover, looking at the policy behind state and local taxes, taxing each of the co-tenants equally lends itself to the easy and economical administration of the tax. The tax base for real property taxes is property itself.[99] Applying a special form of taxation for joint tenants would not coincide with the rationale of an easy application of a tax. Reformatting the procedure

92. Delfino v. Vealencis, 436 A.2d 27, 30 (1980).

93. *Id.* at 30 n.7.

94. *Id.* at 30.

95. *See* DUKEMINIER ET AL., *supra* note 3, at 338.

96. *E.g.*, Moroney v. Copeland, 5 Whart. 407 (Pa. 1840).

97. *See, e.g.*, Rose v. Holbrook, 287 S.W.2d 914 (Ky. 1956); Larmon v. Larmon, 191 S.W. 110 (Ky. 1917).

98. Montgomery v. Montgomery, 78 S.W. 465, 466 (Ky. 1904).

99. BROWN ET AL., *supra* note 30, at 14.

would be time consuming and costly, the opposite goal of the principle.

Lastly, the main feature of concurrent ownership is that each tenant owns an undivided share of the whole property and has most of the same rights as an individual property owner.[100] This means that each co-tenant has the same and equal rights to the property as the other co-tenant. If each of the co-tenants has equal rights to the property, then each co-tenant should be liable for an equal amount of the taxes, even if they are attributable to an increase in value due to an unconsented improvement. Dividing the tax equally among the co-tenants would be consistent with the seasoned common law property rule as well as cohere to the tax policy principle of easy and economical administration.

However, not allowing the improving co-tenant contribution for an increase in the tax liability for improvements made without the consent of the non-improver would be consistent with the common law surrounding improvements to property that dates just as far back as the law surrounding tax contribution.[101] To combat a tenant from improving other co-tenants out of the property, the courts have taken the stand that a co-tenant in a concurrent estate cannot improve the other co-tenants out of the property.[102] Applying the rule regarding improvements, instead of necessary costs, seems to capture the spirit of the law in that one co-tenant cannot improve the property to the extent that the other co-tenant can no longer afford the contributions. "It is a general rule that the act of one joint tenant without express or implied authority from or the consent of his cotenant cannot bind or prejudicially affect the rights of the latter."[103] In applying this rule, not requiring a contribution for the tax increase is foolish. Without consent from the non-improver, the improvement to the property could prejudice the rights of the non-improver with the condition that he or she could not pay the higher tax liability.

Though not directly on the issue of tax increase caused by improvements by one co-tenant, there is established common law on tax increases caused by improvements in landlord and tenant relationships.[104] If a tax is increased due to an improvement by the lessee for the sole enjoyment of the lessee, then the lessee is liable for the incremental value.[105] The law on lessees-lessors correlates with the common law of contribution of improvements. The incremental tax on a property held in tenancy in common should therefore be the liability of the improver to mimic similar common law.

100. Dukeminier et al., *supra* note 3, at 320.
101. Stevens v. Thompson, 17 N.H. 103 (1845).
102. *See, e.g.*, Larmon v. Larmon,191 S.W. 110 (Ky. 1917).
103. Swartzbaugh v. Sampson, 54 P.2d 73, 76–77 (Cal. Dist. Ct. App. 1936).
104. *E.g.*, Ky. Farm & Cattle Co. v. Williams, 140 F. Supp. 449, 452 (E.D. Ky. 1956).
105. 49 Am. Jur. 2d *Landlord and Tenant* § 366.

Furthermore, the fair and equitable principle of tax policy favors not requiring a contribution. State and local governments try to create taxes that appear fair.[106] To achieve this goal, governments are mindful of horizontal equity—treating taxpayers that are in similar situations the same.[107] With the value of the improvement to the property going to the improver at a sale or partition, it would be inequitable to tax the non-improver on the increase in liability.[108] Additionally, the non-improver has expectations of the amount of property tax he or she will be liable for each year. Subjecting the non-improver to more tax liability than he or she expected is not only unfair, but could cause the non-improver to under-budget his or her expenses and not have sufficient funds to pay the increased tax. Apportioning the tax to the co-tenants in proportion with their tax base is not only the most fair and equitable method, but also parallels the common law rule for contributions to improvements.

Considering there is no case law or statutory law on the issue, my proposition is that, following the spirit behind the rule for contributions of improvements, the improving tenant be wholly responsible for the additional taxes incurred due to the improvement. This seems to correlate with the existing law on improving concurrent estates, landlord tenancy law, and sound tax policy. It strays away from the rule of necessary costs, but if the law went in any other direction, it would diminish the improvement law's purpose. Others have expressed the view that the improving party should pay the entire tax increase.[109]

It goes without saying that property taxes are important to local governments.[110] With the proposed rule, the portion of the tax that is to be paid is not set by the wayside, but instead is rightfully allocated to the party that should be liable for the tax increment, the improving co-tenant. The application of the proposition would not cause undue strife. Considering the rules on contribution between co-tenants are essentially only common law, adherence by the courts would be all that is necessary. However, the Author believes legislation would be the preferred avenue due to the relationships that are usually seen in

106. Brunori, *supra* note 58, at 19.

107. *Id.*

108. Dukeminier et al., *supra* note 3, at 358.

109. *E.g.*, *Tenants in Common (TICs)/Fractional Ownership Q&A*, Monterey County Ass'n of Realtors (Sept. 26, 2007), http://www.mcar.com/gapdf/TIC-QandAFinal.pdf; *Tenancy in Common (TIC) Frequently Asked Questions*, Sirkin & Associates (May 19, 2011), http://www.andysirkin.com/htmlarticle.cfm?article=1; Kevin Hagen, *Tenancies in Common as a Way to Invest in Real Estate*, Yahoo Voices (Dec. 28, 2007), http://voices.yahoo.com/tenancies-common-as-way-invest-real-estate-750843.html?cat=54; *Taxes and TIC*, S.F. Real Est. Brain, http://www.sanfranciscorealestatebrain.com/tenancy-in-common-tic/taxes-and-tic (last visited Mar. 17, 2013). There is no legislation in any state that speaks to the issue of who should bear the burden of the increased tax liability. However, many different sources share the same view, that the improving party should bear the increased liability.

110. Brown et al., *supra* note 30, at 14.

concurrent estates. Legislation paralleling these ideas will: avert any judicial proceedings that may end in partition, keeping the costs of litigation down, and giving notice to co-tenants.

VI. Conclusion

The current law, as it stands, leaves a loophole open for a co-tenant to, in essence, oust the other co-tenant through a rise in tax liability for the unconsented improvements made to a concurrent estate. The Author proposes that the loophole be closed with adherence by courts to be consistent with the current case law in neighboring areas. Requiring the contribution of increased taxes, due to an improvement by one co-tenant without the consent of the other co-tenant, is unjust. By complying with the common law rules now in place for tenancy in common for taxes, there is a potential to harm the non-improving co-tenant without recourse. If the law goes unaltered, non-improving co-tenants will be liable for taxes in which they have no tax base, and could create a situation where the non-improver is not in a position to pay necessary costs for the property. Implementing this change in the law is not only consistent with sound state tax law policy, but would also be consistent with the common law of property. The Author's proposition, of charging the tax increment caused by an unconsented improvement to the improver, captures the essence of the common law on improvements while still taking into consideration the importance of property taxes to states' governments.