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TO JOHN HENRY





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PREFACE

As a former instructor, for over two decades, I had the pleasure of teaching a real estate course to paralegal students. This textbook, a greatly expanded version of that course material, is directed toward the training and practice of paralegals in the area of modern real estate transactions. The text has been revised several times to reflect new methods and laws that affect the practice of real estate law.

A paralegal cannot assist a transactional real estate attorney effectively unless he or she is fully aware of all the substantive legal issues involved and has a good command of the various legal forms in use. The treatment of the subject material in this textbook assumes that the reader has no knowledge of real property law. The text introduces the reader to the basics of real property law and then proceeds step by step through all the areas of a modern real estate practice.

The text is written for national use and tries to present the general concepts of real property law that are applied in most of the 50 states. Although the text is not state-specific, it can be supplemented easily with state materials if the instructor so desires.

The book is designed to be used in two ways. It can be used as a classroom teaching source for the training of paralegals. It can also be used as a reference work by paralegals employed in a real estate legal practice. The book includes an explanation of legal principles, practical suggestions, and numerous forms. Using this text, the student or practicing paralegal possesses a collection of useful material in a single source.

TEXTBOOK ORGANIZATION

Based on comments and suggestions from various teachers, students, and reviewers of the previous editions of this book, the text has been revised. Chapter 1 introduces students to the concept of property ownership and discusses the various types of ownership that can exist. Chapter 2 explains to the student the situation in which real property is owned by more than one person and summarizes all the forms of concurrent ownership. Chapter 3 outlines the methods of describing real property and contains sample surveys and legal descriptions. Chapters 4 and 5 discuss government regulation of and various private encumbrances to the ownership of real property, with a special emphasis on easements. Chapter 6 explains the basics of contract law, and Chapter 7 is devoted to contract forms and the explanation of standard provisions found in real estate contracts. Chapter 8 is a discussion of deeds, complete with many examples and sample forms. Chapters 9, 10, and 11 outline real estate finance. Chapter 9 explains the business aspects of real estate lending and acquaints student with the economic and practical needs of lender and borrower clients. Chapter 10 is a summary of the substantive law of notes, mortgages, and foreclosures. Chapter 11 explains the various note and mortgage forms as well as other documents used by lenders to document and secure residential and

commercial loans. Chapters 12 and 13 identify the importance of title examinations and title insurance.

Chapters 14 and 15 explain the practical procedural steps in a real estate purchase and sale and in a loan closing. Chapter 14 contains a comprehensive explanation of the substantive issues involved in the purchase and sale and the loan at real estate closings. Chapter 15 is devoted to forms and examples of closing documents, including a sample of a small investment real estate closing transaction. Chapter 16 summarizes the law of condominiums, cooperatives, and time-shares. Chapter 17 contains an explanation of lease law and includes examples of residential and commercial lease forms.

CHANGES TO THE EIGHTH EDITION

Each chapter has new Review Questions, Case Problems, and Practical Assignments to provide the instructor and students with an assessment tool to determine what students learned in the chapter.

New forms have been introduced in many chapters. This allows the instructor and students to work with and learn using current examples of legal forms.

Chapter 3, Surveys and Land Descriptions, has been rewritten in several places to include new and better examples and illustrations. The new material makes the important but difficult concepts easier for the instructor to teach and students to learn.

New material discusses deeds in lieu of foreclosure. This material supplements students' knowledge and reinforces Chapter 10's content on legal aspects of real estate finance.

Chapter 15 from the seventh edition that discussed RESPA and Truth-in-Lending content has been deleted. Important information from the former Chapter 15 has been updated and added to Chapter 14 and the new Chapter 15.

STUDENT LEARNING FEATURES

- **Learning Objectives** open each chapter, aligning to content and end of chapter questions, problems, and assignments. This provides a clear pathway for learning wherein students can focus on key concepts and instructors can better measure knowledge and skill acquisition.
- **Checklists** are found in most chapters and include task-specific steps that students can apply to many aspects of a paralegal's workday. For example, Chapter 7 contains a checklist for the preparation and review of a commercial real estate contract, and Chapter 14 includes a checklist for a purchase and sale closing and a loan closing.
- **Terminology** is emphasized throughout each chapter. Key terms appear in boldface and are defined in context where they first appear. They are also listed at the end of each chapter for quick reference. A comprehensive glossary ends the text.
- **The Ethics** feature in each chapter takes the student into a hypothetical scenario that presents an ethical problem. The feature emphasizes the importance of professional responsibility in a law practice.
- **A chapter-ending summary** provides an excellent review of the chapter's main points.
- **Review questions, case problems, and practical assignments** at the end of each chapter provide students with more exercises and opportunities to consider how they would handle specific tasks. For example, a practical assignment in Chapter 5 asks students to draft an easement, and one in Chapter 10 asks students to draft a note and a deed to secure debt based on a hypothetical scenario.

SUPPLEMENTS AVAILABLE FOR THE EIGHTH EDITION

Instructor Companion Site



Instructor's Manual

The Instructor's Manual has been revised to incorporate changes in the text and to provide comprehensive teaching support. The Instructor's Manual contains the following:

- Chapter Outline for each chapter
- Teaching Ideas
- Answers to Review Questions and Case Problems
- Test Bank and Answer Key

PowerPoint Presentations

- Customizable PowerPoint® Presentations focus on key points for each chapter. (PowerPoint® is a registered trademark of the Microsoft Corporation.)

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This text covers all the important issues that a real estate paralegal will encounter in a modern real estate practice. I offer it to you with the sincere hope that you will find it useful.



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INTRODUCTION TO THE LAW OF REAL PROPERTY

OBJECTIVES

After reading this chapter, you should be able to:

- Distinguish between real and personal property.
- Describe the rights and obligations an owner of real property has in regard to surface and subsurface water.
- Explain the rules for determining if property is a fixture.
- Summarize the legal rights an owner has in real property.
- Recognize and compare the estates of ownership in real property.
- Summarize the various ways of becoming an owner of real property.
- Identify and describe the legal principle of adverse possession.
- Explain the transfer of ownership to real property by conveyance.
- Describe the role of a paralegal in a real estate legal practice.

OUTLINE

- | | |
|---|--|
| <ul style="list-style-type: none"> I. Real Property Law <ul style="list-style-type: none"> A. Laws That Govern Real Property Transactions B. History of American Real Property Law C. Real Property versus Personal Property <ul style="list-style-type: none"> 1. Tangible Personal Property 2. Intangible Personal Property D. Fixtures <ul style="list-style-type: none"> Case: <i>Ex Parte Brown</i> E. Physical Elements of Real Property <ul style="list-style-type: none"> 1. Airspace 2. Mineral Rights 3. Water Rights F. Ownership of Real Property II. Modern-Day Estates in Real Property <ul style="list-style-type: none"> A. Fee Simple or Fee Simple Absolute B. Fee Simple Determinable C. Fee Simple on Condition Subsequent D. Life Estate E. Future Interests | <ul style="list-style-type: none"> F. Estate for Years G. Estate at Will III. Methods of Acquiring Ownership to Real Property <ul style="list-style-type: none"> A. Inheritance and Devise B. Gift C. Contract and Sale D. Adverse Possession IV. Transfer of Ownership (Conveyances) V. The Role of Paralegals in Real Estate Legal Practice <ul style="list-style-type: none"> A. Research Materials for Real Property Law VI. Ethics: Introduction VII. Summary VIII. Key Terms IX. Review Questions X. Case Problems XI. Practical Assignments |
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"For 'tis the only thing in the world that lasts.

'Tis the only thing worth working for, fighting for, dying for."

Margaret Mitchell, *Gone with the Wind*

The sentiments of Scarlett O'Hara's father about Tara, his plantation, are shared by millions of homeowners throughout the world. Home ownership ranks high on most people's wish list, and a home is the most valuable asset in many households. The real estate industry with all its many facets, such as development, construction, sales, leasing, and finance, generates vast concentrations of wealth and creates millions of jobs. Real estate is a valuable commodity, and almost every aspect of its use, sale, and development is regulated by law. These laws are steeped in history and tempered with logic and practicality. Representation of real estate clients is a major area of practice for many law firms, and the opportunities for the trained real estate paralegal are numerous. Preparation for this work begins with an introduction to the basic principles of real property law.

REAL PROPERTY LAW

Laws That Govern Real Property Transactions

The law of the United States comprises two separate systems of law: federal law and state law. Federal law applies uniformly throughout the country, whereas state law, because of differences in local history and conditions, varies from state to state. The law of real property in general is governed by state law and therefore is somewhat different in each of the various states. The law of the state in which the real property is located usually governs. For example, if a New York couple owns a beach house on Cape Cod, the laws of the Commonwealth of Massachusetts control the couple's ownership rights to the property and the form and content of the various legal documents and procedures involved in the sale, leasing, financing, inheritance, and so on, of the property.

There are, however, basic legal principles that govern real estate transactions, and the approach of this text is to describe these principles and to mention the more important instances in which the states do not agree.

History of American Real Property Law

The early settlers who came to America from Europe brought with them the laws of their native lands, including the laws concerning land ownership. Except for Louisiana, Texas, and portions of the Southwest, where the civil laws of France and Spain have substantial influence, most modern real property law is the product of English feudal law, which developed into what is known as the common law.

Feudalism grew out of the chaos of the Dark Ages. Because of the collapse of all central law and order, people banded together for security and stability, usually with the strongest member of the group taking command. The stronger members became known as lords, and the weaker members became known as tenants or vassals of the lord. For the lord to keep the allegiance of the vassals, it became necessary to compensate them for their services. Because almost all the wealth of the lords at that time was in the form of land, the land was parceled out to the vassals for services. Tenures or rights to possession were created. The early tenures were of four main types: (1) *knight tenure*, land given in return for pledged armed services; (2) *serjeanty tenure*, land given in return for performance of ceremonial services for the lord (later evolving into ordinary domestic services such as cook and butler); (3) *frankalmoign tenure*, land given for religious purposes to priests and other religious bodies; and (4) *socage tenure*, land given to farmers. These early field tenures evolved into the concept of estates (derived from the Latin word *status*), which became the primary basis of classification of interests in land. The word *estate* is still used today to express the degree, quantity, nature, duration, or extent of an owner's interest in real property.

The word *fee* is used to describe many modern-day estates evolved from the ancient English doctrine of tenure, which was based upon the notion of a lord giving up his land to a tenant in return for *homage* (rent) and service. The holding of the tenure by the tenant was called his *fief* or *fee*. So long as homage was paid by the tenant, the lord was bound to respect the tenant's rights for his lifetime. Over a period of several decades, the lords began to believe that the tenant's heirs had a right to take up the tenant's property upon the tenant's death and to continue to pay homage to the lord and keep the land. This created the ability to transfer the fee to heirs of the tenant at the tenant's death, and the concept of inheritance began to be associated with fee ownership.

The ability to transfer a fee during the tenant's life took longer to establish. The ability of the tenant to transfer the property during his lifetime was first

viewed as a means of the tenant to deprive his heirs of their future ownership of the property, or to otherwise disinherit the heirs, and was at first considered against public policy.

The power to sell property during the tenant's lifetime was first recognized with purchased land rather than inherited land. The idea was that one must not take advantage of the right of inheritance and then deprive one's own heirs of the same advantage. However, as the law continued to evolve in England, the right of transfer became well established and applied to both purchased and inherited land.

Real Property versus Personal Property

The law recognizes two classifications of property: real and personal. John E. Cribbet, former dean of the University of Illinois College of Law, in his treatise *Principles of the Law of Real Property*, points out:

The terminology makes no semantic sense because a car is just as "real" as a farm and the family mansion is more "personal" to the owner than shares of stock. The explanation lies not in the history of property, but in the history of procedure. In early common law a real action, so called because it led to the return of the thing itself, was used when land was wrongfully detained by another; a personal action, which gave only a money claim against the wrongdoer, was proper when things other than land were involved. Thus the thing took the name of the action, and we have, to this day, real property and personal property.

Real property relates to land and those things that are more or less permanently attached to the land, such as homes, office buildings, and trees.

Personal property is sometimes referred to as *chattels* or *goods*. Personal property has its own set of legal rules and regulations, which govern the ownership of the property, the ability to sell the property, and the ability to pledge the property to secure a debt. Personal property may include living objects, such as animals, and inanimate objects, such as a television.

Tangible Personal Property

The property can be either tangible or intangible. Tangible personal property is property that has a physical substance—something you can hold, taste, see, or hear. Tangible personal property includes such things as automobiles, televisions, and clothes.

Intangible Personal Property

Intangible personal property is property that represents a set of rights that have no physical existence but that do represent control or ownership of something of value. A certificate of stock is an example of intangible personal property. Although the stock certificate itself is tangible, the stock certificate represents a fractional ownership in a company, and it is the intangible fractional ownership in the company that gives the stock certificate value. Other examples of intangible property are bonds; patents; copyrights; and intellectual property rights, such as software.

Fixtures

It usually is easy to tell if an item is personal property or real property, but in some situations, the determination may be difficult. Take, for example, a stove and a refrigerator that are located in the kitchen of a house. Are these items real property or personal property? The answer to this question is governed by the law of fixtures.

A **fixture** is an article of personal property, such as an air conditioning unit or a dishwasher, that has been installed in or attached to land or a building

real property

Property that relates to land and those things that are more or less permanently attached to the land, such as homes, office buildings, and trees.

fixture

Item of personal property that becomes real property because of its attachment to the land or a building.

and, on attachment, is regarded by the law as part of the real property. The term *trade fixtures* is used to describe shelving, counters, and other ornamental items installed on property by a tenant to assist the tenant in the conduct of its business. Most states permit a tenant to remove trade fixtures during the term of the lease and at the expiration of the lease. The removal may be conditioned upon the tenant repairing any damage to the property that results from the removal of the trade fixtures.

A number of judicial tests exist to determine if an article is a fixture. The tests are based upon the extent of the fixture's annexation to the real property and the adaptation of the fixture to the use of the real property. The more permanent the attachment or annexation, the more likely the court will determine that the item is a fixture. If it is clear that the item has been specifically constructed and adapted to enhance the use of a particular building, such as a hot tub on the deck of a house, then the item is more likely to be a fixture. In addition, courts pay strict attention to the intention of the parties. If it is clear from the circumstances surrounding the attachment of the item to the building that the parties intended for it to be a fixture and part of the real property, this will be given weight by the court. In addition, if the parties have indicated in writing an intention that an item shall be a fixture or shall not be a fixture, a court will enforce this written intention.

Often the question of whether an object is a fixture or not is really a question of *who gets the property*, and the answer varies according to the context in which the question is asked. The question is raised in disputes between landlords and tenants, mortgagors and mortgagees, sellers and buyers, and lenders and creditors. For example, in a seller and purchaser dispute, the law generally favors the purchaser and holds that any personal property attached to the home or building are considered fixtures and will transfer with the real property unless the seller either has removed the fixtures before the sale or reserved ownership in the contract or deed. The requirements of justice and fairness in a particular case may determine the outcome of whether an object is a fixture or not, which makes it difficult to create any consistent body of law on the subject.

The classification of an item as a fixture is important because if the item is a fixture, it is part of the real property and will be transferred with the real property unless there is a clear intent for it not to be transferred. This means that if a person buys a building, he or she also obtains all the fixtures within the building. Classification also is important in a loan transaction because if a person pledges real property as security for a debt, not only the real property will be pledged, but also any items deemed to be fixtures located on the real property.

Failure to identify an item as a fixture may send a person to jail, as shown by the case of *Ex Parte Brown*.

Physical Elements of Real Property

As previously discussed, real property is land and those things, such as houses or buildings, which are attached to the land. The definition of real property, however, includes more than land and things that are attached to the land. Real property includes everything beneath the surface of the earth and in the air-space above. Ancient laws decreed that an owner of the earth's surface rights of ownership extended from the surface downward to the center of the earth and upward indefinitely to the stars.

CASE

Ex Parte Brown
485 So. 2d 762 (1986)

WRIGHT, Presiding Judge.

Ruby and Louis Brown were divorced by decree of the Lauderdale County Circuit Court in November 1983. As part of this decree, the husband was awarded the family home, "including all fixtures and realty appurtenant thereto." The wife was awarded all furniture in the home with the exception of the master bedroom suite, the dining room furniture, kitchen appliances, and one-half of all silver, silverware, and other kitchenware, which was awarded to the husband. The wife was to remove all of the furniture and personal property awarded to her prior to relinquishing possession of the home. In February 1984, the husband filed a petition with the circuit court asking that the wife be found to be in contempt for violating the property settlement provisions of the divorce decree. In May 1985, the court issued an order which specifically stated:

"The evidence shows that under the decree of divorce the Plaintiff [husband] was awarded certain items of personal property which the Defendant [wife] removed from the Plaintiff's home. A microwave of the value of \$400.00 and a refrigerator of the value of \$500.00. Further, the Plaintiff was awarded the family home and there was attached thereto a bookcase and china cabinets of the value of \$2,000.00 which the Defendant removed from the home. Therefore, the Plaintiff was deprived of real and personal property of the value of \$2,900.00 and the Defendant's action in removing these items is [a] violation of the decree and a contempt of the Court."

For her contempt, the court ordered the wife to serve ten days in the county jail, allowing, however, that she could purge herself of the contempt by making a payment of \$2,900 to the Clerk of the Circuit Court of Lauderdale County. Thereafter, the wife filed this petition for certiorari asking that we review this finding of contempt.

We are perplexed by the wife's first argument for reversal. She admits that she acted in contempt of the court's order when she removed the microwave and refrigerator from the home, but argues that the bookcase and china cabinets were not fixtures appurtenant to the home and thus could be removed by her as furniture. She does not argue that the ten-day jail sentence was excessive, see *Williams v. Stumpe*, 439 So.2d 1297 (Ala. Civ. App.1983), nor that she is unable to pay the \$2,900 necessary to purge herself of this contempt, see *Zeigler v. Butler*, 410 So.2d 93 (Ala. Civ. App.1982). Instead, the real issue she wishes this court to address is whether the \$2,900 is an accurate assessment of the damage caused the husband by her contempt.

[1] It is settled that a trial court can assess damages in favor of an aggrieved party in civil contempt proceedings. *Lightsey v. Kensington Mortgage & Finance Corp.*,

294 Ala. 281, 315 So.2d 431 (1975); *Smith v. Smith*, 365 So.2d 8 (Ala. Civ. App.1978). It is also settled that "a party who has been found in contempt and who has been assessed compensatory damages should seek review of the finding of contempt by means of extraordinary writ (certiorari or habeas corpus), and should seek review of the question of the assessed amount of compensatory damages by appeal." *Smith, supra*. The wife has not appealed the \$2,900 award. However, out of deference to the parties, we note that even if the wife had not admitted her contempt, there is ample evidence in the record to support the trial judge's determination that the bookcase and china cabinets were fixtures appurtenant to the house.

"A 'fixture' is an article that was once a chattel, but which, by being physically annexed or affixed to realty, has become accessory to it and 'part and parcel of it.'" *Milford v. Tennessee River Pulp and Paper Company*, 355 So.2d 687 (Ala. 1978). Whether an article is a fixture is a determination that must be made on the particular circumstances of each case. *Id.* The supreme court has articulated the criteria to be used in making this determination as follows:

"(1) Actual annexation to the realty or to something appurtenant thereto; (2) Appropriateness to the use or purposes of that part of the realty with which it is connected; (3) The intention of the party making the annexation of making permanent attachment to the freehold. This intention of the party making the annexation is inferred; (a) From the nature of the articles annexed; (b) The relation of the party making the annexation; (c) The structure and mode of annexation; (d) The purposes and uses for which the annexation has been made."

Id. (quoting *Langston v. State*, 96 Ala. 44, 11 So. 334 (1891)).

In her own testimony, the wife revealed that the articles had all been custom-built for the express purpose of being used with the family house, not just to be used in any house. All of the articles were anchored to the walls, and the china cabinets were each set into a permanent base. Under our limited scope of review, we cannot say that this testimony does not support a finding that the articles were intended to be fixtures, "part and parcel" of the house.

We are of the opinion that the trial court has not committed error in finding that the wife acted in contempt of the divorce decree. Further, her sentence of ten days in jail, with the opportunity to purge her contempt by paying to the clerk \$2,900, is not unconstitutional. The decision of the trial court is affirmed.

AFFIRMED.

BRADLEY and HOLMES, JJ, concur.

Airspace

The ability of humans to fly has limited the concept of ownership from the surface to the stars, and there is now public domain airspace occurring at certain elevations above the surface of the earth. An owner of real property still owns the private airspace above the surface of the land. This private airspace is of a sufficient elevation to permit the construction of the tallest buildings and other structures found throughout the world.

This airspace can be quite valuable, especially as in a crowded city such as New York, where the airspace can be used for building purposes. For example, a charitable organization in New York City owned a four-story building that was located in the midst of multistory skyscrapers. The organization sold the airspace above its building to a developer for several million dollars. The developer used the existing building as a foundation for the construction of a skyscraper within the airspace. Airspace also can be valuable in less populous areas, where it can be used to preserve a scenic view of a mountain or a shoreline. The advent of solar energy has increased the value of airspace, and most states provide for solar easements that create the right to purchase adjoining airspace to permit the sun to shine on solar heating or cooling units of a building.

Mineral Rights

Since the ownership of the surface of real property includes ownership extending from the surface to the center of the earth, an owner of real property usually owns all the minerals beneath the surface of the land. Some minerals, such as oil, gas, and coal, are more valuable than the land's surface. The law generally permits the ownership of real property to be divided horizontally; that is, ownership of the surface may be divided and be separate from ownership of the minerals beneath the surface. It is not uncommon for the owner of the surface to sell or lease the minerals separately from the surface to a company with the technology to extract the minerals, retaining a royalty or percentage of the profits on the sale of the minerals. Conversely, the surface of the land can be sold, and the owner can retain the rights to the minerals beneath the surface.

It is easy to see that tension can be created between the owner of the surface of land and a separate owner of the minerals beneath the surface. The mineral rights owner in its exploration efforts may disturb the surface of the land and make it unusable by the surface owner. Extensive mining underneath the surface for coal or other minerals can result in a collapse of improvements upon the surface, resulting in injury to both property and person. It is not uncommon for the sale of mineral rights to contain limitations upon the mineral rights owner's ability to disturb the surface in its exploration of minerals. States that have large mineral resources have enacted laws that not only define the rights of a mineral owner, but also resolve the conflicts between surface owners and mineral rights owners.

Certain trees, plants, and other things that grow in the soil may be considered real property. Trees, perennial bushes, grasses, and so on, that do not require annual cultivation are considered real property. However, annual crops produced by labor, such as wheat, corn, and soybeans, are considered personal property.

Water Rights

An owner of real property has certain ownership rights to use water that is located on or beneath the surface of the land. The users of water are diverse, such as governments, farmers, manufacturers, and consumers. Water pollution and changes in weather patterns that are responsible for below-average rainfall have combined to drastically reduce the amount of usable water available in many sections of the nation and have heightened competition among the users of water. In an effort to resolve this conflict, many states have enacted laws regulating the transfer, ownership, and use of water rights.

The source of water governs, to a great extent, a landowner's rights to own and use the water. The categories of water sources are (a) groundwater, such as an underground stream or spring; (b) surface water, which accumulates on the surface of the land from rain; and (c) water that accumulates in a river, stream, or natural lake.

Groundwater is water beneath the surface of the land. It is created by underground streams or by rain that soaks through the soil. A landowner's right to use an underground stream is governed by the same rules that govern rivers and streams on the surface of the land, which are discussed later in this section. Groundwater that has been created by rain soaking through the soil is deemed to belong to the owner of the land on which the groundwater is found. The landowner has the right to use the groundwater in any way he or she chooses as long as the landowner does not use or divert the water in such a way as to intentionally harm an adjoining property owner.

A landowner can use *surface water* in any way he or she chooses as long as the use does not harm an adjoining property owner. The diversion of surface water by a landowner onto a neighbor's land may be a problem, especially when the terrain is hilly. For example, a property owner owns land that is at or near the bottom of a hill. Because of the natural flow of surface water, the property floods during rainy periods. The property owner decides to build a dam on the property to keep the surface water from flooding the land. The dam protects the property from flooding by diverting the water uphill onto a neighbor's property, causing the neighbor's property to flood. The flooding of the neighbor's property is unnatural because the flooding is caused by the artificial dam. The owner of the dam in this situation is liable to the neighbor for damages caused by the flooding because the dam altered the natural flow of the water. A property owner does not have the right to alter the natural flow of surface water.

Water located within a river, stream, or natural lake is owned by the state or federal government and not by the individual property owners whose properties adjoin the river, stream, or natural lake. Although an adjoining property owner to a river, stream, or natural lake does not have ownership rights of the water, in most states, the owner has a right to the beneficial use of the water. The right to the beneficial use of the water is governed by one of two areas of water law, known as **riparian rights** and **appropriation**. Riparian rights, derived from the Latin word *ripa*, for "river," are based on an ancient doctrine that all owners of riparian lands must share equally in the use of the water for domestic purposes. Riparian lands border a stream, river, or natural lake. Under the riparian rights doctrine, an owner of riparian land has the right to use the water equally with other owners of riparian lands. This equal ownership means that a riparian owner does not have a right to interfere with the natural flow of the water in the river, stream, or lake. For example, an owner of riparian land could not create a dam across the river so that the water would cease to flow to other owners of riparian land. In addition, the riparian owner would not be able to channel the water from the river into a reservoir located on his or her property. Both the dam and the reservoir would alter the natural flow of the water and violate other owners' riparian rights to beneficial use of the water.

Appropriation, sometimes referred to as *prior appropriation*, is found in western states where water is scarce. This doctrine was developed in the nineteenth century to regulate the conflicts regarding water usage among settlers of the western states, predominantly miners, farmers, and ranchers. Under the appropriation or prior appropriation water rights doctrine, the right to use the water is given to the landowner who uses the water first. The date of appropriation determines the user's priority to use water, with the earliest user having the superior right. If the water is insufficient to meet all needs, those earlier in time or first in time obtain all the allotted water and those who appropriate later receive only some or none of the water. The first-in-time, or first-right appropriation, concept contrasts sharply with the riparian tradition of prorating the entitlement to water among all users during times of scarcity.

riparian rights

Rights of the owners of lands adjoining streams, rivers, and lakes relating to the water and its use.

appropriation

In regard to water law, doctrine stating that water belongs to the person who first makes beneficial use of it.

In order to obtain rights to water, a landowner must prove that he or she has appropriated the water. Generally, this requires an intentional act by the landowner to use the water for a beneficial use. The intentional act is usually the construction of a channel or reservoir to move the water from its natural source and the storage or usage of the water on the landowner's property. The landowner must use the diverted water for a beneficial use. What is a *beneficial use* is usually determined by state law. Generally, domestic use such as drinking water, agricultural use such as irrigation, and water used in manufacturing are considered beneficial uses.

All states that follow the appropriation theory of water rights usage have established administrative agencies to issue water permits in connection with water usage. The chief purpose of the administrative procedures is to provide an orderly method for appropriating water and regulating established water rights. Water rights under the appropriation theory are transferable from one property owner to another. It is possible to transfer water rights without a transfer of land and to transfer land without a transfer of water rights. Each state has its own regulatory system and requirements for the transfer of water rights.

Ownership of Real Property

Members of the legal profession, including paralegals, spend time and clients' money worrying about the ownership of real property. The basic principle that only the owner of real property can sell or pledge it as security for a debt means that on any typical sale or loan transaction, title examinations and other efforts are made by legal counsel for the purchaser or lender to determine the extent of the seller's or borrower's ownership of the real property.

The chief legal rights accorded an owner of real property are possession, use, and power of disposition. An owner of real property has the right to possess the property. **Possession** is occupation of the land evidenced by visible acts such as an enclosure, cultivation, the construction of improvements, or the occupancy of existing improvements. Possession gives the property owner the right to exclude others from the land. Occupancy of land by someone without the permission of the owner is a *trespass*. The owner may evict the trespasser from the land and/or sue the trespasser for money damages or even have the trespasser arrested.

A landowner has the right to use the land for profit or pleasure. Absolute freedom to use land has never existed, and the modern owner is faced with several limitations on the use of land arising from public demands of health, safety, and public welfare as well as the rights of neighbors to the safety and enjoyment of their property. The law, however, does favor the free use of land, and doubts will be resolved in favor of the owner.

An owner of property has the right to dispose of that ownership. The power of disposition may take place by inheritance or will at the owner's death, or it may take place during the owner's lifetime by contract, deed, or lease. The law favors the free right to transfer ownership, and any restraint on this right will not be upheld unless the restraint supports some important public purpose or private right.

Private property rights are subject to the right of sovereignty exercised by federal, state, and local governments. Therefore, private ownership is subject to the powers to tax; to regulate the use of private property in the interest of public safety, health, and the general welfare; and to take private property for public use. A government's power to regulate, tax, and take private property for public use is discussed in Chapter 4.

MODERN-DAY ESTATES IN REAL PROPERTY

There are six types of modern-day estates in real property: (1) fee simple or fee simple absolute, (2) fee simple determinable, (3) fee simple on condition subsequent, (4) life estate, (5) estate for years, and (6) estate at will.

possession

Occupation of land evidenced by visible acts such as enclosure, cultivation, the construction of improvements, or the occupancy of existing improvements.

Fee Simple or Fee Simple Absolute

Fee simple or **fee simple absolute** is the highest and best kind of estate an owner can have. It is one in which the owner is entitled to the entire estate, with unconditional powers of disposition during the owner's lifetime and the power to transfer the property to heirs and legal representatives on the owner's death.

Fee simple or fee simple absolute is maximum legal ownership and has a potentially infinite duration and unrestricted inheritability. In most states, no special language is needed to create a fee simple absolute. The presumption is that a fee simple estate is created at every conveyance unless a lesser estate is mentioned and limited in the conveyance. Most homes and commercial properties are owned in fee simple.

Fee Simple Determinable

A **fee simple determinable** is an ownership in real property that is limited to expire automatically on the happening or nonhappening of an event that is stated in the deed of conveyance or the will creating the estate. For example, Aaron conveys to Bill "to have and to hold to Bill so long as the land is used for residential purposes. When the land is no longer used for residential purposes, it shall revert to Aaron." The use of the words *so long as* to preface the condition under ancient English common law created a fee simple determinable, and in modern times, most states recognize that the use of these words preceding the statement of a condition in a deed or will creates a fee simple determinable. The estate granted is a fee, and like the fee simple absolute, it can be inherited and may last forever so long as the condition is not broken. Yet it is a determinable fee because there is a condition. The estate will automatically expire on the non-occurrence or occurrence of the event, for example, the use of the land for non-residential purposes. The estate conveyed to Bill will automatically end if and when the land is used for nonresidential purposes, and Aaron will again own the estate in fee simple absolute. During the existence of Bill's ownership of the fee simple determinable, Aaron retains a future interest in the land called a *possibility* or *right of reverter*. Aaron's possibility of reverter can be passed on to Aaron's heirs at Aaron's death. Aaron's possibility of reverter also may be transferred to a third party at the time of the conveyance to Bill. For example, Aaron conveys to Bill to "have and to hold so long as the land is used for residential purposes and then to Carol. If the land is not used for residential purposes, it will go to Carol, Aaron's possibility of reverter having been transferred to Carol."

Fee Simple on Condition Subsequent

A **fee simple on condition subsequent** exists when a fee simple is subject to a power in the grantor (person who conveyed the fee) to recover the conveyed estate on the happening of a specified event. "Aaron transfers to Bill on the express condition that the land shall not be used for nonresidential purposes, and if it is, Aaron shall have the right to reenter and possess the land." The use of the words *on the express condition that* under English common law created a fee simple on condition subsequent, and in modern times, most states recognize that the use of these words preceding the statement of a condition in a deed or will creates a fee simple on condition subsequent. Bill has a fee simple on condition subsequent, and Aaron has the right of entry or power of termination. On the happening of the stated event, the granted estate will continue in existence until Aaron effectively exercises the option to terminate by making entry or bringing an action to recover the property. A breach of the condition does not cause an automatic termination of the fee simple on condition subsequent estate. The basic difference, therefore, between the fee simple determinable and the fee simple on condition subsequent is that the former automatically expires on violation of the specified condition contained in the instrument creating the estate, whereas the latter continues until it is terminated by the exercise of the grantor's power to terminate. Aaron's right to reenter can be transferred to a third party in the same manner as the possibility of reverter in a fee simple determinable.

fee simple or fee simple absolute

Estate of real property with infinite duration and no restrictions on use.

fee simple determinable

Estate of real property with potential infinite duration. The ownership of a fee simple determinable is subject to a condition, the breach of which can result in termination of the estate. A fee simple determinable automatically expires on the nonoccurrence or occurrence of a condition.

fee simple on condition subsequent

Estate of real property with potential infinite duration. The ownership of a fee simple on condition subsequent is subject to a condition, the breach of which can result in termination of the estate. A fee simple on condition subsequent continues in existence until an action is brought to recover the property.