## Chapter 28

**REAL PROPERTY AND**

**LAND USE REGULATION**

*What do I really own?*

**I. Overview**

Students find it important to learn how to plan their personal affairs through the law. The laws of contracts, property, and torts play significant roles in business and vital roles in how one arranges his or her personal affairs. Personal property is one such key area.

The study of personal property revolves around being able to answer three key questions:

1. How is this property classified?

2. How is this property acquired or transferred?

3. What are the legal consequences of the answers to questions 1 and 2?

All personal property falls into one classification or another. The type of classification used will determine how property will be treated in the eyes of the law. For example, consider the basic distinction between real and personal property. Sales of real property transactions generally come under the purview of the common law of contracts. Sales of goods, however, are generally covered by the UCC. If you are selling trees on the land, that property is classified as real, and the common law of contract controls. If the trees have been cut and are being sold to a mill, the UCC will now call the shots. If that lumber becomes part of a house, the common law of contracts again controls because the house is treated as real property.

In addition to classification, the acquisition and transfer of rights and duties to property are of key personal and business importance. Most property is transferred by way of contract with some sort of reciprocal exchange of consideration. You work, get paid, and that money is exchanged for property. You may be lucky, however, and find it, inherit it, or just have it given to you. In all these events, the acquisition or transfer must be made in compliance with the elements required by law. Once you have acquired the property, what are the rights and duties that arise out of that ownership? What if you found it? What if others have claims against it? These issues are of key importance in both business and private lives.

This chapter is in part, designed to introduce students to the law of real property from two key perspectives: first, ownership and the rights and duties that arise out of the ownership of real property, and second, use of real property and the respective rights and duties that can arise out of that use.

Real property represents the largest single outlay most people make in the course of their earning years. Even if they choose to rent, the price of keeping a roof over one's head will still probably be their biggest expense. Real estate is not only necessary as a matter of physical survival, it is critically important to our economic system because of this large dollar outlay. One of the most basic terms used in the law of real estate is "fee simple absolute." It connotes the highest form of recognized ownership in real property. The term is originally derived from the words *feud* or *fief* and *fief d'haubert* meaning a fee held by tenure of a knight's service to the lord of the manor. It is infinite, with no limitation on inheritability, and does not end upon the happening of any event. Think of fee simple as the whole pie. That pie, in turn, may be sliced and diced into all sorts of smaller morsels.

Another way to look at real estate is as a circular object in the physical shape of the earth. It is round, and each ownership of land has a unique wedge-shaped slice of that round body. The basic parameters of that ownership start with the surface rights as defined by the surveyed metes and bounds in the legal description. In addition to those rights, real estate extends theoretically to the center of the earth in minerals below the surface and in development of air rights. Both these rights are subject to use limitations and the rights of other owners of adjoining properties.

The other interesting aspect of this chapter goes into more detail on forms of coownership of property and the landlord-tenant relationship. Most of us, sooner or later, will get involved with coownership of property in one way or another. Anyone who is married is a likely coowner. Anyone who shares property interests by gift, inheritance, or earnings is likely to be a coowner. Even if one's property is entirely his or her own, he or she will need to know the rules of the coownership game for purposes of credit, finance, business planning, and the like. How, when, and where coownership rights and duties are created is as important as the basic terms of real property law itself. Most of us also will rent at some time in our lives. The various aspects of renting are also very important and are dealt with in this chapter.

**II. Hypothetical Multi-Issue Essay Question**

Bloke and Crissy Carrington have been married for the past 50 years (the first 20 in California) and live on the Worthmore Ranch in Aspen, Colorado. Bloke met Ms. Misty Blue (age 21) at the annual cookout on the ranch. He decides it's now or never for his mid-life crisis and runs off with Misty to Miami, telling Crissy: "My lawyer will call your lawyer about the divorce." Three days later Bloke dies on the beach. He did not leave a will but told Misty just before he died, "I leave you everything!"

Crissy comes to you for advice as to the disposition of the ranch.

The following properties have been acquired during the marriage:

1. The Worthmore Ranch, held as tenancy in the entirety.

2. Bank accounts in California and Colorado. They had been held in joint tenancy, but Bloke tried to wire the money to Miami the day before he died. The money had not yet been wired to Miami.

1. Jewelry worth over $1 million that Bloke had handed to Misty on the plane to Miami.

Please advise.

# **III. Outline**

# Two Kinds of Property

## Real

### The land itself as well as buildings, trees, soil, minerals, timber, plants, and other things permanently affixed to the land

## Personal

### Property that consists of tangible property, such as automobiles, furniture, and jewelry, and intangible property, such as securities, patents, and copyrights. Includes everything that is not real property. Note, intangibles cannot be reduced to physical form.

### 

# What is Real Property?

### The land itself as well as buildings, trees, soil, minerals, timber, plants, and other things permanently affixed to the land

# Real Property:

### Land

### Buildings 🡪 constructed on land

### Subsurface Rights 🡪located beneath land surface

### Plant Life and Vegetation 🡪 growing in or on the land surface

### Fixtures 🡪 affixed to real estate so as to become part of it

# Estates in Land—ownership rights

# Freehold Estates—present possessory, interest

Estates in Fee

## Fee simple absolute

### Highest form of ownership of real property

### Ownership is infinite in duration, has no limitation on inheritability, and does not end upon the occurrence or nonoccurrence of any event

## Fee simple defeasible

### Grants owner all of the incidents of a fee simple absolute except that it may be taken away if a specified condition occurs or does not occur

## Life estate

### Interest in property for the life of a specified person

### A life estate terminates upon the death of the named person and reverts back to the grantor or his or her estate or other designated person

# Future Interests—right to possess property in the future

### The interest that the grantor retains for himself or herself or a third party

### Reversion

#### Right to possession of real property returns to the grantor after the expiration of a limited or contingent estate

### Remainder

#### Right to possession of real property goes to a third person or remainderman upon the expiration of a limited or contingent estate

# Concurrent Ownership—two or more persons owning a piece of real property together (co-ownership)

## Joint tenancy—right of survivorship

### Deceased tenant’s interest automatically passes to co-tenants

### Tenant may transfer his or her interest without consent of co-tenants; transfer severs joint liability

## Tenancy in common

### Deceased tenant’s interest passes to his or her estate

### Tenant may transfer his or her interest without the consent of co-tenants; transfer does not sever tenancy in common

## Tenancy by the entirety—right of survivorship

### Deceased tenant’s interest automatically passes to his or her spouse

### Neither spouse may transfer his or her interest without the other spouse’s consent

## Community property—only in some states

### Surviving spouse automatically receives 1/2 of the income of both spouses and the assets acquired during the marriage

### Neither spouse may transfer his or her interest without the other spouse’s consent

# Condominiums

# Usually in multiple-dwelling buildings and sometimes in office buildings and

# others.

# Purchasers have title to individual units and can be transferred.

# Common areas are owned as tenants in common with monthly fees.

# Cooperatives

# Multiple-dwelling buildings

# Corporation owns building. Residents own share of corporation and lease a unit

# from the corporation with special lease.

# How Ownership of Real Property Is Transferred

## Sale

## Tax sale

## Gift, will, or inheritance

## Adverse possession—wrongful possession for a set time that is open, visible, notorious, actual, exclusive, continuous, peaceful, hostile, and adverse

# Marketable title is required. Title insurance may be a good idea.

# Deeds and Recording Statutes

## Deed

### A writing that describes a person’s ownership interest in a piece of real property

Warranty deed has greatest number of warranties.

Quitclaim deed conveys only ownership interest owner has.

## Recording statute

### A state statute that requires the mortgage or deed of trust to be recorded in the county recorder’s office of the county in which the real property is located. Gives constructive notice of owner’s interest. Quiet Title Action may be bought to determine the extent of a party’s ownership rights.

# Nonpossessory Interests in Real Property

### Easement—right to make limited use of other’s property without owning or leasing it. Given by grant or reservation. May be implied or by necessity.

License – grants a person the right to enter for a specified and usually short period of time.

Profit – grants a person the right to remove something from another’s real property.

Landlord – Tenant Relationship

Landlord or lessor transfers right of temporary possession to tenant or lessee who

does not receive title. Tenant’s interest is a leasehold.

Types:

Tenancy for Years 🡪 specific duration is agreed upon.

Periodic Tenancy 🡪 payments due at certain intervals but no specification of

length of lease

Tenancy at Will 🡪 may be terminated by either at any time

Tenancy at Sufferance 🡪 tenant retains possession at end of lease without

owner’s consent

Rental agreement is called the lease.

Implied warranty of habitability provides that the leased premises must be fit, safe

and suitable for ordinary residential use. Failure allows tenant usually

to withhold rent, repair defect, cancel the lease or sue for damages.

Land Use Control

Regulation of possession, ownership and use of real property

Zoning 🡪 municipalities’ regulation of land use within their boundaries

Variance 🡪 permission to use other than allowed by a zoning ordinance

Nonconforming Use 🡪 Permitted continued use within zoned area that does not

fit within new zoning ordinances

Eminent Domain

Government acquisition of private property for public purposes.

Just Compensation Clause mandates compensation.

**IV. Objective Questions**

**Terms:**

1. Property that consists of tangibles such as automobiles, furniture, and jewelry, and intangibles such as securities, patents, and copyrights are all classified as \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

2. When property is owned by two or more persons at the same time, there are four types: (1) joint tenancy, (2) tenancy in common, (3) tenancy by the entirety, and (4) community property. All these are forms of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

3. All real property and physically defined personal property such as buildings, goods, animals, minerals, and such are deemed to be \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

4. The effectiveness of the gift can be inferred from the circumstances or language used by the donor. These factors are used by the courts to help determine \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

5. A gift that is made in contemplation of death is called a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

6. The two most prominent forms of future interests are called \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

7. Property is usually classified as \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ or \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

8. A person's ownership rights in real property is called an \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

9. The party who transfers an ownership interest in real property is called a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

10. In a lease a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ transfers temporary possession to a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**True/False:**

1. \_\_\_\_ The method of acquiring ownership in property by capture is very important and widely used

in today's society.

2. \_\_\_\_ A gift is only valid if the donee gives some consideration for the property that the donor

gives.

3. \_\_\_\_ Tenancy for years is a lease without specific duration.

4. \_\_\_\_ Eminent Domain allows the government to take property without compensation.

5. \_\_\_\_ The owner of the premises when mislaid property is left has rights to the property that are

superior to the rights of the person who finds the property.

6. \_\_\_\_ Subsurface rights may be sold separately from surface rights.

7. \_\_\_\_ When land is sold, any plant life growing on the land is included unless the parties agree

otherwise.

8. \_\_\_\_ A fee simple absolute is the type of ownership most people connect with owning real

property.

9. \_\_\_\_ A person may not be given the right to possess property in the future.

10. \_\_\_\_ Tenancy by the entirety is a form of coownership that can be used by anyone.

**Multiple Choice**:

1. Farmer Fran owns several acres of farmland in Nebraska. At present, much of the land is planted with corn that is growing. How would Farmer Fran's property be characterized?

A. Both the land and corn are personal property.

B. The land is personal property, and the corn is real property.

C. The corn is personal property, and the land is real property.

D. Both the land and corn are real property.

2. Aunt Adrian wishes to give her niece Nancy a gift. Adrian is in good health. Adrian gives Nancy a diamond ring that has been in the family for generations. Adrian tells Nancy that since she had no daughters, she wants Nancy to have the ring. Nancy graciously accepts the ring. Which of the following is correct?

A. Nancy has received a gift *causa mortis*.

B. Nancy has received an *inter vivos* gift.

C. Nancy has received an inheritance.

D. None of the above.

3. Homeowner Helen contracts with Builder Bob to have Bob build a deck on to her house while she is on vacation for two weeks. Helen gives Bob her address and instructions about the deck. Helen then leaves town. However, Bob mistakenly builds the deck on Hank's house. Hank is Helen's neighbor and is also out of town for two weeks. The deck is a permanent structure, firmly secured to one side of the house. Which of the following is correct?

A. Hank is an owner by production.

B. Hank is an owner by accession.

C. Hank is an owner by purchase.

D. Hank is an owner by gift.

4. Loser Larry loses his gold watch in City Park. Stroller Stella finds the watch while walking in the park one day. Stella discovers Larry's name and address on the back of the watch. Which of the following is correct?

A. Stella may keep the watch since it is lost property.

B. Stella may keep the watch since Larry has not demanded its return.

C. Stella must return the watch to Larry since she knows his identity.

D. Stella must leave the watch where she finds it.

5. Guest Gary takes off his diamond studded ring to help wash dishes at his friend Sarah's house after a dinner party. Gary places the ring on top of a cabinet so it will not be lost. However, Gary leaves Sarah's house and forgets the ring. Mary, Sarah's housekeeper, discovers the ring one day while cleaning. Which of the following is correct?

A. Mary has superior rights against everyone but Gary since she found the ring.

B. Sarah has superior rights against everyone but Gary since the ring was misplaced in her house.

C. Mary is a bailee of the ring.

D. None of the above.

6. Larry Landowner is one of five tenants in common who own Blackacre. Larry dies with a will leaving all of his property to Barry. Which statement is *not* true of Barry?

A. Barry becomes a tenant in common with the other four landowners.

B. Barry's interest is subject to the claim of Larry's creditors.

C. Barry receives Larry's interest in the tenancy in common.

D. Barry may not terminate the tenancy in common by agreement of him and the other parties.

7. Pat and Mary live in California, a state that recognizes community property. Pat is an artist who makes $15,000 per year and Mary is a business owner who makes $75,000 per year. Which of the following statements is *not* true with regard to Pat and Mary?

A. If Pat or Mary dies, the surviving spouse automatically receives all of the community property.

B. Each owns one half of the assets acquired during the marriage.

C. Each spouse has joint authority to manage community property.

D. Upon a divorce, each spouse has the right to one half of the community property.

8. Implied warranty of habitability

A. Applies to a lease.

B. Provides that premises are safe for normal use.

C. Creates certain remedies.

D. All of the above.

9. Which of the following is a way to transfer real property?

A. Adverse possession.

B. Inheritance.

C. Gift.

D. All of the above.

10. Real property includes:

A. Land.

B. Buildings.

C. Fixtures.

D. All of the above.

**V. Answers to Objective Questions**

**Terms:**

1. *Personal property*. Technically, personal property is any property that cannot be classified as real property. Remember, however, that property that may have started as personal may be converted to real (such as a fixture) or vice versa (such as timber which has been severed from the land).

2. *Concurrent ownership.* Coownership can take place over both real and personal property. It can be between only two persons, such as a marital community property, or between thousands of persons, as seen in large publicly traded companies.

3. *Tangible property*. This is property having a physical form, capable of being touched. Sometimes the physical evidence of an intangible property is called a semitangible, such as a stock certificate. This is a tangible paper, but its real value is the share of ownership that it represents in the corporation.

4. *Donative intent*. Intent is one of the three key elements when examining possible gift transfers. The other two are delivery and acceptance on the part of the donee.

5. *Gift causa mortis*. A gift *causa mortis* is established when the donor makes a gift in anticipation of approaching death from some existing condition and then dies without having revoked the gift.

6. *Reversions, remainders*. In a future interest, the right to possess the property lies in the future rather than in the present. Ordinarily, there is some sort of precondition to the use. In a reversion, the property may revert to the original transferor or his heirs after the condition has been met. In a remainder, it will pass on after a prior holding period, such as a life estate, has been completed.

7. *Real, personal*. Some jurisdictions refer to this dichotomy as movables vs. immovables.

8. *Estate.* When used in the context of real property, this term helps define the degree, quantity, and extent of interest the person has in the property.

9. *Grantor.* The grantor is the person by whom a grant is made.

10. *Landlord, tenant.* Landlord is lessor and tenant is lessee who does not receive title.

**True/False:**

1. False. In today's society, there is very little property that is not already owned. Acquiring ownership in property by capture was much more common during the early years of our country's history.

2. False. Lack of consideration is what distinguishes a gift from a purchase. If consideration is required, it is not a gift.

3. False. Specific duration is agreed upon.

4. False. Just compensation clause requires compensation.

5. True. The rationale for this rule is that the true owner may return to the premises to find the mislaid property. If this happens, the owner of the premises must return the property.

6. True. All of these tiers--air, surface, and subsurface--may be divided and sold separately from each other.

7. True. Plant life, while growing on the land, is classified as part of the land interest. Once removed, it has been converted from real to personal property.

8. True. This classification is considered the highest and most complete form of ownership of real property.

9. False. Such a right is called a future interest.

10. False. It can only be used by married couples.

**Multiple Choice:**

1. D. Land and property permanently attached to it are real property. In addition, crops that have not yet been harvested and removed from the land are also real property. Therefore, both the land and corn are real property. A is incorrect because personal property is everything which is not real property. Since both the land and corn are real property, they are not personal property. B is incorrect because the land is real property. C is incorrect because the corn is real property here since it has not been removed from the land.

2. B. Nancy has received an *inter vivos* gift from Adrian. Adrian was alive and well at the time the gift was made. In addition, Adrian had donative intent to give the ring to Nancy, Adrian actually delivered the ring to Nancy, and Nancy accepted the ring. A is incorrect because a gift *causa mortis* is made by a dying donor and is conditional upon the donor's death. C is incorrect because an inheritance is received under a will when the donor has already died.

3. B. Since Bob mistakenly made improvements on Hank's house and such improvements cannot be easily removed, Hank is an owner by accession. A is incorrect because ownership by production is where a person uses raw materials to produce a finished product and therefore owns the product. C is incorrect because ownership by purchase is where a person buys property. D is incorrect because ownership by gift is where a person voluntarily transfers property to another. Here, Bob did not intend to give Hank a new deck.

4. C. If a finder knows the identity of the true owner, she must return the property. A is incorrect because since Stella knows Larry's identity, she must return the watch. B is incorrect because Stella must return the watch since she knows Larry's identity even if Larry does not demand it be returned. This is because Larry may not know Stella has found the watch. D is incorrect because Stella may take the watch, but must return it under the circumstances discussed above.

5. B. Sarah has superior rights to the ring as to everyone except Gary since it was lost at her house. A is incorrect because the owner of the premises has rights to the mislaid property, not the finder. C is incorrect because Sarah, not Mary, is the involuntary bailee of the ring.

6. D. Unless otherwise agreed, Barry can sell, give, devise, or otherwise transfer his interest in Blackacre without the consent of the other four landowners.

7. A. When a spouse dies, the surviving spouse automatically receives one-half of the community property. The other half passes to the heirs of the diseased spouse as directed by will or by a state intestate statute if there is no will.

8. D. All are part of warranty.

9. D. All are ways to transfer real property.

10. D. All are types of real property.

**VI. Answers to Essay Question**

First, the properties in question must be generally classified. The ranch is clearly classified as real property. This classification would include the surface, mineral, and air rights associated with land. It would also include any permanent improvements on the land, including buildings, fixtures, and the like.

The bank accounts would be classified as personal property. Because the accounts may be represented by passbooks or some other indicia of ownership such as a certificate of deposit, these assets would be classified as intangibles in that the real value of the property is found in what these documents represent, i.e., monies deposited with the financial institution. The jewelry is classified as tangible personal property. All the property involved is privately held.

Because all the properties were presumed to be acquired during a fifty-year marriage, it must be assumed that in the hands of Bloke and Crissy, the property was either purchased or somehow otherwise legally acquired by them. The more important immediate issue is: was any of the property in question transferred to Misty in the problem as presented? Of overriding concern is the attempt by Bloke to deprive Crissy of her legitimate marital claims to the properties. Here the laws of Colorado, Florida, and California will all come into play to one extent or another.

With regard to the ranch, under the laws of tenancy by the entirety, the property will pass automatically at death to the surviving spouse. This right of survivorship is by operation of law, and the property will not pass by way of probate, with or without a will. Transfer of the property must have been made with the consent of both tenants and must be evidenced by some sort of symbolic written document, i.e., a deed. None of those occurred here. Some states sever the tenancy by entirety in case of divorce. Here the divorce had not yet taken place, so Crissy takes the ranch as surviving tenant by the entirety.