

OWNERSHIP

(REAL PROPERTY CHARACTERISTICS, DEFINITIONS, OWNERSHIP, RESTRICTIONS, AND TRANSFER)

Property is everything subject to ownership (also known as title). Tangible (corporeal) means physical items such as furniture and buildings. Intangible (incorporeal) means rights such as copyright and appurtenances.

PERSONAL PROPERTY (personalty or chattel)

Movable; **not** attached directly or indirectly to land; conveyed from one party to another by an instrument called a **bill of sale**.

Two Exceptions: Trade Fixtures: attached and used in the ordinary course of business; by lease terms, tenant will remove them at expiration of lease – despite attachment, they remain personal property of tenant. **Emblements:** annual and semi-annual plantings (crops) which, although rooted in the land, are removable by seller by agreement with buyer or tenant farmer by agreement with landlord.

REAL PROPERTY (real estate or realty)

Land and anything either directly or indirectly permanently attached (affixed) to the land. Immovable, affixed, attached and annexed. Ownership of real estate includes the "**bundle of rights**" meaning owner may transfer, build, mortgage, control, possess, rent and devise any component of the realty. Realty is conveyed from one party to another by an instrument called a **deed**. Real estate includes:

Land: the surface material of the earth (a horizontal/surface interest).

Improvements: items permanently attached directly or indirectly, such as buildings.

Appurtenances: rights existing outside the four corners of the property such as a right of way across adjoining land of another (easements).

Air/Subterranean (subsurface) Rights: rights to space above/below the land (a vertical interest).

Mineral Rights: gravel, dirt, oil, gas, coal, minerals and water.

Riparian Rights: rights of owners of land adjoining waterways. Abutting a navigable river gives rights to edge or accretion line of the water and to the low water mark. Abutting non-navigable river gives rights to mid-point (thread).

Littoral Rights: rights of owners of land bordering lakes and oceans.

Four common tests as to whether property is personal or real: **Method of Attachment** - permanently affixed; **Adaptability** - custom-built to fit a particular space; **Agreement of Parties** - seller and buyer agree seller will remove an item of realty before transfer of title; **Intention** - owner intended to make it permanent.

All real estate is part of sale unless excluded in writing in the purchase and sale agreement. The real estate agent must discover from the seller what realty is **not** included and inform prospective buyers.

Changes in property: Annexation: personal to real. **Severance:** real to personal.

Full legal description of property location in the deed includes:

Address, Land description, Title reference: Book, Page, Date.

Methods of land description in America:

Metes and Bounds - monuments, natural or artificial may be point of beginning (p.o.b.). **Metes** is the number of feet from one point to another; **Bounds** pertains to the compass direction. The description returns to the p.o.b.

Government Rectangular Survey - **Base** lines run east and west and are crossed by **meridians** which cross them running north and south. **Townships** are 36 square miles (or ranges) which are divided into **sections** one square mile of 640 acres - the smallest land unit. Also known as Public Land Survey. Arrows point **north** on maps.

Lot and Block System - the recorded plat (plan) of subdivision divides the tract into **blocks** separated by streets. The blocks are divided into house **lots**.

Links and Rods – a link is equal to .66 feet and a rod equals 16.5 feet.

Area Calculations

1. A building measured 300' by 20'. Its footprint covered 25% of the lot. If 15% of the lot was sold, how much land would remain?

$$\text{Building is: } 300' \times 20' = 6,000 \text{ s/f [Answer]}$$

$$\text{Total Lot is: } \frac{6,000 \text{ s/f}}{[Answer] \ 24,000 \text{ s/f} \times .25}$$

$$\text{Remaining Lot is: } \frac{20,400 \text{ s/f}}{24,000 \text{ s/f} \times .85} \text{ [Answer]}$$

2. A 18' by 20' room was covered with wall to wall carpeting. The carpet cost \$6.75 per square yard. What was total cost of carpeting?

$$18 \times 20 = 360 \text{ s/f total carpet}$$

$$360 \div 9 \text{ (3 ft per yard in each direction [3 x 3])} = 40 \text{ square yards}$$

$$\$6.75 \times 40 = \$270.00 \text{ [Answer]}$$

TYPES OF ESTATES

The words "estates" and "interests" and "tenancies" are interchangeable. They refer to amount and duration of an individual's rights in a parcel of real estate. These estates are divided into two groups: freehold (ownership) and non-freehold (possession).

FREEHOLDS

Fee, Fee Simple or Fee Simple Absolute (interchangeable terms)

- Highest form of ownership; *indefeasible*
- Indefinite duration; unlimited
- Most common form of ownership
- Inheritable

Ownership is assumed to be fee unless deed states otherwise. Transferring title (ownership) is known as "granting" title. Grantor A - signs and delivers *deed* to Grantee B - Upon B's death, ownership passes to B's heirs.

Life Estate

Title passes from grantor to grantee by deed, but grantor states in deed who gets title after this grantee's death – not inheritable, a life-time stewardship of the property. Three variations:

Life estate in reversion – upon grantee's death, title passes back to grantor, who retains a future interest. If grantor is already dead, title passes to grantor's estate/heirs.

Life estate in remainder – the ordinary life estate (most common form). Upon grantee's death, title passes in fee to third party C – *remainderman* (or to his/her heirs).

Pur autre vie – Title passes from A to B. B owns the property for Z's lifetime. When Z dies, B loses title to C, who is originally named by A in the deed. Life tenant holds a **present** interest; remainderman holds a **future** interest; life tenant may not commit waste or fail to pay property taxes; life tenant may sell property but new owner holds title only as long as the original life tenant lives; life tenant may lease property but lease terminates on the death of life tenant; no lender will accept it as collateral.

TYPES OF CO-OWNERSHIP

One owner/one deed is ownership in **severalty** (a corporation or other legal entity counts as a "person")

Concurrent or Co-ownership: ownership by two or more persons (human or entity)

Tenancy In Common

- ◆ Equal or unequal interests (percentage interests)
- ◆ Equal right of possession
- ◆ Undivided interest in whole (interest in every part of property)
- ◆ Upon death of tenant in common, interest passes in probate to heirs
- ◆ Transferable when tenant in common is alive

Joint Tenancy

- ◆ Equal interests
- ◆ Equal right of possession
- ◆ Undivided interest in whole
- ◆ One deed with all parties named
- ◆ At death of a joint tenant, interest does NOT go to probate for distribution to heirs; it goes to **surviving** joint tenants equally
- ◆ Four Unities: Possession - equal right to possess
Interest - equal, undivided interest
Time - acquire title at same time
Title - acquire title in same deed
- ◆ Transferrable when joint tenant is alive, but converts transferred interest into tenancy in common

Tenancy By The Entirety

- ◆ A form of joint tenancy restricted to a married couple (they choose it, it is not required)
- ◆ Upon death of one spouse, the survivor becomes fee simple owner, without probate
- ◆ Neither party may alienate (sell or convey) without written permission of other
- ◆ Creditor shield against forced sale by unsecured creditors when only one spouse owes money
- ◆ Both parties must sign deed when selling
- ◆ Upon divorce, they own as tenants in common unless they choose to own as joint tenants

PUBLIC RESTRICTIONS - Government (federal, state, local) may take actions to promote public safety, health or welfare, but not against the public good.

THE FOUR (4) PUBLIC LIMITATIONS ON PRIVATE PROPERTY

Police Power - zoning ordinances and building (sanitation) codes.

Eminent Domain – right of government to force sale of private property through process of **condemnation** for the public good at a fair price.

Taxes - municipal ad valorem property taxes. The priority lien before lender.

Escheat - death of owner with no will and no heirs or abandoned property. Cash or cash proceeds put in state treasury.

Attachments

- ◆ A legal seizure by court action of a defendant's property as security for possible judgment; to prevent transfer and hiding of assets.
- ◆ Defendant remains owner and possessor of subject property.
- ◆ Final determination of rights of parties by a court.
- ◆ Writ of execution used to enforce a judgment or decree of court.
- ◆ A sheriff's sale takes place after a judgment is not paid.
- ◆ Recording a **homestead exemption** prevents this for primary residence

PRIVATE RESTRICTIONS - Run with the land; contractual limitations.

Private restrictions known as C, C & Rs (conditions, covenants and restrictions) are a form of private zoning. They must be deemed legal (for example, not a violation of fair housing laws or an abridgement of basic rights) and not intrude in public governance.

In a conflict between a private restriction and a public zoning ordinance, the stronger restriction will be enforced. For example, if public zoning permits two-family houses, but the deed only allows a single family house, the deed controls.

Conditions

- ◆ Created by deed of grantor.
- ◆ Restriction, if violated, may give grantor or heir the right to demand forfeiture of title (right of reentry).
- ◆ Grantee has **defeasible estate**. Fee Simple Defeasible (Fee Simple Subject to a Condition Subsequent/Fee Simple Determinable)
- ◆ Runs with the land - restriction passes to persons subsequently taking title.
- ◆ Examples: certain business activities not permitted.
- ◆ Not typically an arms-length transaction so no role for an agent to play

Covenants

- ◆ Developer of a subdivision records in county registry of deeds covenants binding upon property owners in the subdivision or owners sign a separate agreement.
- ◆ Covenants are either in the deed or through recording home owners' association (HOA) rules.
- ◆ Examples: yard care, prohibition of outbuildings; fence heights; types of exterior construction materials; no signs; painting/color.
- ◆ Enforced by developer or other home owners through court action (injunction prohibiting restricted activity or court order to force compliance); must be legal and consistently applied to all owners.

Mortgage (Deeds of Trust held by 3rd party in some states, title theory)

- ◆ Parties: mortgagor (borrower) and mortgagee (lender)
- ◆ Instruments: note and mortgage (Mass is a lien theory state)
- ◆ Mortgage instrument encumbers the title of new owner giving mortgagee **conditional title** (owner must do something wrong for lender to take title).
- ◆ When debt is paid in full, mortgage is null and void, no more conditional title.

Mechanic's Liens

- ◆ A form of protection for contractors, sub-contractors and material suppliers.
- ◆ A specific lien on a specific property for labor and/or materials contributing to the real property improvement.
- ◆ Does not refer to a **personal** property improvement, such as appliance repair.

TRANSFERS OF REAL ESTATE

Purchase

- ◆ Purchase and sale agreement encumbers the seller's bundle of rights by providing the buyer with **equitable title** (meaning buyer can ask a court to force seller to close). After delivery of deed, buyer has **legal title**.
- ◆ Installment Sales Contract, conditional sales contract, land contract, contract for deed. Seller (vendor) retains **legal title**; buyer (vendee) holds **equitable title**. Failure to maintain contractual payment schedule results in loss of equitable title and accumulated financial equity. After paid in full, a deed conveys **legal title**.

Death

- ◆ **WILL:** An instrument (testament) used to dispose property owned by a person upon death. **Testate.**
- ◆ **Executor** (MA uses the term Personal Representative) is named in will by **testator** to represent the estate.
- ◆ **Devise** - to give real property by will to devisee (heir); **Bequeath** - to give personalty by will to legatee (heir). Called a bequest or legacy.
- ◆ **Codicil** - an addition or amendment to a will; **Holographic** - a will in handwriting of testator.
- ◆ **Dower** - When disinherited or left token amount, surviving spouse can demand spousal elective/forced share (\$25,000 and 1/3 life estate if deceased had children or 1/2 life estate when no children).
- ◆ **Descent - Intestate** - no will or defective will. Administrator (Personal Representative) appointed by court. **Descent and Distribution** - law governing distribution to heirs (1/2 to spouse, 1/2 divided among children).

Dedication

- ◆ Devotion (gift) of land (fee simple or easement) (permanent or temporary) by owner with intent it be accepted for public use.

Accession

- ◆ Acquisition by union through natural actions (water or wind).

Involuntary Alienation – forced transfer

- ◆ **Adverse Possession:** Acquisition of title by possession for a statutory period (20 years) against owner's will, openly, continuously, without permission. Applies to **private** property evidenced by deed only (**not registered**).
- ◆ Tax sale due to delinquent municipal taxes; foreclosure due to defaulted loan; court ordered sale due to law suit; bankruptcy; suit for partition of property held in co-ownership; forfeiture of title in defeasible fee estate (condition)

THE DEED

- ◆ **Requirements:**
 1. Must be in writing.
 2. Legally competent grantor (if owner is not competent, someone with court approval must act for them).
 3. Grantee named.
 4. Valuable consideration (money) or good consideration (love).
 5. Complete and accurate description (more than a street address).
 6. Granting clause, such as words "grants to."
 7. Signature of grantor.
 8. Delivery and acceptance (final step).
- ◆ **Habendum Clause: ("to have and to hold")** defines the estate being granted, such as a life estate only. It is not necessary if grantor is conveying a fee simple.

BASIC DEEDS

- ◆ **General Warranty Deed** (Warranty Deed) - Grantor will pay for any loss if a claim is made against the title by third parties even if the claim originated prior to grantor's term of ownership.
- ◆ **Special Warranty Deed** - Grantor is liable for claims by third parties if the claim originated **only** during grantor's term of ownership.
- ◆ **Quitclaim Deed** - Grantor conveys only whatever interest grantor may have at time of conveyance. No warranties, expressed or implied, but neither grantor nor his/her heirs can return to claim ownership against grantee. Also used to correct mistakes in prior deeds. Most common deed in Mass. Mass also uses Release or Fiduciary Deed if conveyance is done by fiduciary (i.e., guardian, trustee, personal representative).
- ◆ **Bargain and Sale Deed** – (a/k/a Grant, Bargain and Sale Deed) Grantor implies a current or past interest in the property and conveys any such title which may exist without warranties, expressed or implied. Used for foreclosures, tax sales.
- ◆ **The validity of deed does NOT require the following: Witnesses** (not to the signing or delivery, **Signature of grantee**, **Date** (any date on the deed is the date of signing, not necessarily the date of delivery, so it means nothing important), **Seal** (a representation of the grantor but most people would not have one), **Acknowledgment** (i.e., notarization where notary public confirms the identity of grantor and that sign is a free act, although needed if recording) and **Recording** (although needed to establish mortgage lien, and gives public notice of transfer). Because most deeds are recorded, virtually all of the rest follows as a matter of routine. Sometimes a joint tenancy deed will even have the signature of the grantees to confirm they accept the rights of survivorship.

LAND COURT (TORRENS SYSTEM)

- ◆ A method of **registering** land. Upon petition, the Land Court conducts a thorough search of title called an action to quiet title to establish ownership. A Certificate of Title is issued as of a certain date. Future title searches only have to go back to this date. An owner can petition to deregister the property and return to the deed system. (Do not confuse registered land with recording of title at the registry of deeds.

TITLE INSURANCE

- ◆ An insurance policy for protection against occurrences that have already happened such as forged deeds, undisclosed heirs, parties lacking capacity, etc. that will not be discovered by title search. Title insurance company provides legal defense and financial protection to owner and lender. A one-time charge at closing. Occasionally used to cover defects found in title, or mistakes in municipal lien certificate. Will not cover issues known to insured but not to insurance company. Owner protection up to the full purchase price of property. Lender protection up to the outstanding loan balance.