10

Chapter 10

Interests in Real Property

In This Chapter

A person who has a property right or a claim against property is said to have an interest in the property. Ownership is just one of many ways that parties can have an interest in real estate. For most of these interests, various legal documents outline the relationships and responsibilities of the parties. An ownership interest is evidenced by a deed, a right to use the land may be shown by an easement, and a lender's financial claim against the title is protected by a mortgage. There are actually many other interests that one can have in real property. This chapter explores various types of real property interests, how they're created and terminated, documents that show their existence, and how they affect property.

At the end of this chapter, you will be able to:

- Distinguish among the different forms of deeds.
- Discuss the purpose of the public records system and the significance of a marketable title.
- Describe the purpose of title insurance.
- Identify alternate ways people can take ownership of real property.
- Contrast freehold and leasehold estates.
- Discuss various types of liens and easements and their impact on property.

Key Terms

Abstractor
Acknowledgment
Adverse Possession
Chain of Title
Clouds on the Title
Co-ownership
Condominium
Cooperative
Deed
Dower
Easement
Encumbrance
Estate
Fee Simple
Freehold Estate
Leasehold Estate
Lien
Life Estate
Marketable Title Record
Possessory Interest
Quitclaim Deed
Recording
Root of Title
Severalty
Title
Undivided Interest
Warranty Deeds

Deeds

A **deed** is *an instrument that conveys a grantor's interest, if any, in real property.* The deed is the document used by the owner of real property to transfer all or part of his interests in the property to another. The deed serves as evidence of title.

Title is *the actual lawful ownership of real property.* Title refers to holding the bundle of rights conveyed. Title is not a document, but rather a concept or theory of ownership. The deed is written proof of the rights conveyed to the owner, but having title to the land is what must be held to actually "own" it. **Equitable title** is an *interest in property created on the execution of a valid sales contract, whereby actual title will be transferred by deed at a future date*, such as at the closing. Having equitable title is *not* the same as having actual title, but the person who holds equitable title still enjoys certain rights and privileges.

Real Success

Much of the discussion about ownership options and deeds involves the practice of law and, thus, is not an area about which you can advise clients or customers, unless you are also licensed to practice law. Still, it's necessary for your professional development and overall knowledge to understand these concepts, since a real estate transaction culminates in delivery and acceptance of a properly drafted deed.

However, it's important to remember that this chapter is intended to be an overview. It should NOT be used as the basis for personal action and is NOT intended as a substitute for competent professional legal advice.

Requirements of a Valid Deed

For a deed to be valid in most states, it must be *in writing* and contain necessary information on its face. In most states, basic requirements for a valid deed are:

1. Competent **grantor**(s),
2. Identifiable **grantee** to whom title will pass, named in such a way so as to reasonably separate this person from all others,
3. Words of **conveyance** stating the grantor's intent to convey the land,
4. Legal **description** of the property being conveyed, adequate enough to distinguish it from all other parcels of land,
5. **Consideration** recited to prove that a sale of land took place, and
6. Acknowledgment **signature** of the grantor, usually before a notary public, stating that the sale of land is a free and voluntary act.

Once the deed is valid, **delivery and acceptance** of the deed, during the grantor's life, will transfer the title from the grantor to the grantee.

Warranty Deeds

A **warranty** deed, in the general sense, is a *deed that carries certain guarantees related to title and the grantor's right to convey title.* Warranties may be very broad or very limited. When a warranty is breached, the grantee has the right to sue the grantor for compensation.

WARRANTY DEED 2922 PAGE 561 FUTURE TAX BILLS TO THE GALHREA R GOLFCSE CO. COLUMBUS BLANK BOOK CO., COL., O. FORM NO. L12-9

Know all Men by these Presents

That Ralph B. S. Mowery, Widower 19096

of the City of Columbus, County of Franklin and State of Ohio Grantor, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to him paid by William A. Thompson and Helen Thompson

5. Consideration

of the City of Columbus, County of Franklin and State of Ohio Grantees, the receipt whereof is hereby acknowledged, does hereby **grant, bargain, sell and convey** to the said Grantees William A. Thompson and Helen Thompson their heirs and assigns forever, the following **Real Estate** situated in the County of Franklin in the State of Ohio, and in the City of Columbus and bounded and described as follows:

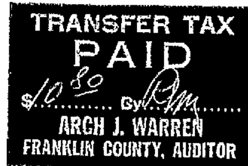
2. Grantee

3. Words of Conveyance

Being Lot Number Eighty-five (85) of CHARLES R. CORNELL'S SUBDIVISION in the said City of Columbus, Ohio, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book No. 5, page 48, Recorder's Office, Franklin County, Ohio.

4. Description

SAMPLE



Last Transfer: Deed Record Volume 734, Page 67

To have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said Grantees their heirs and assigns forever.

And the said Grantor for himself and his heirs, does hereby covenant with the said Grantees their heirs and assigns, that he is lawfully seized of the premises aforesaid; that the said premises are **Free and Clear from all Incumbrances whatsoever** Except taxes and assessments due and payable hereafter and all conditions, easements and restrictions of record.

Example of a General Warranty Deed. Note that in addition to being a written document, this example contains 6 of the 7 requirements for a valid deed; delivery and acceptance cannot be illustrated here.

VOL ___ PAGE ___

and that he *will forever* **Warrant and Defend** *the same, with the appurtenances, unto the said Grantee*s their *heirs and assigns against the lawful claims of all persons whomsoever*

In Witness Whereof *the said Grantor*

Ralph B. S. Mowery, Widower

*ha*s *hereunto set* his *hand, this* 27th *day of* August *in the year of our Lord one thousand nine hundred and* sixty-eight (1968)

Signed and acknowledged in presence of

C. Richard O'Neil — Ralph B. S. Mowery

Robert H. Moore

1. Grantors' Signatures

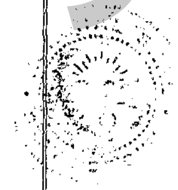
The State of OHIO FRANKLIN **County** ss.

Be it Remembered *That on this* 27th *day of* August *, A.D. 19* 68 *, before me, the subscriber, a* Notary Public *in and for said county, personally came the above named* Ralph B. S. Mowery

6. Acknowledgment

the Grantor in the foregoing Deed, and acknowledged the signing of the same to be his *voluntary act and deed, for the uses and purposes therein mentioned.*

In Testimony Whereof, *I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.*



C. RICHARD O'NEIL
ATTORNEY-AT-LAW
NOTARY PUBLIC, STATE OF OHIO

This instrument was prepared by C. RICHARD O'NEIL, ATTORNEY-AT-LAW, 2346 N. HIGH ST., COLUMBUS 2, OHIO

Warranty Deed 19096

MAIL TO

Transferred ______ 19 ___

COUNTY AUDITOR

STATE OF OHIO
COUNTY OF FRANKLIN ss
RECEIVED FOR RECORD ON THE AUG 28 1968
___ day of ___ 19 ___ at ___ o'clock ___ M
and RECORDED AUG 30 1968 19 ___ in
DEED BOOK ___ PAGE ___
James A. Schaefer, COUNTY RECORDER
RECORDERS FEE $ 2.50

COLUMBUS BLANK BOOK CO.

SAMPLE

General Warranty Deeds

General warranty deeds are *deeds in which a grantor warrants title against defects that may have arisen before or during the grantor's ownership*. (Also called standard warranty deeds or, sometimes, simply warranty deeds.) A general warranty deed gives the grantee the greatest possible protection. General warranty deeds are the most common for property transfers. Grantor guarantees typically include the following covenants:

- **Covenant of Seizin.** The grantor owns the estate and has the right to convey it.
- **Covenant Against Encumbrances.** The property is free of encumbrances not recited as exceptions in the deed.
- **Covenant of Quiet Enjoyment.** The grantee can possess the land without claims of title from others.
- **Covenant of Warranty Forever.** The grantor will defend the grantee's interest against all lawful claims of title.

Limited Warranty Deeds

Limited warranty deeds are *deeds with which the grantor warrants title only against defects arising from the time the grantor owned the land, but makes no further warranties.* These types of deeds, which may also be called **special warranty deeds**, are common when foreclosed property is transferred to a new owner. With these, the grantor only:

- Guarantees there are no encumbrances that he or she created.
- Promises to defend title against anyone claiming under grantor.

Deeds without Warranties

Deeds without warranties can also transfer title to real property but, with them, the grantor makes no warranties regarding title, nor does the grantor guarantee that he even has the right to convey title.

Quitclaim Deeds

Quitclaim deeds are deeds that convey any interest in a piece of real property that the grantor has at the time the deed is executed. A quitclaim deed makes no warranties whatsoever regarding the title, if any, held by the grantor. It conveys whatever right, title, or interest the grantor holds in the property without representation that there is any interest at all. Often, quitclaims are used to clear up title problems (e.g., a spouse may use a quitclaim deed to release dower interest not conveyed). It may also be used, in the case of a life estate, to deed the remainder interest to a life tenant, creating marketable title by merger.

Bargain and Sale Deeds

Bargain and sale deeds imply that the grantor owns the property and has a right to convey it, but there are no warranties that go with it.

Fiduciary Deeds

Fiduciary deeds, also called **judicial deeds**, are *executed by a trustee, executor, or other fiduciary, conveying property the fiduciary doesn't own but is authorized to manage.* A fiduciary is one in an appointed position of trust and acting on another's behalf. The fiduciary cannot give general warranty provisions, since the fiduciary is acting on behalf of someone else. The only warranties fiduciaries can give, by law, involve their role as fiduciaries, not the condition of title to land. Fiduciaries warrant that they've been duly appointed by a court of competent jurisdiction as fiduciaries, and that the act of selling the land falls within their duties as a fiduciary.

Evidence of Marketable Title

When conveying real property, the seller is generally expected to deliver a **marketable title**, *a title that is free and clear from undisclosed encumbrances or other defects that would expose a purchaser to litigation or impede a purchaser's ability to enjoy the property or to later sell the property easily.* A **title search** of the public records, also known as a title examination, is necessary to *determine ownership and the quality of the title prior to conveyance*. If a marketable title cannot be produced, a closing may have to be postponed.

Public Records

Recording is *the act of filing a document in the county where the property is located so that it will be placed in the public record.* The public records system is a way to provide **notice** so that the public is able to determine who holds an interest in any piece of property. Recording a document is a simple process and requires a fee to the county recorder's office. In most counties, the document is placed in the public record by being electronically copied to a database, but is sometimes photographed onto microfilm. Anyone can view these documents and request a copy. The documents are recorded in the order they are filed. This is very important, since deed priority or lien priority often depends on when the documents were filed. Each document is numbered so it can be located easily.

Recording documents allows property owners to defend their estate, right, or interest against third parties claiming a subsequent interest. Although there is no legal requirement to record a real estate document, such as a deed or title, an unrecorded document is likely to be unenforceable against a third party claiming a subsequent right or interest in the property. In most states, a recorded deed takes precedence over any prior unrecorded deed, and so it is in all parties' best interests to record deeds.

Notice

The concept of *constructive notice* provides this protection. A person is considered to have **constructive notice** of something when *it should be known*, even if it is not. Since the public records are available for anyone's inspection, *everyone is considered to have constructive notice of the contents of recorded documents*. The burden of discovery rests with the general public. Furthermore, the law expects a buyer or lender to search the public record for his or her own protection. This results in **actual notice**, which exists *when individuals have actual knowledge of a fact*. Actual notice includes what someone personally saw, heard, read, or observed.

In addition to actual notice and constructive notice, there's **inquiry notice**. A person has inquiry notice when there's *an indication of a claim or other situation that would alert a reasonable person to a possible problem, causing further inquiry about the title.* If you don't find a claim because you fail to look further, you may still be held to have inquiry notice of a claim. Also, when someone is in possession of land, a buyer is held to have inquiry notice of the possessor's claim, even if the buyer never visited the land, which is why land should not be purchased sight unseen.

Class Activity: Notice

Property owner Mary grants an easement across her land to Bill, so Bill records the easement document. Mary then sells her land to Joe. Joe claims he doesn't have to honor the easement since he couldn't tell it existed by looking at the land, and Mary never told him about it.

Is this a valid easement?

Abstract of Title

To perform a title search, a **title abstractor** will examine the public records for deeds, taxes, special assessments, liens, judgments, mortgages, and other encumbrances that have ever affected the property, even if the encumbrance has been removed or satisfied. The resulting **abstract of title** is *a chronological history of title to a property, listing all recorded documents that affect the title, as well as all public records searched, or not searched.*

An abstract of title does *not* ensure the validity of the title, and there is no guarantee associated with this type of title evidence, so the homeowner or lender does not have any recourse if title defects are discovered later.

Chain of Title

The **chain of title** is a *clear and unbroken chronological record of the ownership of a specific piece of property*. Tracing the chain of title simply means tracing the successive conveyances of title, starting with the current deed and going back a suitable number of years. Each owner is linked to the *previous* owner and the *subsequent* owner through deeds, forming a chain of title as disclosed in the public records.

A *gap or flaw in the chain of title* creates uncertainty, which is referred to as a **cloud on the title**. A cloud on the title could be something simple. For example, Sue Jones buys a house; she gets married and is now Sue Smith. When she sells the house, the grantor name on the deed is Sue Smith. This creates an ambiguity in the title.

A **suit to quiet title**, also called a quiet title action, may be required to close any missing links and remove the cloud on the title. This is a *lawsuit filed to determine and resolve problems of instruments conveying a particular piece of land.* The purpose of this suit is to clear a particular known claim, title defect, or perceived defect. To close the gap and clear the cloud on the title, the court may issue a quitclaim deed or a judicial deed.

A *deed that falls outside of the chain of title* is said to be a **wild deed**. Buyers and lenders are not generally held to have constructive notice of wild deeds.

Class Activity: Recording Deeds

Ann buys a house and records her deed. Later she sells the house to Bob, who does not record his deed. Bob sells the land to Curt, and Curt records his deed promptly. Now there's a break in the chain of title—the record shows only Ann's deed and Curt's deed, but the link between them (Bob's deed) is missing.

Whose deed, if anyone's, is wild?

Ann is aware that Bob never recorded his deed and decides to sell the same property a second time. This time she sells it to Dan. Dan doesn't know about Bob or Curt, so he has no reason to look up those names in the grantee/grantor index. He looks up Ann's name in the index, and as far as he can tell from the record, she still owns the property. So, Dan buys the house.

Does Dan have constructive notice of Curt's interest?

Marketable Title Act

About half of the states have some equivalent of a **marketable title act**, a law which is *intended to improve the marketability of title and simplify the title search process by extinguishing certain old claims against a title.* Generally speaking, a marketable title act is designed to assure a title searcher who has found a chain of title starting with a document at least 40 years old that he need search no further back in the record to establish **marketable record title**. The **root of title** is the deed or other title transaction in the chain of title which was the *most recent to be recorded as of a date 40 years before the time marketability is being determined*.

Class Activity: Marketable Title

For example, a title researcher in 2011 finds six recorded deeds on a particular parcel of land:

July 12, 1889:	Grantor, U.S. Land Office	>	Grantee, Robert Brown
March 5. 1934:	Grantor, Robert Brown	>	Grantee, Lyle Baxter
June 21, 1956:	Grantor, Lyle Baxter	>	Grantee, Peter Jones
April 4, 1989:	Grantor, Peter Jones	>	Grantee, Margaret Headley
June 14, 2005:	Grantor, Margaret Headley	>	Grantee, Denise Russell

Which is the root of title?

Does Denise have marketable record title?

√ ***Note:*** The marketable title act in some states may not use a 40-year benchmark and could require either less or even a farther look back. Regardless of the state law, many attorneys prefer a title search of 60 years or more.

The Torrens System

Some states use the **Torrens System** of title registration, which is *an alternative to the recording system*. To use the Torrens System, an owner registers land with the state Torrens registrar. A careful title search and survey of the land are performed, and a Torrens certificate is issued. The original certificate is kept in the registrar's office, and the property owner receives a duplicate. When the owner sells the property, the duplicate certificate must be surrendered to the registrar.

Once land has been "Torrenized," no deed, mortgage, lien, easement, or other encumbrance has any legal effect unless it's registered with a Torrens registrar. If a lien is recorded and not registered, the lien has no effect. A buyer or lender can check title status with the Torrens register, with no need to search public records. Despite its convenience, the Torrens System is rarely used because it is expensive.

Title Insurance

Title insurance *protects lenders (and sometimes property owners) against loss due to disputes over ownership of a property and defects in the title not found in the search of the public record.* Further, title insurance protects lenders and property owners from claimants not listed in the insurance policy, including defects in the public record such as forged documents, improper deeds, undisclosed heirs, errors in a property's legal description, and other mistakes. Title insurance does not generally cure defects, although a title company could potentially purchase the property and fix the problem. More commonly, it simply insures against losses (up to the coverage amount specified in the policy) due to title defects *other than those specifically excluded.* It may require the title company to go to court if necessary and defend its policyholder against any claim against the ownership of the land.

When considering title insurance, the abstract, chain of title, and any pertinent documents may be examined by the title company or perhaps by an attorney who issues a **letter of opinion** regarding the quality of the title. This process is to identify any encumbrances that must be removed, liens that must be paid, or other issues clarified, in order to deliver good title. Once all of the issues have been resolved, and a check of the public records ensures that outstanding encumbrances have been cancelled, the insurer can issue a policy.

Types of Title Insurance Policies

A title insurance policy, generally paid for with a one-time premium, may have different insureds.

Mortgagee's Policies

The mortgagee (lender) will have a policy to protect its interests in the property. Sometimes called a lender's loan policy, the mortgagee's policy is for the loan amount outstanding at the time a claim is paid. The owner's policies and the mortgagee's policies typically coincide, so the title insurance issuer is not paying twice on the same claim. The existence of a mortgagee's policy helps facilitate the sale of the mortgage to the secondary market.

Owner's Policies

Owner's fee title insurance policies are issued in the name of the property owner. It may be paid for by the buyer or seller as indicated in the sales contract. An owner's policy insures that the title to the property is free from liens, encumbrances, and defects except for those listed as exceptions. It also generally covers losses and damages if the title is unmarketable or if there is no right of access to the property (this does not necessarily mean simply vehicular access; it could include pedestrian access, water access, etc.). Coverage runs from the time of purchase for as long as the policyholder owns the property, usually with no additional premium. When the property is sold, the new buyer must purchase a new policy and be named beneficiary to collect on a claim from a title defect. An owner's policy does continue to protect the owner who has given a warranty deed, however, if a problem is later discovered which the owner did not cause and about which the purchaser is attempting to sue for damage.

Other Policy Types

- **Leasehold Policies.** A less common type of title insurance is the leasehold policy. Lessees typically obtain this type of insurance when a substantial amount of money is invested in a property, such as for a building owned on leased land.
- **Easement Policies.** Another less common type of title insurance is the easement policy, which *protects an easement owner's interests across another's property*.

American Land Title Association (ALTA)

The **American Land Title Association** (ALTA), founded in 1907, is the national trade association and voice of the abstract and title insurance industry. ALTA members *search, review, and insure land titles to protect home buyers and mortgage lenders who invest in real estate.* ALTA members are in business in most counties across the nation, and most title insurance companies—in addition to abstractors and title agents—hold ALTA

membership. Associate members of ALTA may include attorneys, builders, developers, lenders, real estate brokers, surveyors, consultants, educational institutions, computer services firms, and related national trade associations.

The typical ALTA form that is used throughout the country for one- to four-family residences insures against these losses:

1. The title to the property on which the mortgage is being made is either not in the mortgagor's name; is subject to defects, liens, or encumbrances; or is unmarketable,
2. There is no right of access to the land (vehicular, pedestrian, or otherwise), and
3. The lien created by the mortgage is invalid or unenforceable; is not prior to any other lien existing on the property on the date the policy is written; or is subject to mechanic's liens under certain circumstances.

ALTA policy forms also cover the cost of defending the insured against challenges.

MERS

ALTA, along with other participants in the mortgage industry, helped to fund the development of the **Mortgage Electronic Registrations System** (MERS), which registers and tracks mortgage loans electronically. MERS, a privately-held company, asserts that it streamlines the mortgage process by naming MERS as the original mortgagee, thereby eliminating the need to prepare and record loan assignments (*See: www.mersinc.org*). One intended benefit of MERS is to enable settlement agents to obtain timely, accurate, and reliable pay-off amounts and terms without the typical "telephone tag" or the costly and time-consuming FAXing back and forth.

Acquisition of Title

Generally speaking, ownership or title to property can be **acquired and conveyed** through any of these methods:

- **Deed**, which is *a document that transfers ownership of real property*, as when someone sells a house to someone else.
- **Devise**, which is *when real property is transferred after the death of the owner because of a will.*
- **Descent**, which is an operation of law *when real property is transferred to an heir after the death of the owner who leaves no will.*

Title to any single piece of property may be conveyed through any combination of these methods over time. Consider this example: A couple acquires title to property they purchased through the granting of a deed by the seller. When one spouse dies, the surviving spouse owns the property in severalty as an operation of law. When the surviving spouse dies, the heirs acquire title to the property either by devise or descent.

Forms of Ownership

Since deeds transfer ownership, the next logical step is to look at how ownership can be held. Ownership can be divided into two primary forms that describe how the property is held: Ownership in severalty and co-ownership.

Ownership in Severalty

Ownership in severalty, the simplest form of ownership, is a sole form of ownership, meaning that *only one person or legal entity holds the title to that property.* A "person" could involve a single "real" person, or a single legal "non-living" entity, such as a corporation. With ownership in severalty, the owner's interest has been *severed from the interests of all others.*

Co-Ownership

Co-ownership, also known as concurrent ownership, is *any form of ownership where two or more persons share title to real property, with each person having an undivided interest in the property*. **Undivided interest** gives *each co-owner the right to possession of the whole property, not just part of it.* Under the law, any number of persons may join in the co-ownership of real property.

There are three forms of co-ownership: Tenancy in common, joint tenancy, and tenancy by the entirety. A key distinguishing factor is the method in which the ownership interest is passed. The **right of survivorship** means that *the property passes automatically to other co-owners when one co-owner dies.*

Additionally, the presence of several conditions, known as **unities**, will define the form of co-ownership:

- **Unity of Possession.** *All co-owners hold the same undivided right to possess the whole property* (as opposed to a designated portion of that property).
- **Unity of Interest.** *All co-owners hold equal ownership interests.*
- **Unity of Time.** *All co-owners acquired their interests at the same time.*
- **Unity of Title.** *All co-owners acquired their interests by the same deed or will.*

Most states have specific laws that define the forms of co-ownership and how property may be held or conveyed. Make sure that you understand the laws in the states in which you conduct business.

Tenancy in Common

Tenancy in common is a form of co-ownership with *two or more persons having an undivided interest in the entire land, but no right of survivorship.* Tenancy in common is the most common form of co-ownership and requires **only the unity of possession.** Tenancy in common is the only co-ownership that can be owned in unequal portions. When a tenant in common dies, his interest in the property passes to his heirs.

For example, Mike, Dan, and Sam own a farm. Mike has a 50% interest in the property; Dan and Sam each have a 25% interest in the property. Sam can sell his 25% interest to Mary if he wants. When Mike dies, his 50% interest goes to his heirs, not to Dan and Mary.

If language in a deed does not specify a different type of co-ownership, or if the co-owners are not married to each other, tenancy in common is assumed. If the deed is silent as to the interests of the parties, the shares will be equal.

Joint Tenancy

Joint tenancy exists when *each co-owner has an equal undivided interest in the land with right of survivorship.* Joint tenancy requires **all four unities**: Possession, interest, time, and title. A main feature of joint tenancy is that it allows co-owners to take ownership shares of a deceased co-owner automatically. Since survivors take ownership equally and simultaneously, a person can't will or inherit a survivorship estate. For example, Ann, Bob, and Curt take title to property as joint tenants. Each owns a one-third interest in the property. When Ann dies, her interest passes to Bob and Curt automatically, who each now own a half interest.

Generally speaking, when a joint tenant *conveys* an interest, the joint tenancy—and the right of survivorship—ends and the new form of ownership is tenancy in common. For example, Dan, Ed, and Fran co-own a property as joint tenants. Fran sells her share to Gary. Dan, Ed, and Gary are now tenants in common. If Dan dies, his interest goes now goes to his heirs.

Tenancy by the Entirety

Tenancy by the entirety is a *form of co-ownership that involves only owners who are husband and wife with each having an equal and undivided share of the property.* This form of ownership includes the right of survivorship, with property automatically going to the surviving spouse. Tenancy by the entirety requires all **four unities**—possession, interest, time, and title—as well as the **unity of person**, since spouses are considered a single, indivisible legal person. In most states, husband and wife ownership is assumed to be tenancy by the entirety unless specified otherwise in the deed.

This type of ownership can be terminated if:

- Either spouse dies, at which point the surviving spouse becomes owner in severalty.
- Both parties agree to end this type of ownership and both sign a new deed.
- The couple divorces. In most states, after a divorce, the couple owns the property as tenants in common.

Adverse Possession

Adverse possession is a process by which someone may be able to *acquire title to someone else's real property without compensation by possession of it*. Adverse possession laws are designed to encourage productive use of land, with the rationale that it's better to give title to someone who actively uses the land, instead of someone who ignores it.

Acquiring title through the courts to land by adverse possession requires open and notorious, hostile and adverse, and exclusive and continuous use of another's land for a number of years (as specified by state law). These requirements are similar to those for easement by prescription, but the adverse possessor's use must be exclusive (not so for an easement). And an adverse possessor may actually be able to acquire title to the property, not just an easement. Most property can be adversely possessed, except land owned by federal or state governments, municipal streets, and Torrens system registered land.

Possessory Interests in Property

A person with a *property right or a claim against property* is said to have an **interest** in the property. An interest may be an ownership right, a right to use the land, or a financial claim against the title. An **estate** is a *possessory interest in real property*, which entitles the holder to possess the property now (a present interest) or sometime later (a future interest). In addition to being classified as to the time of enjoyment, present or future, interests are also classified as a freehold or leasehold estate.

Freehold Estates

A **freehold estate** is a *possessory interest of uncertain duration*; it may end, but no one knows when. Some events that will end a freehold estate include the transfer of the property to someone else, the death of the owner, foreclosure, and confiscation for back taxes. There are different types of freehold estates: Fee simple, qualified fee, fee on condition, and life estates.

Fee Simple Estate

A **fee simple estate** is the *fullest freehold estate interest that exists in real property*. It is also called fee title or fee simple absolute. A person referred to as the "owner" of land usually holds a fee simple absolute interest. The owner of a fee simple absolute has all the bundle of legal rights. Since the fee simple estate is absolute, this implies there are *no conditions on the title*. It is perpetual, inheritable, and transferable. When a fee simple absolute owner deeds an interest in property to someone else, it is presumed the entire estate is transferred, unless the deed language specifies otherwise.

Qualified Fee Estate

A **qualified fee estate** means that *a grantor puts a condition or requirement in the deed that terminates the estate automatically if the condition or requirement is not met and reverts the title back to the grantor or the grantor's heirs.* This may also be called **fee simple defeasible**. For example, deed language may transfer Ann's land to Bob, as long as the land is used as a park. If Bob uses the land for another purpose, the title to the property reverts back to Ann (or Ann's heirs).

Fee on Condition

A **fee on condition estate** means that *a grantor puts a condition or requirement in the deed that gives the grantor the "right of reentry" if the condition or requirement is not met.* In this type of estate, the grantor (or heirs) has the right to terminate the estate, but this does not happen automatically. For example, deed language may transfer Ann's land to Bob, but if Bob builds a bar, Ann may go to court to regain possession.

Life Estates

A **life estate** is a *freehold estate that lasts only as long as a specified person, the "measuring life," lives*. For example, if Ann owns property in fee simple, she could deed it to Bob for life. Bob then has the right to occupy and use the property for the rest of his life. But when Bob dies, the life estate ends. Life estates are created for a variety of reasons, such as to simplify property division in a will or so property won't have to be probated after death.

The *holder of a life estate* is called a **life tenant**. In a **conventional** life estate, when Ann grants property to Bob for life, the life estate's duration is measured by the lifetime of the life tenant, Bob. A life estate may also be *based on another person's life.* For example, a grantor could deed property to Bob for the life of Curt. Bob's life estate would end when Curt died. This is called a life estate **pur autre vie** (for another's life). Curt is the measuring life.

A life tenant owns an interest in land that can be sold, mortgaged, or leased. But a person can only transfer the interest that he owns. Someone who buys a life tenant's interest only has a life estate; the buyer's interest ends when the measuring life dies. Also, a mortgage signed by a life tenant becomes an invalid lien when the life estate ends, and a lease signed by a life tenant ends when the life estate ends.

A life tenant may not commit an **act of waste** to the property, which means *using the property in a way that damages it or reduces its market value*. Thus, a life tenant has restricted rights of use that are transferred with the life estate.

Dower Rights or Community Property

In some states, **dower** is *a special real property interest the law gives to a spouse as a statutory life estate when a married person owns real property***.** Dower rights—usually referencing the wife's rights—attach with marriage for property brought into the marriage or acquired during the marriage. The common law equivalent of dower rights for husbands is called **curtsy** rights, or curtesy rights. These define the rights that a husband has to the property that his deceased wife owned. As long as the married person owns the property, or remains alive, the spouse's dower or curtsy rights are inchoate (pronounced in-KOE-it), meaning contingent, inactive, or incomplete. These inchoate rights aren't possessory, only potentially possessory. Dower and curtsy rights are terminated by divorce, and can't be willed to heirs since this is a life estate interest. Dower and curtsy rights become choate (active or complete) when the owner spouse sells the property without benefit of release, and/or the owner spouse dies before the other spouse. Dower and curtsy must be released in almost all real estate transactions involving married sellers. There's a serious issue of marketable title if there's no release. Even if there's a pre-nuptial agreement, title companies still often require a spouse to release dower or curtsy as there's always a chance the agreement could be declared void in the future. Note that many states have officially abolished curtsy and dower.

In **community property** states, *two people in a marriage are equal but separate partners***.** Any property acquired during the marriage is owned equally. Any property or assets acquired *before* the marriage are separate and belong only to that individual. There are some exceptions, such as for property inherited or gifted during the marriage which may belong only to the individual who inherited it. However, keep in mind that there are no two community property states with exactly the same laws on how community property is determined.

Leasehold Estates

A **leasehold estate** is an interest in real estate that *gives the holder a temporary right to possession, without conveying title.* The *holder of a leasehold estate* is known as a **tenant** or **lessee**. The *property owner* is known as the **landlord** or **lessor**. Leasehold estates are created by lease agreements that provide contractual rights and obligations to all parties involved. A leasehold interest is reversionary, meaning that once the lease ends, *possession of the property reverts to the landlord.* There are several types of leasehold estates.

Estate for Years

An **estate for years** is a leasehold estate *set to last for a specific period, after which it automatically terminates.* It is also known as a **term tenancy**. Duration of an estate for years can be any amount of time, even just for one day. An estate for years terminates automatically at the end of the specified rental period and does not require either party to give notice. Unless someone breaches the terms of the lease, neither the landlord nor the tenant can terminate a term tenancy sooner than what is stated in the contract, unless both parties agree. *Ending a lease by mutual consent* is called **surrender**. An estate for years is *not* terminated by the death of either party or by the sale of the property.

Periodic Estate

A **periodic estate** (or **periodic tenancy**) is a *leasehold estate that continues for successive equal periods of length until terminated by proper notice from either the lessor or the lessee.* The term of a periodic estate may be any length of time agreed to—such as week-to-week, month-to-month, or year-to-year—and the tenancy automatically renews itself at the end of each period until one party terminates it. A periodic estate is *not* terminated by the death of either party or by the sale of the property.

Estate at Will

An **estate at will** (or **tenancy at will**) is a *leasehold estate that does not have a lease to specify the termination date and rental period.* Sometimes no rent is paid (e.g., resident apartment superintendent), or the rent owed has no reference to time periods (e.g., "35% of gross profits"). A common example of an estate at will is someone who rents to a family member who occasionally pays rent, but there is no lease agreement. Either party can end an estate at will at any time with proper notice. Unlike the estate for years or the periodic estate, an estate at will *automatically terminates* when either the landlord or tenant dies. Tenancy at will is not recognized in some states.

Tenancy at Sufferance

Tenancy at sufferance describes *possession of property by a tenant who came into possession of the property under a valid lease, but stays on after the lease expires without the landlord's permission.* This so-called **holdover tenant** is not much different from a trespasser, except that he originally had a right to be there. A tenancy at sufferance is ***not a leasehold estate***; however, most leases will contain provisions that address such a situation. For example, the landlord may allow the tenant to remain but at an increased rent. Remember that landlords cannot use force to regain possession of the property; in most states, only a sheriff can physically remove a holdover tenant.

Eviction

If a tenant breaches the lease contract, an owner can choose to terminate the contract by evicting the tenant. **Eviction** is *the forced removal, by legal means, of a tenant and the tenant's belongings from a leased premise*. The key word in this definition is *legal*. This process is known as **actual eviction.** Although the process may be different from state to state, the steps to legally evict a tenant usually involve:

1. A **notice to vacate**, in which the landlord demands the tenant to vacate.
2. A **forcible entry and detainer lawsuit**, which is filed by a landlord to evict the tenant.
3. A **writ of execution**, which is a court order directing a public officer (often the sheriff or marshal) to seize and/or sell property to regain possession for the owner and/or satisfy a debt.

Note that this is essentially the same process that would be followed by the new owner of property acquired through foreclosure if the previous owner refuses to vacate the property.

Ownership by Organizations

Ownership in severalty and co-ownership can be further categorized into ownership by business entities, which include nonprofit groups and other organizations. Depending on its form, a business association may be a legal entity separate from its members or owners.

Sole Proprietorship

A **sole proprietorship** is a *business owned by a single individual (or a husband and wife for tax purposes) in severalty.* With this, the owner is personally responsible for any business debts, and personal assets could be attached in the event of default (except for property that is owned with a spouse as tenants by the entirety). A sole proprietorship can operate under the sole proprietor's name or under an assumed or fictitious name, if registered with the state; for example, Joe Smith doing business as (dba) Smith Realty or Patsy Davis also known as (aka) Patsy Cakes.

Partnerships

A **partnership** is *an association of two or more individuals as co-owners of a business, as specified in the partnership agreement.* For title to real property to be held in the partnership's name, a business name certificate must be recorded in the county where the partnership's principal office is located, and also in the county where the real property is located. The certificate lists the names and addresses of all partners. The partnership agreement will indicate the authority that individual partners may have to convey or mortgage property held by the partnership. The type of partnership determines how much control and liability each individual will bear.

General Partnership

A **general partnership** is *an association of two or more individuals as co-owners of a business where all partners share in the financial liability, both individually and as a member of the partnership.* It doesn't have to be formally organized like a corporation. A group of people running a business may be a partnership without even realizing it. For most purposes, the law doesn't recognize a general partnership as an entity independent from the individual partners, thus for example, all partners share in the financial liability for actions of the other partners.

Limited Partnership

A **limited partnership** is an *association of two or more persons as co-owners of a business with one or more general partners and one or more limited partners.* The rights and duties of general partners in a limited partnership are the same as in a general partnership, but limited partners have no say in partnership matters. Further, the partners' liability is limited to their original investment.

Corporations

A **corporation** is a *legal entity that is created and operated according to the laws of each state.* A corporation could be public (cities, counties, school districts, etc.), private for profit, or private nonprofit. It is regarded by the law as a legal person *separate from the individual stockholders*, and therefore shareholders are not personally liable for the corporation's debts. Within a corporation, property is owned *in severalty* as the legal person. The corporation must pass a resolution authorizing the sale or purchase of real estate. The most common types of corporations are:

- A **C Corporation** must pay corporate income tax. Then when profits are distributed to the shareholders, the shareholders pay income tax on the dividends as well, which leads to a situation of double-taxation.
- A **subchapter S Corporation** functions as a corporation, but like a partnership, it does not pay any corporate income taxes. Instead, the corporation's income or losses are divided among and passed through to its shareholders. The shareholders must then report the income or loss on their own individual income tax returns.

Condominiums, Cooperatives, and Townhomes

Condominiums and other housing alternatives physically and legally combine individual ownership with co-ownership.

Condominiums

Condominiums are *properties developed for co-ownership where each co-owner has a separate fee simple interest in the interior airspace of an individual unit and an undivided interest in the common areas of the property,* which usually includes the land on which the condominium sits; condominium owners generally have no exclusive ownership interest in the actual land beneath their individual units. Common areas are areas of the development that all residents use and own as tenants in common, such as the parking lot, hallways, and recreational facilities. Condominium owners must follow the declarations and by laws set forth by the condominium founder, and maintained and enforced by the owners association. A condominium may be for residential or commercial use.

Each owner may give a lender a mortgage on his or her unit and undivided interest in common areas. Each owner's creditors can claim a lien against that unit and undivided interest. If a lien holder forecloses, only that unit and its undivided interest are affected without jeopardizing the entire condominium. Property taxes are also levied against each unit separately, and thus don't affect the whole property. Owners association levies to pay for common area expenses are divided among unit owners, and can also result in a lien on an individual unit if unpaid. Hazard insurance on the building and the common areas is also paid with the owners association fees, although failure by the owners association to pay the insurance could have negative consequences for the entire development. Individual unit owners must insure the contents of their units, similar to renter's insurance.

When a condominium unit is sold, an undivided interest in common areas and membership in the owners association are automatically transferred, too.

Cooperatives

Cooperatives (or co-ops) *are buildings owned by corporations, with the residents as shareholders who each receive a proprietary lease on the interior of an individual unit and the right to use common areas*. The title to the cooperative building is held by a corporation formed for that purpose. A person who wants to live in the building buys shares in the corporation, instead of renting or buying a unit, and is given a proprietary lease for a unit in the building. **Proprietary leases** have *longer terms than ordinary leases and give the shareholder more rights than an ordinary tenant*.

A cooperative shareholder pays a prorated share of the building's expenses, including property taxes and hazard insurance for the building. If a resident doesn't pay his or her share of expenses, the entire cooperative may be threatened with foreclosure. So, an agreement may provide that a shareholder can't transfer an interest without the other shareholders' consent. To transfer a cooperative interest, a shareholder conveys his or her stock and assigns the proprietary lease to the new shareholder.

Planned Unit Developments (PUDs)

The term **planned unit development (PUD)** is often used to define a *special type of subdivision that may combine nonresidential uses—for example, commercial or recreational—with residential uses, which could be single-family homes or some form of co-owned property*. PUDs may depart from ordinary zoning and subdivision regulations. For example, the homes in a PUD may be clustered together on smaller lots than generally allowed in order to maximize common green space. Unlike condominium owners, property owners in a PUD generally own the land beneath their individual units. PUDs generally have an association funded by fees from the owners that is responsible for upkeep and maintenance, as well as declarations and bylaws that owners must follow.

Townhomes

Townhomes are *properties developed for co-ownership where each co-owner has a separate fee simple interest in an individual unit, including its roof and basement, as well as the land directly beneath the unit, and an undivided interest in the common areas of the property.* Many townhomes share a common wall. The fee simple ownership may extend to a small patio or lawn outside of the unit.

Townhomes, like condominiums and PUDs, generally have owners associations that propagate declarations and by laws and that assess fees for the maintenance of common areas and other association benefits.

Non-Possessory Interests: Easements

Non-possessory interests are also called **encumbrances**, since they *encumber (or burden) a real property owner's title*. Someone who holds a non-possessory interest has a claim or right concerning the real property, but does not have the right to possess the property. Two types of non-possessory interests detailed here are easements and liens. (Restrictive covenants, which were discussed in a previous chapter, also create non-possessory interests.)

An **easement** is a *right to use another person's real property for a particular purpose*. An easement creates limited rights for the easement holder related to the land surface, its airspace, or subsurface. An *easement that grants access to property* is commonly referred to as a **right of way** (ROW).

Types of Easements

Easements can be **public** (e.g., for power lines) or **private** (e.g., for access to a landlocked parcel) and can be put into a deed before a transfer of property occurs or created separately as an agreement between the parties. Easements are classified according to how the land is burdened and who benefits.

Easements Appurtenant

An **easement appurtenant** involves *two separately deeded parcels that are owned by different parties. This type of easement burdens one piece of land for the benefit of the other piece of land*. Appurtenances are rights that go with real property (e.g., air rights), so an easement appurtenant is a *right that goes with land ownership.* A recorded easement (either in a deed or as a separate document) gives notice to third parties, and so usually causes the easement to transfer with the property, which means the easement *runs with the land*. When title is transferred, the new owner owns the easement or takes title subject to the burden of the easement.

Easements in Gross

An **easement in gross** involves a *specific parcel of land and benefits a person or company* (called the **dominant tenant**), *not a piece of land.* The *burdened land* is called a **servient tenement**. Easements in gross are most commonly held by the government and public utilities for commercial purposes; for example, a utility easement that a power company has to place power lines over someone's property or that a municipality has to place sewer lines under the surface. Easements in gross that belong to companies can be assigned to others. For example, if Phone Company A has an easement in gross to place underground lines, they could assign or sell the easement rights to Cable Company B. Easements in gross can also be granted for noncommercial purposes, for example, an easement that allows access to a public beach.

License or Easement

A **license** is *a temporary, revocable, non-assignable permission to enter another's land for a particular purpose***.** A license is *similar* to an easement because it grants permission to use another's property and may be granted for a specific purpose and duration. Unlike an easement, a license does ***not*** create an interest in property and is not considered an encumbrance. Some other differences are:

- While an easement could be for a specified duration, easements are often for an indefinite period of time, while licenses are often temporary.
- Easements are created by written agreement or action of law, but licenses may be created by oral contract.
- Easements run with the land, but licenses do not have to.
- Easements cannot be revoked, whereas licenses may be revoked at any time, except where the licensee makes a substantial financial commitment in reliance on the license.
- A license cannot be assigned and becomes invalid if the licensee dies.

Creation of Easements

Easements can be created many ways, voluntarily or involuntarily. Easements created by agreement of the parties involved must be in writing to be valid. A document granting an easement should be drawn up and signed just like a deed, and should be recorded to ensure that anyone who buys the land has notice of the easement. If the buyer doesn't have notice, the easement probably won't run with the land. Easements can be created a number of ways:

- **Easement by Express Grant.** A *landowner sells land and includes deed language that creates an easement across the land*. This can also be part of the deed transfer or be in a separate document conveying only the easement.
- **Easement by Implication.** *Created by law when land is divided, and there is a long-standing apparent use reasonably necessary for the enjoyment of the land*. This is also called an implied easement. Generally, easement by implication arises when a tract of land was originally held by one owner and divided into two or more parcels. The original owner would keep an ingress or egress, which is a means to enter or exit property.
- **Easement by Necessity.** A *special easement that arises if land would be completely useless without the easement, even if there is no long-standing apparent use*. An example is a **landlocked** property with no access. For a court to assign an easement by necessity, the claimant must prove an easement is strictly necessary (not just reasonably necessary) to use the land; if there is another way to access the land, easement by necessity will not be assigned. This type of easement is not automatic and usually not granted to owners of vacant land.
- **Easement by Prescription.** *Created by open and notorious, hostile and adverse use of another person's land for a specific time, as indicated by state law.* **Open and notorious** use of the land means the use must be obvious and unconcealed, so if the landowner is kept reasonably informed about the property, she would be aware of the use. **Hostile and adverse** is use without the owner's permission and against his interests. If the owner gives permission, there is no easement by prescription. **Continuous use** for specified period of years is required by state law.
- **Easement by Condemnation.** *Occurs through the government's power of eminent domain*. Just as the power of eminent domain allows the government to take title to private property for a public use, the same power allows government entities to impose easements upon private property. These easements are usually for the purpose of future rights of way, visibility, safety, and expansion of existing roadways or utilities and require payment of just compensation to the servient tenant.
- **Party Wall Easement.** *When a wall is shared between two connected properties*. The ownership of the wall is split between the two, and each has an appurtenant easement in the other half of the wall. An agreement should be expressed in writing outlining the ownership of the wall between the two parties. Each owner shares in the building and maintenance costs of the wall.

Terminating Easements

Easements can be terminated in several ways:

- **Release.** A document *the easement holder signs releasing the easement holder's interest in the property*. Easement releases should always be recorded.
- **Merger.** *Uniting two or more separate properties by transferring ownership of all properties to one person*. If one person owns the property, both the dominant tenement and the servient tenement, the easement is terminated by merger. If the land is later divided again, the easement no longer exists and must be recreated if desired.
- **Abandonment.** The failure *to occupy and use property, which may result in a loss of rights*. An easement ceases to exist if the owner abandons it. Non-use alone, however, is not enough for abandonment. There must be an act or statement that clearly expresses the owner's intention to abandon the easement.
- **Prescription.** Loss of easement by prescription occurs after a certain number of years as specified by each state. If an easement owner does not use the property within that timeframe, it can be lost by prescription.
- **Failure or Expiration of Purpose.** An easement terminates when *the purpose for which it was created no longer exists.*

Encroachment or Encumbrance

An **encroachment** is *a physical object intruding onto a neighbor's property.* A driveway that extends two feet over a property line is an example of an encroachment. Another common example is a tree limb that extends over a property line. Although most encroachments are unintentional, they are a form of trespassing in the eyes of the law. If a neighbor sues, the court can order removal of the encroachment or payment of damages to the neighbor by the encroacher, but the owner of the encroached upon property does ***not*** have the right to destroy the encroachment.

An encroachment is ***not*** an encumbrance because it is not a right or interest that is held. However, the encroacher could get an easement from the neighbor to allow the encroachment.

Financial Encumbrances: Liens

A **lien** is not only *a financial interest in property; it is also a financial encumbrance.* Liens are typically security for a debt that gives the creditor, or lien holder, the right to foreclose on the debtor's property if the debt is not paid. In **foreclosure**, the *property is sold and the lien holder collects the amount of the debt from the proceeds of the foreclosure sale*.

Liens against property don't prevent its transfer, but the liens still exist. The buyer takes the property subject to the liens. This means that the buyer takes the property along with the liens, but without being personally liable. The buyer must keep paying the liens to keep the property, but only loses equity in the event of default. The creditor can't go after the new owner personally for these debts because the new owner did not assume the debts. In most real estate transactions, though, the seller must clear the title of liens at closing by paying off the debts. A lien can be:

- **General**, which means it attaches *to all property, personal and real, owned in the county by the debtor*, or
- **Specific**, which means it *attaches only to specific property*.

Liens may also be either voluntary or involuntary.

Voluntary Liens: Mortgages

Voluntary liens are *liens placed against property with consent of the owner.* The most common form is a mortgage or, similarly, a home equity line of credit. **Mortgages** are *written instruments that use specific real property to secure payment of a debt.* Without a debt, there can be no mortgage. A **note**, or promissory note, is *a written, legally binding promise to repay a debt.* The note creates the debt and the mortgage secures payment. A mortgage is a powerful incentive for an owner to pay, since it represents a potential transfer of title to the mortgagee in case of default. **Default** is *the failure to fulfill an obligation, duty, or promise, as when a borrower fails to make payments.* The mortgage instrument itself defines what constitutes default. The most common reason for default is not making payments by the due date, but other factors (e.g., failing to pay property taxes) may also result in default.

The lender is a **secured creditor**, *a creditor with a lien on specific property*, in this case holding the mortgage as security. If default occurs, the lender can pursue judicial foreclosure. **Judicial foreclosure** under a mortgage *may result in a court-ordered sheriff's sale of the property to repay the debt.* If the foreclosure sale doesn't yield enough to pay the debt, a deficiency judgment could result. A **deficiency judgment** is *granted by the courts, and allows the creditor to go after other property owned by the debtor.* It is enforceable and collectable in the same manner as any other judgment at law.

Involuntary Liens

Involuntary liens, also referred to as statutory liens, *arise by operation of law without consent of the property owner.* These liens are created to protect creditors of the landowner. These liens can be general or specific. A general lien attaches to all property owned in the county by the debtor. A specific lien attaches to specific property.

Mechanic's and Materialman's Liens

Mechanic's liens and **materialman's liens** are liens *claimed by someone who performed work on real property and was not paid*. The property serves as security for payment if the property owner does not pay contractors, subcontractors, laborers, or materialmen for improvements to their property. If a property owner does not pay the bills, the holder of this lien can go to court and force the sale of the property to collect the debt from the proceeds according to the particular laws of the state.

Tax Liens

Tax liens are *liens on property to secure the payment of taxes*. **Property taxes** create an *involuntary, specific* lien against real estate. A property tax lien could result from ad valorem taxes assessed by local entities such as municipalities and school districts to raise revenue, or special assessment taxes to pay for specific improvements that only affect specific property owners. Unpaid **federal income taxes** also create liens on real property. Income tax liens are *involuntary, general* liens, and so unlike other tax liens, these can be attached to personal property as well.

Judgment Liens

Judgment liens are liens *against a person's property through court action*. At the end of a lawsuit, if it is determined that one party owes the other money, a judgment is entered. The winner of the lawsuit (judgment creditor) may claim a lien against the other party's (judgment debtor) real property.

To claim a lien, the judgment creditor obtains a certificate of judgment from the court issuing the judgment and files it in the county where the judgment debtor owns real property. A judgment lien attaches to all of a debtor's real property in each county where the certificate is recorded. It is valid for ten years from the judgment date and renewable for ten more years. Judgment liens are *involuntary, general* liens.

Attachment Liens

Attachment liens are liens intended *to prevent transfer of property pending the outcome of litigation.* When a plaintiff files a lawsuit, there is a danger that before a judgment is entered, the defendant may sell all property, making a judgment worthless. To prevent this, at the outset of a lawsuit, a plaintiff can ask the court to issue

an order of attachment. The order directs the sheriff to seize personal property or to create an *involuntary lien against real and/or personal property*. A notice of a pending suit, called a **lis pendens**, may also be recorded. Although this is not a lien, it can *serve notice to potential buyers that there is a lawsuit pending*, and the outcome may affect the title to the subject property.

Real Success

Many states have a form of **commercial broker lien law**. With such a law, a broker in a commercial transaction has an automatic lien against a property that is the subject of a contract, for the contracted commission amount. This is enforceable, however, only when the contract is fulfilled and the broker files a lien affidavit in the recorder's office in the county where the property is located. Many states also have laws that dictate the process by which residential real estate brokers may go about enforcing a commission payment. Make sure you know the laws in the states in which you practice.

Lien Priority

It is not unusual for real estate to have several liens against it at the same time (e.g., mortgage, mechanic's lien, and property tax lien). Sometimes, the total owed for the liens is more than the land will bring at a sale, so there is an order of priority for paying off liens after foreclosure. Generally, liens are paid in the order they were attached to the land. An important exception is a **property tax lien**, which is *superior to all other liens*. If the sale of the property does not produce enough money to pay off all of the lien holders, later lien holders may get nothing.

Sometimes a lender is willing to change its order of priority with a **subordination agreement**. With this contract, a *lender voluntarily puts its lien in a lower order of priority*. This is usually done if the lender is sure the property is worth enough to pay off the additional liens *and* the mortgage.

Class Activity: Lien Classification

Individually or as a class, classify each type of lien:

Type of Lien	Voluntary	Involuntary	General	Specific
Property Tax Lien				
Income Tax Lien				
Mortgage Lien				
Mechanic's Lien				
Judgment Lien				
Attachment Lien				

Homestead Laws

Most states have homestead laws that give owner-occupied residences some protection from lien foreclosure, by exempting some of a homeowner's equity in real estate. In some states, homestead protection is limited by statute to a set amount. The exemption may apply only to attachment or judgment liens. (A special homestead exemption may also result in a lower assessed property value for tax purposes for homeowners age 65 or older with limited income.)

Chapter 10 Summary

1. **Deeds** are instruments that convey ownership in real property. **Title** is the holding of rights conveyed. Deed is evidence of title; title is actual ownership. Title is not a document, but a concept or theory of ownership. Seller is the grantor; buyer is the grantee. Valid deeds must be written and have competent grantor's signature, identifiable grantee, words of conveyance, description of property, consideration, acknowledgment, and delivery and acceptance.
2. **General warranty deeds** obligate the grantor to defend the grantee from claims against the title, give the grantee the best possible protection, and are most often used for real estate transfers. Most common deeds without warranty are **quitclaim deeds,** where the grantor conveys only the interest he may have in the property, without warranty that he or she has an interest. Quitclaim deeds are mostly used to clear up clouds on title.
3. **Title insurance** protects lenders and sometimes property owners against loss up to the coverage amount in the policy due to disputes over ownership of a property and defects in the title not found in a public record search. The **American Land Title Association** (ALTA) is a national trade association that provides standardized policy forms used throughout the country for one- to four-family residences insured against title-related losses.
4. Recording documents gives notice of ownership or rights. **Actual notice** is a known fact. One has **constructive notice** of all filings in public records. People have a duty to check public records for real property filings. Many states have a **marketable title act:** Unbroken chain of title back a specified number of years finds the root of title, establishes marketable title. Easements and other rights must be recorded or put specifically in deeds to preserve the rights. **Torrens System** must be recorded with the registrar to be valid (rare).
5. Ownership can be held **in severalty** (one person), or co-owned by two or more persons with each having **undivided interest**: Each co-owner may possess the whole property, not just part of it. Forms of co-ownership are **tenancy in common, joint tenancy**, or **tenancy by the entirety.** Title to real property can be held by associations of individuals: Corporations, general and limited partnerships. **Condominium** units are owned in severalty; owner has undivided interest in common areas. **Cooperatives** are owned by corporation; each shareholder has proprietary lease for one unit. **Adverse possession** is acquiring title to other's real property by open and hostile possession for a specified time.
6. **Estates** are possessory interests in real property, either now or in the future. Freehold estates are of uncertain duration. They are **fee simple** (inheritable, transferable, and perpetual ownership) or **life estates** (possession as long as specified person lives). Fee simple absolute is fullest interest in property. **Defeasible** or **conditional** fee estates can be undone if conditions aren't met. **Dower** or **curtsy** is an interest held by married persons in each other's real property as recognized in some states. **Leasehold estates** give tenants a temporary possessory interest, but they don't hold title. An **estate for years** can be any fixed period of time. **Actual eviction** is the legal removal of a tenant from the property.
7. **Easements** are a non-possessory right to use another's land for a certain purpose. They're appurtenant or in gross; created by express grant, reservation, implication, necessity, or prescription. **Liens** are also non-possessory interests, which are financial encumbrances. Lien holders can **foreclose** on property in the event of default, forcing it to be sold so the unpaid debt can be paid from the sale proceeds. The most common liens are mortgages, tax liens, mechanics' liens, and judgment liens. Usually liens are prioritized (and thus paid out in foreclosure) in the order they are recorded, but property tax liens always have priority. Later recorded liens may not be paid if no money remains after sale. **Lis pendens** is a recorded notice stating that a lawsuit is pending, which may affect title to property.

Chapter 10 Quiz

1. ***A deed is***
   A. actual ownership to real estate rights.
   B. better than title.
   C. a document that must be recorded.
   D. evidence of title.

2. ***A grantor acknowledges a deed before a***
   A. federal official.
   B. lender representative.
   C. notary public.
   D. witness.

3. ***Requirements for a valid deed include all EXCEPT***
   A. an acknowledgment before a notary public.
   B. an adequate description of the property conveyed.
   C. delivery and acceptance of the deed.
   D. the signature of a competent grantee.

4. ***Alice and Conrad bought a house and received a general warranty deed. Later, they discover that the previous owner's wife didn't release dower. What's the best way to correct this?***
   A. The previous owner executes a quitclaim deed.
   B. The previous owner and spouse execute another general warranty deed.
   C. The previous owner and spouse issue a wild deed.
   D. The wife of the previous owner executes a quitclaim deed.

5. ***Documents are recorded to give***
   A. actual notice.
   B. constructive notice.
   C. inquiry notice.
   D. legal notice.

6. ***A Marketable Title Act says that proper title is established by***
   A. adequately searching the public records.
   B. buying adequate title insurance.
   C. making sure that no wild deeds exist.
   D. an unbroken chain of title back a specified number of years to the root of title.

7. ***How many persons may share ownership in severalty?***
   A. one
   B. two, as long as they are married to each other
   C. two or more, as long as there is unity of title
   D. any number, regardless of unity of title

8. ***Which rights are NOT transferred with real property?***
   A. disposal rights
   B. easements
   C. encroachments
   D. surface rights

9. ***Which is NOT an encumbrance on real property?***
   A. appurtenant easement
   B. judgment lien
   C. personal license
   D. restrictive covenant

10. ***In deciding who gets paid from a foreclosure sale, which lien has priority?***
    A. first lien recorded
    B. lien for delinquent property taxes
    C. mechanics or materialmen who file a timely notice after commencing work on the property
    D. mortgagee or original lender

11. ***A non-possessory interest in real property is also called a(n)***
    A. encumbrance.
    B. leasehold estate.
    C. license.
    D. servient tenement.

12. ***Which condition of use is NOT required for adverse possession?***
    A. continuous use for a number of years, as specified by state law
    B. hostile and adverse
    C. open and notorious
    D. permission of the owner