Chapter 2

Property & Property Ownership

Chapter 2 Goals:

- Understand California's unique history
- Be aware of the different ways in which land can be held
- Learn landowner rights
- Recognize different parties that may hold interest in property
- Understand how personal property can be owned by a non-owning landuser
- Defining fixtures

Chapter 2: Property & Property Ownership

Key Terms

air rights	fixture	public property
annexation	foreign corporation	Real Estate Investment Trust (REIT)
adaptability	freehold estate	real estate syndication
appropriative rights	fructus industriales	real property
appurtenance	fructus naturales	remainderman
bill of sale	general partner	right to possess
bundle of rights	general partnership	right to sell or transfer
C Corporation	interest	right of appropriation
chattels	joint tenancy	right of prior appropriation
community property	leasehold estate	right of survivorship
concurrent ownership	life estate	riparian rights
condition precedent	Limited Liability Company (LLC)	S Corporation
condition subsequent	Limited Liability Partnership (LLP)	tenancy in common
corporation	limited partnership	tenancy in partnership
deed	mineral rights	title
domestic corporation	ownership in severalty	trade fixture
emblements	partition action	Treaty of Guadalupe Hidalgo
executor limitation	partnership	*United States v. Causby*
estate	personal property	unity of possession
fee simple absolute		water rights
fee simple subject		

What Is Property?

Property is defined as anything that can be owned or possessed, either physically or intangibly. An individual, a business, or a group of people can own property. A property owner has the right to sell, transfer, lease, rent, consume, alter, or destroy his or her property at his or her discretion.

There are three main types of property:

- Public
- Real
- Personal

Public Property

Public property is that which is dedicated to public use. Unlike real or personal property

– which are privately owned – public property is owned by the state.

There are two types of public land. The first type is public land that are held in a trust by some form of government and the second is government owned property.

Land held in a public trust is used for specific purposes meaning the government does not have the absolute authority to use the land for any other purpose other than its goal. Examples of this type of public property is parks, monuments, public waterways, and other specific purposes.

Government owned property is any property owned by the government. Unlike land held in a public trust, the government has the right to use government property for any purpose irrespective of its use. This is similar to the rights of a private landowner. Examples of these include schools, military bases and stations, and government office buildings.

Real Property

Real property refers to any land, natural resources, or structures that are permanently attached to a piece of land. More simply, it is any "immovable" asset. These assets can be naturally occurring (i.e. trees, crops) or manmade (i.e. houses, dams).

Real property is purchased, sold, or transferred via a purchase agreement. The transfer of ownership is documented through a property deed which is publicly recorded.

A transfer of real property does not include the transfer of personal property within the real property.

Personal Property

Personal property – also known as **chattels** – is any "movable" asset that is not attached to a piece of land. Examples include furniture, vehicles, livestock, clothing, jewelry, and household goods.

Personal property does not require a contract for its purchase, sale, or transfer. The owner of personal property may or may not be recorded, although ownership claims can be made by simply possessing a personal property item.

Real vs. Personal Property

Real Property	Personal Property
Real property is transferred via a deed.	Personal property is typically transferred via the payment of money for the cost of the item. If the personal property exceeds a certain amount, it may use a receipt for the transfer (**bill of sale**).
The transfer of real property is recorded with the county recorder's office.	The transfer of personal property does not need to be recorded.
The transfer of real property must be made in writing through a purchase agreement.	The transfer of personal property is not required to be in writing. The two exceptions are if the value of the personal property exceeds $5,000 or if it is an item defined in the Uniform Commercial Code (i.e. securities, bulk item transfers, security agreements).
Real property taxes are routinely assessed and must be maintained by the property owner.	The buyer pays a one-time sales tax on the personal property.

For example, say a property owner grows oak trees on his or her land. As the trees are rooted into the land, they are considered the property owner's real property. If the property owner chops down the trees, the lumber is no longer affixed to the property and is now considered personal property. If the property owner sells the lumber to a lumber company, it is now the lumber company's personal property. If the lumber company creates a bookcase out of the lumber and sells it to a consumer, the bookcase is the consumer's personal property.

Land

Land refers to the soil on which a property is located. It encompasses all of the resources and rights that make up that soil, such as:

- Mineral rights (i.e. gas, oil, coal)
- Water rights

- Air rights

Mineral, Oil, and Gas Rights

A property owner owns the property's mineral, oil, and gas rights.

Mineral rights – also referred to as mineral interest or mineral estate – refer to a property owner's right to extract organic and inorganic materials that make up the soil on his or her property. These minerals include coal, gold, silver, and other naturally occurring chemicals.

A property owner has the right to mine the land below his or her property's surface for economic purposes. A property owner is not entitled to any minerals found beyond his or her property, however.

A property owner can also transport minerals found on his or her property, unless barred from the government.

Property owners can sell or lease mineral rights.

For example, it is common for a property owner to lease his or her property's mineral rights to an oil or gas company for exploration. If the oil or gas company makes a profit from the minerals found on the property, the property owner may be entitled to royalty checks and/or bonuses.

Ownership cannot be claimed over non-extracted oil; ownership only applies after oil is removed from the ground. Once removed, oil is considered personal property.

Example

Bob finds oil under his property, but does nothing with it. His neighbor, Jack, believes that he may have oil under his property and hires an oil company to inspect the property. The company discovers massive oil reserves under Jack's property. Jack decides to lease the reserves to the oil company. He then orders the company to drill under Bob's property to get as much oil as possible. Bob files a lawsuit against Jack to prevent him from drilling on his land. A court orders that Jack is only entitled to drill beneath his own land, not other's land.

Water Rights

Water rights refer to a landowner's ability to extract water from a water source, such as a stream, river, or underground collection.

California's unique geographic conditions have led to the creation of two types of water rights:

- Riparian
- Appropriative

Appropriative Rights

Appropriative rights allow property owners to divert, or transport, water in one location to be used in another. These rights are typically used for farming.

The law in California permits water to be appropriated (diverted) from one point and used in another. This is different than a riparian right that is based on who owns the property.

Appropriative rights exist without any relation to the landowner and the water. It is based on permits or licenses, physical control and beneficial use. Use depends on continued use meaning an appropriative right may terminate if the user fails to make reasonable use of the water. Such a right can be bought, sold, and transferred. Storage of water is considered reasonable unless a riparian right that does not permit users to store water.

Riparian Rights

Riparian rights allow property owners to use and divert water from a water source on his or her residential property. These rights guide the disbursement of water among property owners whose land borders, crosses, and/or enters water.

A property owner who intends to make use of water on his or her property may be required to get a permit. This typically applies to situations involving commercial water use.

A landowner's water use must be "reasonable" and "beneficial". He or she does not have the right to use more water than necessary. His or her use cannot reduce the quality or substantially reduce the amount of water.

For example, a large local farm that supplies a significant amount of produce would have the right to use water running through the farm because the production of crops is beneficial to the local economy.

Riparian rights do not give landowners ownership over the water, but rather, the legal right to use the water. Therefore, landowners do not have the right to remove water from the water source and sell or transfer it to others.

If a landowner sells his or her land, his or her water rights are terminated.

Right of Prior Appropriation

California also recognizes the right of prior appropriation. The **right of prior appropriation** is a legal concept whereby the first legal holder of a water right retains that right over future users. This embodies the "first in time, first in right" principal.

When a water source passes through multiple properties, all property owners possess the same right to use and enjoy the water.

Right of Appropriation

There are instances when the government has the right to terminate a property owner's right to use the water on his or her property. The **right of appropriation** allows the government to confiscate or divert water for a beneficial purpose that benefits the community.

Air Rights

Air rights refer to a property owner's ability to use the airspace above his or her property.

Prior to the invention of airplanes, air rights did not exist. When airplanes became a more common mode of transportation, the government was forced to clarify the issue of air rights.

In 1926, the government passed the Federal Aviation Act (FAA). This granted the government exclusive sovereignty over United States airspace.

However, the legal case, ***United States v. Causby*** (1946), challenged the government's encompassing control over airspace. The case determined that navigable airspace was a public domain. It ruled that a property owner's land rights included the airspace above the land.

The government subsequently argued that it was unreasonable for a property owner to claim air rights over all of the airspace above his or her property, as doing so would hinder air travel. Therefore, the government clarified the *United States vs. Causby* ruling: property owners would have the right to the 500 feet of airspace above their property, but the airspace above 500 feet would be considered a public easement.

The airspace associated with a property is the sole possession of a property owner. The owner typically has the right to use the airspace as he or she sees fit.

An example of this might the landowner growing large trees that might affect the ability of planes to take off or land.

However, the government can impose certain limitations on a particular property's airspace. Airspace limitations are often imposed on properties that are near an airport, army base, or certain government buildings.

Other Types of Property

Fixtures

A **fixture** is a physical asset that is permanently attached to a property without the ability for it to be readily removed. Examples of fixtures include a fence, gazebo, shed, swimming pool, septic system, water tank, front door, windows, or planted trees.

An important characteristic of a fixture it that it was once considered personal property, but has since become real property. The conversion from personal to real property is called **annexation**. Annexation occurs through installing, fastening, or bolting an asset into the property.

For example, a stove sitting in a delivery box is considered personal property. However, if the stove is installed in the kitchen and hooked up to the electrical wiring or gas line, it becomes a permanent fixture.

All fixtures are included in the sale or transfer of a property unless otherwise agreed-upon by a buyer or a seller.

For example, if a buyer purchases a home with installed crystal chandeliers and a state-of-the-art refrigerator, the seller cannot take those items with him or her unless it is agreed to in the purchase agreement.

The following may be used to determine whether an asset is a fixture:

- ***Method of attachment***. If an item is installed, nailed, bolted, fastened, screwed, glued, drilled, or cemented to a property, the attachment is considered permanent and the item is considered a fixture. If the item can be easily moved – such as in the case of a mirror, plants, or furniture – then the item is considered non-permanent and is not considered a fixture.

- ***Agreement of the Parties***. Any asset that is itemized in a purchase agreement can be transferred upon the sale of a property, even if it is not classified as a fixture. For example, an installed chandelier may be considered a fixture, but a buyer and a seller can agree that it is not included in the sale of a property. It is advised that any questionable assets be indicated in the purchase agreement. If an item is not itemized, the court will typically rule in favor of a buyer or a tenant.

- ***Adaptability***. If an item becomes an integral part of a property, or it is custom-built to fit a property, it is considered a fixture. For example: flooring, cabinets, or a built-in refrigerator.

- ***Intent***. If the original property owner intended an installed item to be permanent or if the item's removal would damage the property, the item is considered a fixture. If an item is customized for the original property owner (i.e. a mailbox with the family's name), however, it can be removed.

Trade Fixture

A **trade fixture** is an item that a lessee fixes to a landlord's property for the purpose of a trade or business. It is attached to the property, however unlike a standard fuxture that remains apart of the property, a trade fixture can be removed even if it is attached after the tenant's lease expires. If the trade fixture causes any damages to the property, the tenant must pay for the damages and its removal.

An example of a trade fixture might be a special refrigerating system used by a restaurant that attaches to a property. While the walls of the building must conform to the refrigeration system, the tenant would be required to remove the refrigerator and pay for its removal and restore the property back to its original condition.

Appurtenances

An **appurtenance** refers to anything that belongs to, and goes with, something else, and cannot be transferred or sold on its own. It is often defined as something annexed to another worthier thing.

An appurtenance results when an attachment (i.e. building, covenant) becomes a part of a property.

For example, a backyard is an appurtenance. It belongs to a property and cannot be sold or transferred separate from the property's house. A septic tank and a central air system are also examples of physical appurtenances.

An easement that allows a neighbor to use a piece of a property owner's property would also be considered an appurtenance.

Emblements

Emblements refer to profits derived from crops cultivated through labor. Crops that require labor to grow are called **fructus industriales**; conversely, naturally growing plant growth is referred to as **fructus naturales**. Emblements only apply to fructus industriales.

The cultivator of the crops is entitled to the emblements. Therefore, if a tenant cultivates crops on a property owner's land, the tenant is entitled to the emblements, not the property owner.

Emblements are considered personal property. The law of emblements ensures that tenants have the right to use, consume, sale, transfer, or otherwise do as they please with the "fruits of their labor".

A tenant and/or a tenant's family are still entitled to emblements under the following circumstances:

- The tenant's lease expires or the tenant is evicted prior to the harvest of the fructus industriales
- An estate is terminated
- The tenant dies, resulting in the forfeiture of the property

Example

Jerry rents a house from a landlord. The house has an orange tree. The tree does not require any labor and produces beautiful oranges every year. If Jerry is evicted from the property for his failure to make monthly rental payments, is Jerry still entitled to the oranges?

No. As Jerry did not produce any effort to grow the tree or the oranges, he does not have any right to the oranges after his eviction.

History of California's Property Ownership

The land that is now modern-day California has witnessed large waves of migrants for tens of thousands of years. However, the most critical period of change – both in terms of economics and land distribution – occurred in the last 500 years.

California's property history is divided into five time periods:

- Native American Rule (pre-1500s)
- Europe Exploration Period (1500-1769)
- Spanish Colonial Period (1769-1821)
- Mexican Rule (1821-1848)
- United States Rule (1848 - Present Day)

Native American Rule (pre-1500s)

Nomadic Native American tribes originally inhabited California. They embodied a hunter-gatherer lifestyle and no singular tribe held central power over the other tribes.

European Exploration Period (1500 – 1769)

Following the news of Christopher Columbus' successful journey to the new world, a Spanish explorer and conquistador named Vasco Núñez de Balboa set out on his own expedition. Balboa crossed the Isthmus of Panama in 1513 and claimed all of the coastal land on behalf of the Spanish monarchy.

This included California.

Spanish Colonial Period (1769 – 1821)

Although the heart of the Spanish Empire was thousands of miles away, Spain maintained a tight grip on California.

The Spanish conquerors divided the land into two major areas: Baja California and Alta California. In an effort to increase Spanish authority in the state, the Spanish King granted large land grants to Spanish citizens, typically retired military personnel or friends and family of the crown.

Spanish missionaries founded the first mission in 1697 in Baja California. They subsequently created a mission system in an effort to widen Spain's influence and spread Christianity throughout the region.

The missions provided refuge for Spanish settlers traveling throughout the state. Twenty-one missions were separated by a one-day horse ride. They stretched from Monterey in Northern California to modern-day San Diego. They were linked to El Camino Real Trail, which is near the modern day 101 Freeway.

The Spanish brought infectious diseases with them and ultimately wiped out 60-90% of the indigenous Native American population. By the early 1800s, only an estimated 15,000 Native Americans remained in California. Much of this remaining population was enslaved or existed as indentured servants.

Mexican Rule (1821 – 1848)

By the early 1800s, Spain had lost influence in the California region. In 1821, Mexico gained its independence from Spain and subsequently took control of California.

However, the newly independent Mexico was riddled with government instability. Over the course of 25 years, there were 40 different Mexican presidents. The Mexican government also cultivated animosity in California's citizens when it imposed a 100% import tax on goods brought into the state.

This political turbulence and insensitivity to its new citizens undermined Mexico's ability to control California. These factors set the stage for the United States to challenge Mexico's claim.

At the behest of Texas, the United States decided to wage war against Mexico. The United States won.

United States Rule (1848 – Present Day)

On June 23, 1846, the United States and Mexico signed the **Treaty of Guadalupe Hidalgo**. This treaty ceded control of California to the United States.

In 1848, gold was discovered in Sutter's Mill, California. This discovery solidified the United States' interest in California. In 1850, California was officially made a state.

At this point, the United States was forced to settle claims over private land.

In Spanish-ruled California, buyers and sellers were not required to execute a written agreement in order to transfer real property. Instead, a buyer and a seller would consummate a property transfer through a handshake. Customarily, a seller would also offer an item associated with the property – such as dirt, a stick, or a plant – as proof of the transfer.

Many Americans believed that California's statehood would guarantee their right to possess land previously owned by Mexicans. Some had already claimed title to such properties through squatting or informal ownership declarations.

Congress formed the Board of Land Commissioners to resolve land dispute claims by both American and Mexican citizens. The Supreme Court allowed most Mexican property owners to retain land they held prior to the state's formation.

Furthermore, the "handshake" method of property transfer was invalidated. Instead, property transfers and sales in California had to be documented with formal written agreements that indicated proof of residence and ownership.

Property Ownership

A **title** refers to one party's ownership of a property. The written legal document that provides an acknowledgement of title and evidence of property ownership is called a **deed**.

A property deed affords the titleholder a set of legal rights and/or equitable **interest** in the property. These are known as the **bundle of rights**. These rights include:

- Right to possess
- Right to sell or transfer
- Right to control property use
- Right to enjoy
- Right to exclude

These rights may be separated and held by different parties.

An **estate** refers to all of the personal and real property owned by an individual or entity. It is the type of title or the "bundle of rights" a property owner holds to a property.

There are two types of estates:

- Freehold

- Leasehold

Freehold Estate

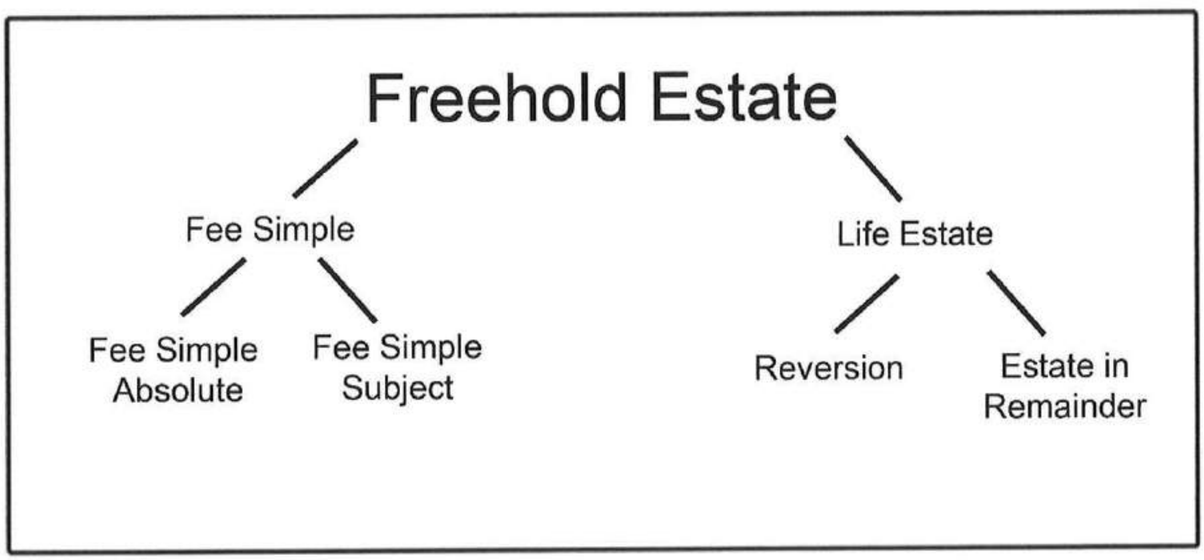
A **freehold estate** grants a property owner the exclusive **right to possess** and enjoy the use of the property without public interruption for an undisclosed period of time.

The term "freehold" originates from England. A freehold estate was a property that could not be controlled by the government or the Crown. Rather, it was freely held.

The owner of a freehold estate has the following exclusive rights:

- The right to occupy, possess, and use the property
- The right to renovate the property
- The right to initiate and manage a rental property and collect rental income
- The right to sell, transfer, or rent interest in the life estate
- The ability to use the estate as a charitable tax deduction

Freehold estate owners do have a duty to maintain a property, pay taxes, and keep current with any H.O.A fees. Standard real estate laws such as eminent domain and police power also still apply.



Fee Simple Absolute

A **fee simple absolute** estate grants a property owner exclusive rights to a property without conditions. It is the highest level of ownership and the most common.

Upon the death of the owner of the fee simple absolute estate, the real property transfers to the owner's heirs.

For example, Charles gives Mary the home on Coldwater Avenue through a fee simple absolute estate. Mary becomes the exclusive owner of the property for as long as she wishes to keep the property. Upon her death, the property is transferred to the heir stipulated in her will.

Fee Simple Subject

A **fee simple subject** – also known as fee simple defeasible – is a fee simple absolute with certain conditions. The agreement transfers property from a seller to a buyer with the stipulation that the buyer must either complete or not complete certain conditions laid forth in the deed. If all conditions are met, the buyer will possess full ownership over the property. If the buyer violates the conditions, his or her ownership may be terminated.

Phrases or words that indicate a fee simple subject include:

- "While"
- "During"
- "So long as"
- "On the condition that"
- "Until"

A **condition precedent** is a provision that prevents something from occurring on the property.

For example, a property owner may agree to sell his property on the condition that the buyer does not convert the property into a strip club (a condition precedent).

A **condition subsequent** is an event that terminates an estate. It allows the seller to take over the property at his or her will upon the buyer's failure to perform a condition. The seller must file a notice of intention or a lawsuit against the buyer within five years of the buyer's violation in order to retake the property.

For example, John gives the Rochester Avenue property to his son Jerry on the condition that Jerry continues to go to school and graduates (condition subsequent). If Jerry quits school and joins a rock band, the fee simple subject estate grants John the right to file a notice of intent and retake the house.

A fee simple subject to **executor limitation** grants a property to another recipient if the original buyer does not meet the conditions set forth in the deed.

For example, John gives the Rochester Avenue property to his son Jerry on the condition that Jerry continues to go to school and graduates; if Jerry does not graduate, the property will be transferred to Jerry's brother, James (executor limitation). If Jerry quits school and joins a rock band, the conditions of the fee simple subject estate will transfer the house to James.

Life Estate

A **life estate** grants a property owner the exclusive right to possess a property for the duration of his or her lifetime. A life estate holder has all of the same rights as a freehold estate except after death.

Life estates terminate upon the death of the life estate holder. At this point, the life estate reverts to the original seller/grantor, a designated heir, or a power of attorney. This designated individual is known as a **remainderman**, or "remaining person".

The most common types of heirs are children. In the event that an estate holder does not designate instructions for transfer prior to his or her death, a court generally transfers an estate's financial interests to his or her children and splits those interests among them.

For example, Bill grants his property to his parents, Jill and Cal, through a life estate. When Jill and Cal pass away, the property rights will revert back to Bill.

Leasehold Estate

A **leasehold estate** – also known as a non-freehold estate or simply, a lease – makes an individual the owner of a property for a specified period of time.

For example, tenant who lives in an apartment unit owned by a landlord is an example of a leasehold estate.

Leasehold estates will be discussed further in Chapter 12.

Sole vs. Concurrent Ownership

Ownership in Severalty

Ownership in severalty – also known as sole ownership – refers to when one individual or entity owns real property. Individuals, corporations, or trusts may hold sole ownership property rights.

Both single and married individuals can be the sole owner of a property. However, a married individual may be required to have his or her spouse quitclaim away his or her interest in the property.

Acquiring title to a property as a sole owner is simpler than as a co-owner as only one individual is required to accept and sign documents.

The one major disadvantage of sole ownership is the potential for legal disputes after the sole owner's death. If a sole owner dies without a will, for example, it may be difficult to ascertain who has ownership rights to the property.

Concurrent Ownership

Concurrent ownership – also known as co-ownership – refers to when two or more individuals own real property during the same period. There are four types of concurrent ownership:

- Joint tenancy
- Community property
- Tenancy in common
- Tenancy in partnership

Joint Tenancy

Joint tenancy refers to when two or more parties hold an equal, undivided interest in a property. Joint tenants enjoy unrestricted use and access of property as long as it does not infringe upon the right of enjoyment of the other tenants or willfully excludes them.

For example, assume party X and Y are joint tenants of a property they both own. Both joint tenants have the right to occupy and make use of all of the property. If Y dies, X becomes the sole owner of the property due to the right of survivorship.

The right of survivorship means the surviving party assumes the property rights of the party that dies.

In order for a joint tenancy to occur, all four aspects of joint tenancy must be established:

1. *Title*: both parties acquire the title to a property through the same deed
2. *Interest*: both parties possess the same percentage of ownership in a property, making the interest undivided. Interest is established by a tenant's acquisition of the "same conveyance, commencing at the same time, and held by the same possessor." (Civil Code 683)
3. *Time*: the acquisition of a property occurs at the same time
4. *Possession*: both parties have equal rights to access and use a property

If any of the four aspects of joint tenancy are missing, the property will instead be a tenancy in common.

Unlike other forms of ownership, joint tenancy allows any two individuals to be joint tenants with each other, including investors, partners, and married and unmarried couples.

A joint tenancy share can be transferred to another party prior to a joint tenant's death. However, if a share is not transferred prior to a joint tenant's death, the **right of survivorship** stipulates that the share will be transferred to the other tenants in the joint tenancy upon a joint tenant's death. In other words, the share will not transfer to the deceased joint tenant's heir.

A joint tenancy is typically not subject to probate because the terms of a deceased party's estate do not apply. However, the surviving joint tenants must submit an affidavit of survivorship and a certificate of death for the deceased joint tenant in order to claim his or her share.

Example

Say Brett, Marissa, and Phil own a joint tenancy property. If Brett dies, Brett's family receives no interest in the property. Rather, Marissa and Phil continue on as joint tenants. If Marissa then passes away, Marissa's family also does not receive any interest in the property. Even if Marissa had a will that stated an individual to be her heir apparent, the fact that the property was purchased as a joint tenancy prevents her share from being transferred to the heir. Instead, Phil now owns an undivided interest in the property and becomes the owner in severalty.

Community Property

The concept of community property in the United States came from the Spanish civil law system that had been in place in California prior to Mexican and American rule.

Community property refers to all property and assets acquired and owned during the course of a marriage or domestic partnership.

Community property includes:

- Real property
- Income
- Debt
- Assets (i.e. pensions, business interests, 401Ks)

Community property grants equal ownership rights to both spouses/partners.

If one spouse/partner possesses property or assets prior to a marriage/domestic partnership, it is not considered community property. However, if the spouse/partner co-mingles that property or assets with those shared with the other spouse/partner, it becomes community property.

For example, say Daniel marries his longtime girlfriend, Sarah. Prior to their marriage, Daniel purchased multiple properties as a real estate investor. These properties are not considered community property and Sarah is not entitled to any interest in them. However, if Daniel co-mingles the rental income from those properties with the income he earns during the marriage, the properties become community property.

Each spouse/partner can acquire individual property during the marriage. For example:

- Assets or real property acquired with separate funds that were not earned during a marriage/domestic partnership
- Money or assets gifted specifically to one spouse/partner
- Money or assets transferred to one spouse/partner through a will
- Rental income from a spouse/partner's separate property

Property designated as community property can be altered to another form of ownership through a written agreement. It must be signed and executed by both spouses/partners.

Both spouses/partners must approve any financial decisions, including the leasing, re-financing, purchasing, and/or selling of property.

In the event of their death, spouses/partners have the right to transfer their share of community property to an heir apparent through a will. An heir apparent who inherits a portion of community property becomes a joint tenant with the surviving spouse/partner.

However, if no heir apparent has been designated, the right to survivorship dictates that full ownership rights will automatically transfer to the surviving spouse/partner.

Because assets transfer automatically without the need for probate or wills, the property will be transferred probate-free without expenses.

Tenancy in Common

Tenancy in common refers to when two or more parties hold an undivided interest in a property through percentage shares.

Unlike joint tenancy, tenants in common can be created at different times. Therefore, an individual may obtain an interest in a property years after other individuals have entered into a tenancy in common.

Tenants in common may also have different ownership shares.

For example, one tenant in common may own 25% ownership in a property, while the other owns 75%. Regardless of their share, however, all tenants in common have ownership rights over (or an undivided interest in) the entire property. This includes an unrestricted **unity of possession**, which states that no portion of the property can be divided with the purpose of excluding one or more tenants in common.

For example, assume Marge and Bill are tenants in common. Marge has a 60% share in the property, while Bill has a 40% share. However, during the tenancy in common, Bill still maintains an equal interest in the property. Therefore, he can access, use, and alter the entire property, not just 40% of it. In the event that the property sells, however, Bill is only entitled to 40% of the overall profit, while Marge is entitled to 60%.

A property deed should be used to document each tenant in common's undivided interest in the property. If a deed does not state the interest, it is assumed that all tenants hold an equal percentage.

Tenants in common contribute to the cost of standard property expenses and necessary repairs. They pay a portion that is proportional to their share in the property. If the property is being rented, all tenants have the right to collect their appropriate share of the rent.

If one of the tenants in common fails to keep current with their portion of expenses, the violating party may lose their share in the property.

Tenants in common have the **right to sell or transfer** their portion of ownership to a third party. The other tenants in common do not have the legal right to prevent one tenant from doing so.

If tenants have disputes about the division of a property, a tenant in common may file a partition action. A **partition action** is a court-ordered action that forces the division of a tenancy in common into apportioned tenant shares. The tenants are then allowed to deal with their shares independently.

Should a property be impossible to divide, parties can agree to sell the property and split the profits equally.

In the event of a tenant in common's death, his or her share in a property is transferred to an heir through a will or to the state if the tenant has no will.

Investors use tenancies in common as they can benefit from the capital investment of other co-tenants and buy properties they may otherwise not have been able to. One disadvantage is that if one tenant in common wishes to sell the property to recoup his or her investment, the other tenants may be forced to sell their shares as well.

However, lenders typically do not provide financing to tenants in common. In the event that a tenant in common defaults on a debt, a lender would only be able to foreclose on the defaulting tenant's share in the property, not the property as a whole. Therefore, a tenancy in common is not a smart investment strategy for lenders.

Tenancy in Partnership

A **tenancy in partnership** refers to when a partnership – rather than its individual partners – is the legal entity that purchases property. In this case, two or more partners agree to share the profit and loss of a purchased property.

Each partner owns a percentage of the purchased property based on his or her capital contribution, expertise, and work responsibilities.

Partners can only use the property for the purposes intended by the tenancy in partnership. Individual partners cannot use it for personal reasons.

For example, Eric is the largest contributing partner and backbone of Bledsoe and Associates. His wife also just threw him out of the house. The Bledsoe and Associates partnership owns a large 10,000-square foot industrial building equipped with a guesthouse. Eric believes he can live in the guesthouse temporarily until he finds a place to live. However, as this is not the intended purpose of the partnership, Eric needs to ask his partners' permission to do so.

If the partnership dissolves or one of the partners dies, the tenancy in partnership terminates. In the event that the property is transferred to an heir, the heir is entitled to the deceased partner's share. Should both partners die at or near the same time, the property would be vested in the hands of the deceased legal representatives.

Partnership debt does not dissolve upon the death of one of the partners. Rather, it is the responsibility of the surviving partners unless otherwise indicated in the partnership agreement.

Property-Owning Entities

Various entities are able to own real property, including:

- Corporations
- Partnerships (i.e. LLPs, LLCs)
- Real Estate Syndication

Corporations

A **corporation** is a legal business entity that possesses the same rights and duties as an individual. Unlike individuals, however, corporations do not expire. As long as a corporation conducts business, its name and rights continue on.

A **domestic corporation** is an entity that conducts business in the state in which it was incorporated.

A **foreign corporation** is an entity that conducts business in a state other than the one in which it was incorporated.

Corporations possess many of the same rights as individuals, including the right to own property. Individuals or partners might consider purchasing real estate through a corporation for several major reasons, including:

- Reducing liability
- Minimizing risk
- Tax purposes

Corporations are held separate from owners/shareholders, board members, or corporate officers. Therefore, individual shareholders cannot be held liable for decisions made by the corporation. This reduces, if not eliminates, a shareholder's liability and minimizes risk.

However, corporate taxation can be a significant drawback.

When a business is incorporated, it automatically becomes a **C Corporation**. A drawback to a C Corporation is that it subject to "double taxation". A C Corporation's income and expenses are taxed at the time they are generated at a generally higher corporate tax rate. Owners must then also pay a personal income tax on corporate profits when they are distributed as dividends.

In order to avoid the "double taxation" of a C Corporation, many business entities may instead create an S Corporation. In an **S Corporation**, the corporation itself is not taxed; rather, shareholders and/or owners are only taxed one time when corporate profits are distributed on their personal tax returns. In this case, income goes directly to the individual shareholders.

An S Corporation must be a domestic corporation with fewer than 100 shareholders. It can only offer one type of stock. Shareholders must submit Form 2553 in order to file as an S Corporation. If an entity does not submit Form 2553, the IRS will consider it a C Corporation.

Securing a mortgage on a corporate-owned property may also be more difficult than with standardly owned property. This is because many lenders may require corporate officers to co-sign the mortgage note.

Partnerships

A **partnership** is when two or more parties legally agree to work together in order to make a profit or to achieve a goal.

Real estate investors often enter into partnerships in order to purchase, flip, sell, or rent property. New, less experienced investors may particularly prefer to use partnerships to divide expenses, responsibilities, and liabilities.

The terms of a partnership vary based on the capital contribution, expertise, and the role of the partners.

Limited Liability Partnership (LLP)

A **limited liability partnership (LLP)** is a business partnership formed by two or more individuals whereby one individual is a general partner.

A **general partner** is an active partner who is responsible for the day-to-day operations and management of a partnership's business, including financial and developmental aspects.

A **limited partner** is a "silent partner" who is not involved in the management of the business. Typically, such a partner only invests capital into an LLP. Inexperienced investors or investors whose only goal is to earn a rate of return are common limited partners. Limited partners are not liable for more than the capital contribution that they personally invest as long as they do not take on a managerial role.

The advantages for a limited partner are lower tax rates and the potential to earn income in exchange for little time. The major disadvantage is the minimal amount of control the limited partner has over his or her investment. Limited partners must rely on the expertise of the general partner and cannot engage in the daily operations of the business. This arrangement is also referred to as a **limited partnership**.

A partnership in which all partners have equal liability – and share in profits and losses equally – is called a **general partnership**.

The number of partners can vary based on the terms of the partnership. Although being a partner guarantees the same rights, one partner may hold more authority or liability than the other. Roles are defined based on a partner's level of skill, capital contribution, and activity in the partnership.

LLPs must be made in writing and clearly indicate each partner, its share, and its contribution towards the partnership.

Limited Liability Company (LLC)

A **limited liability companies (LLC)** is a business partnership formed by two or more parties that provides members with the tax advantages of a partnership, while giving them limited liability. They are one of the most commonly used entities for possessing real estate.

Owners of an LLC are referred to as members. Unlike LLPs, these members can be individuals or corporations. An LLC does not require there to be a general partner who is liable for the partnership's obligations. Any member of the LLC can perform any task unless otherwise indicated in the operating agreement.

Unlike more stringent forms of ownership, LLCs offer property owners more flexibility. Corporations are required by law to have officers and directors, whereas in a LLC owners are free to adjust management positions at will. Corporations must operate according to the corporation's code, whereas LLCs can operate around the unique needs of the investors and the specifics of a property. There are no restrictions on an LLC's structure, including a minimum or maximum number of shareholders requirement.

With LLCs, ownership percentages and holdings can easily be transferred and/or willed to an heir.

One of the main reasons individuals form LLCs is to limit personal liability. LLCs incur liability, rather than the individual.

For example, say an individual who owns an LLC property throws a party. A guest at the party injures him or herself. If the injured guest brings a lawsuit against the owner, the liability is absorbed by the LLC and the owner's personal assets are protected.

Another reason that individuals use LLCs is to avoid "double taxation" on property income. Instead of income being taxed at the LLC level, taxes "pass through" to the individual members' tax returns and members pay taxes only once. However, LLCs are required to pay generally higher taxes.

In order to form an LLC, members must create an operating agreement that lays out the roles and responsibilities of each member, the division of profits, and the specifics of the partnership's business operations. Members must then file Articles of Incorporation with the Secretary of State's Office.

Real Estate Syndication

Real estate syndication refers to when one or more investors combine capital funds with a party that has the expertise and time to find and develop real estate projects. This helps all of the investors including the syndicator (the party that finds the property) earn a rate of return from a property that a single investor without the expertise of a syndicator could not acquire on his or her own.

For example, assume Jerry wants to invest in real estate however has no time or experience in real estate. Tom, a real estate syndicator, approaches Jerry with an opportunity to invest in real estate by buying and flipping real estate. Tom has over ten years of experience developing and selling real estate, so Jerry agrees.

Jerry brings forward nearly a million dollars into the investment of a real estate purchase and Tom agrees to develop the real estate on behalf of both of them. In this scenario Jerry brings forth the capital, while Jerry has the expertise and knowledge to find suitable real estate investments and develop them. Jerry would get a percentage of the transaction, even without investing a dollar.

Typically, one party with real estate skills, connections, and/or expertise partners with a capital investor with access to funds. In this way, the roles in a real estate syndication are similar to those of an LLP: the syndicator (or general partner) is responsible for finding and presenting attractive real estate opportunities while the investor (or silent partner) is responsible for contributing capital. The syndicator may earn a "finder's fee" for finding a property and a percentage of the overall sold or rented price.

Syndication is one of the most common ways for individuals or corporations to become an interest holder in real property without investing money.

Another less common form of syndication is when multiple investors purchase a property together. The investor who introduces the transaction will typically be entitled to a larger percentage of the profits.

Partners in such an arrangement are typically taxed as individuals.

A real estate syndicate may be a corporation, a general partnership, LLP, or a real estate investment trust (REIT).

Real Estate Investment Trust (REIT)

A **real estate investment trust (REIT)** is a type of investment tool that give investors of all income levels the ability to combine their capital investments with other investors to purchase income-generating property or mortgages leveraged by real property.

REITs may be used to purchase real property or mortgages.

REITs enable investors to own a percentage of a property without the liability associated with buying, developing, or financing real estate. This allows inexperienced investors of minimal means to invest in an asset that traditionally increases in value over time.

A board of trustees or board of directors manages an REIT and develops the purchasing and development strategy of the company.

Most REITs are publicly owned companies, some of which are on the stock exchange. Unlike standard partnerships or other forms of property ownership, REITs typically pay investors back through dividends.

The requirements of a valid REIT are:

- Must have at least 100 investors
- A minimum of 75% of the REIT's assets must be invested into real estate (either real property and real estate mortgages)
- Must be a corporation for tax purposes
- Must pay a minimum of 90% of its income through shareholder dividends
- Five individuals cannot possess more than 50% of the REIT
- The interests of investors must be transferable shares, or a certificate