



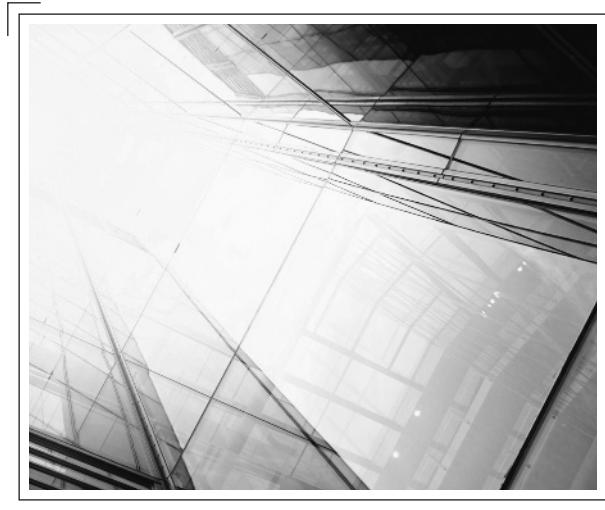
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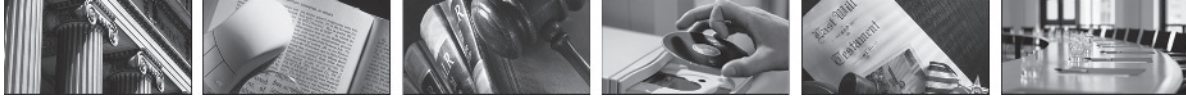
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DANIEL F. HINKEL

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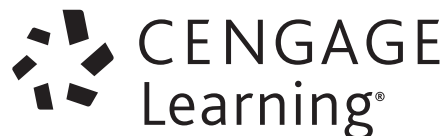
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Daniel F. Hinkel



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**Essentials of Practical Real Estate Law,
Sixth Edition**

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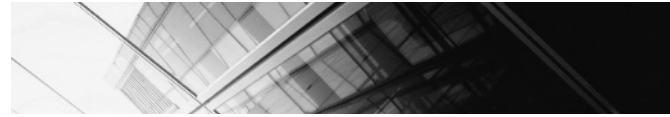
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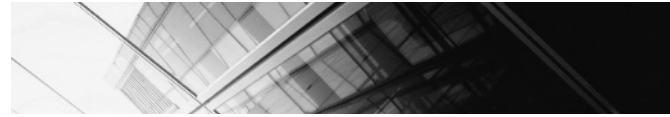
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Preface



This text was originally written as a reduced-essential version of a larger text entitled *Practical Real Estate Law* by Daniel F. Hinkel. *Practical Real Estate Law* covered every aspect of a modern real estate practice. That text, because of its detail and comprehensive coverage, totaled more than 700 pages, and some instructors teaching courses designed for six- to ten-week terms found it difficult to complete. The students who were attending the shorter courses suggested that the text be shortened and that some detail be deleted. Consequently, the editors at Cengage Learning asked me to consider a way to revise and reformat the material in *Practical Real Estate Law* to reach the various audiences. The result was *Essentials of Practical Real Estate Law*, first published in 1993.

It is time for a new edition of this book. Many things have happened since the last revision. Lawyers and their clients keep revising and updating legal forms. The duties and responsibilities of paralegals have increased and become more diversified. Our country suffered a severe real estate recession, and many new laws have been passed to assist homeowners facing foreclosure. This edition discusses these new laws.

TEXTBOOK ORGANIZATION

Each chapter gives definitions of key and important terms where they first appear in the text, and there is a comprehensive glossary at the back of the book. There is also a Self-Study Examination at the end of each chapter to reinforce the student's understanding of that chapter's material.

Based on comments and suggestions from various teachers, students, and reviewers of the fifth edition of this book, the text has been revised. Chapter 1 introduces the student to the concept of property ownership, and the various types of ownership that can exist are discussed. Chapter 2 introduces the student to the situation in which real property is owned by more than one person and discusses all the forms of concurrent ownership. Chapter 3 is a full discussion on the methods of describing real property and contains sample surveys and legal descriptions. Various encumbrances to the ownership of real property, with special emphasis on easements, are discussed in Chapter 4. In Chapter 5, basic contract law is discussed, and standard provisions found in real estate contracts are explained. Chapter 6 contains a discussion of deeds, complete with many examples and sample forms. Real estate finance with emphasis on notes and mortgages, complete with many examples and sample forms, is discussed in Chapter 7. Chapters 8 and 9 are devoted to title examinations and title insurance. Chapters 10 and 11 are devoted to real estate closings, with Chapter 10 containing a full discussion of the substantive issues of real estate closings and Chapter 11 being devoted to forms and examples of closing documents, including a sample of a residential real estate closing transaction. Chapter 12 acquaints the

student with condominiums and cooperatives. Chapter 13 includes a discussion of leases, complete with residential and commercial lease forms.

CHANGES TO THE SIXTH EDITION

Forms

All forms have been updated where needed.

Expanded Coverage

- New examples and exhibits have been added to explain some of the more difficult legal concepts.
- New material discussing conveyancing has been added to Chapter 1.
- New material discussing short sales has been added to Chapters 5 and 10.

The material discussing the recent real estate recession and the efforts being made by the federal and state governments to assist homeowners facing foreclosure and to support the market value of homes has been revised to reflect the changing legal and financial environment since the fifth edition. This material is in Chapter 7. Chapter 9 has been completely revised to discuss the 2006 ALTA title insurance forms in detail.

New material to explain alternative closing methods, such as the “virtual closing,” has been added to Chapter 10.

New self-study questions have been added.

STUDENT LEARNING FEATURES

- **Chapter objectives** open each chapter to focus students’ attention on the key concepts they will learn.
- **Checklists** are found in most chapters and include task-specific steps that students can apply to many aspects of a paralegal’s workday. For example, Chapter 5 contains a checklist for preparation and review of a commercial real estate contract, and Chapter 10 includes a checklist for a residential closing.
- **Terminology** is emphasized throughout each chapter. Key terms appear in boldface and are defined in context where they first appear. They are also listed at the end of each chapter for quick reference. Finally, a comprehensive glossary ends the text.
- A number of **Cases** have been introduced in many of the chapters to illustrate important points of law and to give students experience in reading actual cases and applying actual disputes to chapter material.
- The **Ethics** feature in each chapter takes the student into a hypothetical scenario that presents an ethical problem. The feature emphasizes the importance of professional responsibility in a law practice.
- There is a **Self-Study Examination** at the end of each chapter to help the students reinforce their understanding of the material contained in the chapter. The answers to the self-study examinations are located in the Appendix.
- **Practical Assignments** in each chapter ask the student to perform tasks that will enhance to student’s knowledge of the chapter’s contents.

INSTRUCTOR COMPANION SITE

The online Instructor Companion Site provides the following resources:



Instructor's Manual

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

- Chapter Outlines
- Teaching Ideas and Student Assignments
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Chapter | 1

Introduction to the Law of Real Property



Objectives

After reading this chapter, you should be able to:

- Distinguish between real and personal property.
- Understand the legal concept of property ownership.
- Identify the modern estates of ownership for real property.
- Understand and be able to explain the legal concept of adverse possession.
- Identify various ways of becoming an owner of real property.

“For ’tis the only thing in the world that lasts.
’Tis the only thing worth working for, fighting for, dying for.”

Margaret Mitchell, *Gone with the Wind*

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

REAL PROPERTY LAW

Laws That Govern Real Property Transactions

The law of the United States comprises two separate systems of law: federal law and state law. Federal law applies uniformly throughout the country, whereas state law, because of differences in local history and conditions, varies from state to state. The law of real property in general is governed by state law and therefore is somewhat different in each of the various states. The law of the state in which the real property is located

usually governs. For example, if a New York couple owns a beach house on Cape Cod, the laws of the Commonwealth of Massachusetts control the couple's ownership rights to the property and the form and content of the various legal documents and procedures involved in the sale, leasing, financing, inheritance, and so on of the property.

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

Real Property versus Personal Property

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

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

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

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

Tangible Personal Property

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

Intangible Personal Property

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

Fixtures

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

A **fixture** is an article of personal property, such as an air-conditioning unit or a dishwasher, that has been installed in or attached to land or a building and, on attachment, is regarded by the law as part of the real property. The term *trade fixtures* is used to describe

fixture

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

shelving, counters, and other ornamental items installed on property by a tenant to assist the tenant in the conduct of its business. Most states permit a tenant to remove trade fixtures during the term of the lease and at the expiration of the lease. The removal may be conditional upon the tenant repairing any damage to the property that results from the removal of the trade fixtures.

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

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

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

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

CASE

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

WRIGHT, Presiding Judge

Ruby and Louis Brown were divorced by decree of the Lauderdale County Circuit Court in November 1983. As part of this decree, the husband was awarded the family home, "including all fixtures and realty appurtenant thereto." The wife was awarded all furniture in the home with the exception of the master bedroom suite, the dining room furniture,

kitchen appliances, and one-half of all silver, silverware, and other kitchenware, which was awarded to the husband. The wife was to remove all of the furniture and personal property awarded to her prior to relinquishing possession of the home. In February 1984, the husband filed a petition with the circuit court asking that the wife be found to be in contempt for violating the property settlement provisions of the

(continued)

divorce decree. In May 1985, the court issued an order which specifically stated:

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

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

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

[1] It is settled that a trial court can assess damages in favor of an aggrieved party in civil contempt proceedings. *Lightsey v. Kensington Mortgage & Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975); *Smith v. Smith*, 365 So. 2d 8 (Ala. Civ. App. 1978). It is also settled that "a party who has been found in contempt and who has been assessed compensatory damages should seek review of the finding of contempt by means of extraordinary writ (certiorari or habeas corpus), and should seek review of the question of the assessed amount of com-

pensatory damages by appeal." *Smith, supra*. The wife has not appealed the \$2,900 award. However, out of deference to the parties, we note that even if the wife had not admitted her contempt, there is ample evidence in the record to support the trial judge's determination that the bookcase and china cabinets were fixtures appurtenant to the house.

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

(1) Actual annexation to the realty or to something appurtenant thereto; (2) Appropriateness to the use or purposes of that part of the realty with which it is connected; (3) The intention of the party making the annexation of making permanent attachment to the freehold. This intention of the party making the annexation is inferred; (a) From the nature of the articles annexed; (b) The relation of the party making the annexation; (c) The structure and mode of annexation; (d) The purposes and uses for which the annexation has been made. *Id.* (quoting *Langston v. State*, 96 Ala. 44, 11 So. 334 (1891)).

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

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

AFFIRMED.
BRADLEY and HOLMES, JJ., concur.

Physical Elements of Real Property

real property

Real property is land and things such as buildings that are permanently attached to the land.

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

Airspace

The ability of humans to fly has reduced ownership from the surface to the stars, and there is now public domain airspace occurring at certain elevations above the surface of the earth. An owner of real property still owns the private airspace above the surface of the land. This

private airspace is of a sufficient elevation to permit the construction of the tallest buildings and other structures found throughout the world.

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

Mineral Rights

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

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

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

Water Rights

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

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

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

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

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

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

In order to obtain rights to water, a landowner must prove that he or she has appropriated the water. Generally, this requires an intentional act by the landowner to use the

riparian rights

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

appropriation

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

water for a beneficial use. The intentional act is usually the construction of a channel or reservoir to move the water from its natural source and the storage or usage of the water on the landowner's property. The landowner must use the diverted water for a beneficial use. What is a "beneficial use" is usually determined by state law. Generally, domestic use such as drinking water, agricultural use such as irrigation, and water used in manufacturing are considered beneficial uses.

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

Ownership of Real Property

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

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

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

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

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

Possession

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

METHODS OF ACQUIRING OWNERSHIP TO REAL PROPERTY

The main methods of acquiring ownership to real property are inheritance, devise, gift, sale, and adverse possession.

inheritance

Ability to acquire ownership to real property because of one's kinship to a deceased property owner who dies without a will.

devise

Transfer of real property by means of a last will and testament.

will

Legal document by which a person disposes of his property. A will takes effect on the death of the maker of the will.

conveyance

The transfer of title of some or all of the ownership rights to real property from one person to another. A conveyance is usually by instrument such as a deed, lease, or mortgage.

Inheritance and Devise

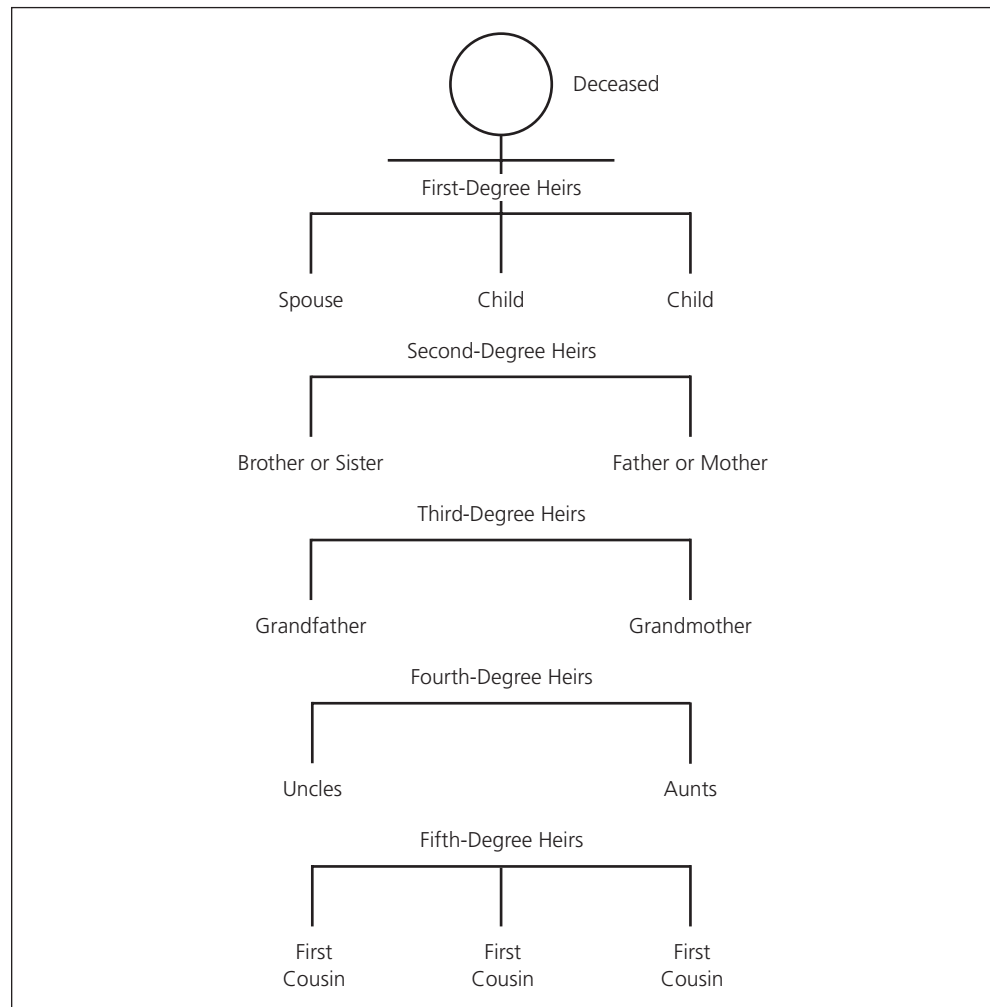
The first two methods, **inheritance** and **devise**, are ownership transfers that take place on the death of the previous owner. Inheritance, or descent, as it is also known, is the passage of title and ownership of real property from one who dies intestate (without a will) to people whom the law designates, because of blood or marriage, as the owner's heirs. Each state has its own inheritance statute, and the statutes vary slightly from state to state. The law of the state where the property is located decides who is to inherit.

One example of a schedule of kinship relating to the deceased is shown as Exhibit 1-1. The closest group of heirs to the deceased property owner will inherit all the property. For example, in Exhibit 1-1, if the deceased property owner is survived by a spouse and children, the spouse and children will inherit all the property. If the deceased property owner is not survived by a spouse or children, the deceased property owner's surviving parents and/or siblings, if any, will inherit the property.

The acquisition of ownership by devise is the passage of title of real property from one who dies *with* a will. A **will** is a legal document prepared during the property owner's lifetime that indicates where and how the owner's property is to be disposed of at the owner's death. The **conveyance** of real property in a will is referred to as a devise. The will must comply with the state law governing wills. Again, the state law where the real property is located controls.

EXHIBIT 1-1

Schedule of Kinship
Relationship to a Decedent



Gift

Ownership to real property can be obtained by a gift. Once the gift is complete—and with real property this would be on the proper execution and delivery of a **deed** to the property—the gift is irrevocable. The promise to make a gift, however, usually is revocable. An exception to the revocation of gifts rule is in the event that the recipient of the gift has detrimentally relied on the belief that the gift would be made. The injured party may recover costs for the detrimental reliance. For example, you purchase insurance for a home based on someone's promise to give you that home. If the gift is not made, you would be able to recover the cost of the insurance.

deed

Written document that transfers ownership of real property from one person to another.

Contract and Sale

Property ownership can be obtained by buying the property. This is the transaction that involves most real estate paralegals and attorneys. A complete discussion of contracts and the sale of property is found in Chapter 5.

Adverse Possession

Possession of real property is given substantial legal protection. Even a party in unlawful possession of the real property has the right to exclude others from possession, except for the true owner. Possession, in and of itself, also engenders, through time, the inference that the possession began lawfully. The longer the continued possession, the stronger this inference. If possession is maintained long enough, it is possible that the person in possession becomes the owner through a process known as **adverse possession**. Adverse possession operates as a statute of limitations, in the sense that it precludes all others from contesting the title of the possessor.

adverse possession

Method of acquiring ownership to real property by possession for a statutory time period.

The rules on adverse possession vary from state to state. Typically, the possessor must possess the property for a period ranging from 7 to 20 years. The possession also must be adverse, which means without the consent or permission of the true owner. In some states, it is necessary that an adverse possessor have knowledge that he is in adverse possession of the property. An example of how this works follows.

Assume that property owners Andy and Barbara are neighbors and that Andy has built a fence on what Andy believes to be the property line, but in fact, the fence encroaches 1 foot onto Barbara's property. Andy is unaware of this encroachment and maintains the fence for 20 years. In a state that requires Andy to have knowledge that he is an adverse possessor, Andy, even though he has satisfied the statute of limitations for adverse possession, would not become the owner of this additional 1 foot of Barbara's property.

In addition to the possession being adverse, it must be public, continuous, peaceful, exclusive, and uninterrupted.

Tacking of possession is permitted if there is some contractual or blood relationship between the two adverse possessors. Tacking is the adding of possession periods by different adverse possessors. For example, adverse possessor Andy enters into possession of the property, keeps it for seven years, and then sells it to adverse possessor Barbara. Adverse possessor Barbara, in a state that requires 20 years of adverse possession, could tack or add onto adverse possessor Andy's period of possession because of the contractual relationship between the two. Then Barbara would have to stay in possession only 13 years to obtain ownership.

tacking

The addition of possession periods by different adverse possessors.

The meaning of possession for purposes of adverse possession varies from state to state. *Possession*, in a strict sense, means occupancy and use of the property. Acts of possession include residing in improvements located on the property; enclosing property by