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REAL ESTATE LAW FOR PARALEGALS



McGraw-Hill's Real Estate Law for Paralegals

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McGraw Hill's Real Estate Law for Paralegals

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Preface

Real estate law in the United States has a long history, going all the way back to British common law. *McGraw-Hill's Real Estate Law for Paralegals* tracks the evolution of real estate law principles leading up to the current state of real property rights, and also explains the various ownership statutes that exist today.

This text was designed to help prepare students for the practical world of real estate, setting forth the differences in real property (real estate) and personal property. Included in the text are numerous subject areas, ranging from modern-day condominiums, cooperatives, and timeshares to regulations, encumbrances, interests in land, and landlord—tenant relations. This text also introduces contracts, deeds, mortgages, financing, and real estate closings. The variety of subject areas introduces the student to a practical array of topics necessary for success in the real world practice of real estate, while not overwhelming the student with dry, dull, textual material.

McGraw-Hill's Real Estate Law for Paralegals contains twelve chapters along with two appendices. To provide a hands-on approach to learning, each chapter has a recent, applicable case opinion, along with many ancillaries, including charts, tables, figures, and exercises to aid in the student's development.

TEXT DESIGN

Pedagogy

This text has numerous features that take advantage of the varying learning styles that students apply to gain knowledge. Based on the notion that students who apply their newly acquired knowledge often retain it much better than those who do not, this text requires students to apply the knowledge they have acquired. Chapters are designed in a manner that assures the student will have the opportunity to learn the appropriate legal concepts, master the necessary vocabulary, develop legal reasoning skills, and demonstrate knowledge of the material. Each chapter contains the following features:

- **Spot the Issue:** A fact pattern in which the student is asked to “spot” the issue(s) present
- **Legal Research Maxim:** A general statement of a principle in law
- **Case Fact Pattern:** A simple fact pattern including a story and its outcome
- **Research This:** A hands-on assignment designed to develop the student's research skills
- **Eye on Ethics:** A presentation of ethical issue(s) related to one or more subjects in the chapter
- **You Be the Judge:** Presentation of a fact pattern and issue with a request that the student “be the judge” and decide on the issue
- **Surf's Up:** Hands-on research presenting the student with numerous Web sites through which surf and gather material
- **Practice Tip:** A tip alerting the student to nuance of law or caveat to a rule

- **Case in Point:** A significant real-life case, included illustrate and expand on the topics discussed in the chapter
- **Portfolio Assignment:** An assignment with which the student can begin, create, and add to a portfolio
- **Vocabulary Builder:** A crossword puzzle for the student to complete, using vocabulary words found in the chapter

The text is written in clear language that engages the student, keeps the reader's interest, and presents information in a variety of styles

OTHER LEARNING AND TEACHING RESOURCES

Supplements

The **Online Learning Center (OLC)** is a Web site that follows the text chapter by chapter. OLC content is ancillary and supplementary germane to the textbook—as students read the book, they can go online to review material or link to relevant Web sites. Students and instructors can access the Web sites for each of the McGraw-Hill paralegal texts from the main page of the Paralegal Super Site. Each OLC has a similar organization. An Information Center features an overview of the text, background on the author, and the Preface and Table of Contents from the book. Instructors can access the instructor's manual and PowerPoint presentations, and Test Bank. Students see the Key Terms list from the text as flashcards, as well as additional quizzes and exercises.

Acknowledgments

Special thanks needs to be given to the reviewers who provided invaluable feedback during the steps to completion of the final draft.

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A Guided Tour

McGraw-Hill's Real Estate Law for Paralegals presents students with a clear, easy-to-understand, and exciting text in which they will learn about real property, personal property, and all of the facets inherent in real estate. The text includes a chapter dedicated solely to real estate closings. The students have access to numerous exercises, cases, and hands-on learning assignments (including sample forms) covering topics ranging from “Regulations and Encumbrances” to “Recording Statutes and Examinations.” The pedagogy of the book applies three main goals:

- Learning outcomes (critical thinking, vocabulary building, skill development, issues analysis, writing practice).
- Relevance of topics without sacrificing theory (ethical challenges, current law practices, technology application).
- Practical application (real-world exercises, practical advice, portfolio creation).

CHAPTER OBJECTIVES

Upon completion of this chapter, you will be able to:

- Identify the concept of property ownership.
- Understand the difference between real property and personal property.
- Discuss the methods of property ownership.
- Identify the sources of real property law.

Throughout history, property ownership rights and control have been very important. Tribes conquered other tribes for the right to control property. Kings fought with other kings for the right to control property. Countries have gone to war for land. For many people, even the American dream centers on the thought of one day owning their own property. Real property has been and still is a valued commodity in almost all societies. The law of real property involves and regulates almost every aspect of the use and ownership of this commodity. This chapter provides an introduction to the law of real property.

Chapter Objectives

Introduce the concepts students should understand after reading each chapter and provide brief summaries describing the material to be covered.

Spot the Issue

Is a hands-on exercise that presents students with a fact pattern and asks them to apply concepts learned in the chapter to “spot” the issues present.



SPOT THE ISSUE

Rodney owns a condominium at Main Place Condominiums. Recently, the board has sent notice that certain regulations have been adopted and added to the rules and regulations of the condominium. These regulations include that an owner cannot have a large dog; trash cans cannot be kept outside of the individual garage units; guests cannot park on the curbs next to the roadways; and owners cannot paint the inside of their condominiums the color red. Which regulation would probably not be within the scope of the board's authority?

Legal Research Maxim

Highlights some of the major principles in law covered in each chapter.



LEGAL RESEARCH MAXIM

If the grantee is deceased, the deed is void. Other examples in which a deed is void may include: a deceased grantor, deceased heirs of a living person, or a corporation not in existence. However, there are times when a court will reform a deed that would otherwise be void in order to carry out the grantor's intent. See *Haney's Chapel United Methodist Church v. United Methodist Church*, 716 So. 2d 1156 (Ala.1998).

Case Fact Pattern

Describes simple fact patterns and asks students to apply concepts learned from the chapter to understand the legal issues at hand.



CASE FACT PATTERN

John and Bob are best friends who both love horses. They decide to purchase a local ranch and raise horses for sale. Bob and John want to have an equal interest in the ranch. They take title to the property as tenants in common, with each having an equal interest. A few years later, John is

killed in a car accident. John's will indicates that his property interest in the ranch is to be left to his grown son. Because John and Bob took title as tenants in common, there exists no right of survivorship between them.



RESEARCH THIS

Research RESPA to ascertain in more detail what types of transactions are subject to RESPA, as well as who is obligated to perform

certain types of duties. How does RESPA protect a consumer financially?

Research This

Gives students the opportunity to investigate issues more thoroughly through hands-on assignments designed to develop critical research skills.



EYE ON ETHICS

It is always important when dealing with real property transactions to check the chain of title carefully in order to ensure that no liens, covenants, or encumbrances are attached to the property of which either party may be unaware. A law office that fails to thoroughly investigate the chain of title could be held liable

for malpractice if problems arise from that failure. There are third-party title companies that will, for a fee, examine the chain of title on a property. In addition, the purchase of title insurance helps to provide a source of redress to a party should issues with title be uncovered after the transaction.

Eye on Ethics

Recognizes the importance of bringing ethics to the forefront of paralegal education. It raises ethical issues facing paralegals and attorneys in today's legal environment.



PRACTICE TIP

Whether buying or selling, parties involved in real estate transactions typically employ brokers. Brokers help prospective buyers find a suitable property, help prospective sellers sell their property, and help parties with all the paperwork involved in a real estate transaction. Most states require that an individual take classes and then pass the state's licensing exam in order to become a licensed real estate broker.

Practice Tip

Presents different nuances of the law and caveats to rules to alert student to the intricacies of the law.

Surf's Up

Presents students with numerous and varied Web sites to “surf” and gather additional information on the important legal concepts and issues discussed in each chapter.




SURF'S UP

To learn more about real estate financing, the following Web sites are helpful:

| | |
|-----------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| http://www.lendny.com/nymortgagebanker.htm | http://www.fanniema.com |
| http://mortgage-x.com | http://www.ginniema.com |
| | http://www.freddiemac.com |

You Be the Judge

Places students in the judge's seat. Students are presented with facts from a fictitious case and they use concepts learned from the chapter to make a legal determination.



YOU BE THE JUDGE

Andrew moves into a house next to a college campus, and rents it from the John the landlord for a period of one year, using a written lease. Loud parties with loud music begin to emanate from the Rock 'em Sock 'em fraternity house, located adjacent to the house leased by Andrew. The loud music is heard only on Saturdays and Sundays from 1:00 p.m. until 5:00 p.m. Does Andrew have any grounds to bring a claim against the John for breach of quiet enjoyment? Consider all possibilities in coming to your decision, based on the facts given.

Chapter Summary

Provides a comprehensive review of the key concepts presented in the chapter.

Summary

The Real Estate Procedures Act (RESPA) is a federal statute that governs all federally guaranteed mortgage loans. RESPA was passed in order to redesign the real estate closing process and protect consumers from the high closing and settlement costs associated with the purchase of property. According to RESPA, all settlement or closing costs must be disclosed to the consumer in advance of the closing. In addition, RESPA eliminates the kickbacks and referral fees that previously plagued the unsuspecting purchasers of real property. RESPA also dictates the maximum amount of funds that may be required to be placed into escrow accounts in order to pay for recurring charges or assessments.

The Truth-in-Lending Act is another act passed by the United States Congress with the intent of protecting the consumer. It protects consumers from inaccurate and unfair billing practices. It also provides for the disclosure of credit terms in a form that is easily read by consumers, so that they can compare the rates from different lenders for a variety of terms.

The Truth-in-Lending Act provides for creditors to make certain disclosures to the consumer or borrower. It affects real estate transactions that are not subject to RESPA. Under the Truth-in-Lending Act, all disclosures must be made prior to the time that the borrower becomes contractually obligated to make payments on the loan.

The Truth-in-Lending Act also provides consumers with the right of rescission. Usually, the right of rescission gives a consumer anywhere from three to five days to change her mind about having contracted for the loan, and allows the borrower to void the transaction without incurring any penalties.

Creditors are required to disclose their interest rates on any loan transaction so that consumers can make informed transactions. The annual percentage rate being assessed on the loan must be disclosed. On some loans the interest rate is set and fixed and does not vary for the life of the loan. For other loans, the interest rate will fluctuate up or down, depending on a predetermined variable to which the interest rate is tied.

Variable interest rates are known as adjustable interest rates and are tied to a particular interest rate index. These rates are usually known as adjustable rate mortgages (ARM). The interest rate index to which these types of loans are tied can be a treasury bill or a prime lending rate. As the index increases or decreases

| | | Key Terms |
|-------------------------------|-----------------------|-----------|
| Caption | Habendum clause | |
| Covenant against encumbrances | Indenture | |
| Covenant for quiet enjoyment | Law of equity | |
| Covenant of further assurance | Limited warranty deed | |
| Covenant of warranty | Preamble | |
| Covenants of title | Quitclaim deed | |
| Deed | Seal | |
| Deed poll | Seisin | |
| Doctrine of merger | Testimonium | |
| General warranty deed | Void | |
| Grantee | Voidable | |
| Grantor | | |


Key Terms

Used throughout the chapters are defined in the margin and provided as a list at the end of each chapter. A common set of definitions is used consistently across the McGraw-Hill paralegal titles.

| Review Questions | |
|------------------|----------------------------------------------------------------------------|
| | 1. What is the difference between a conventional loan and an insured loan? |
| | 2. What is a loan-to-value ratio, and why is it important? |
| | 3. What is a VA loan? |
| | 4. List six indexes upon which an adjustable-rate mortgage might be based. |
| | 5. What is a fixed-rate mortgage? |
| | 6. How do a fixed-rate mortgage and an adjustable-rate mortgage differ? |
| | 7. What is a construction loan? |
| | 8. What is a permanent loan? |
| | 9. What is the secondary mortgage market? |
| | 10. What is a primary lender? |

Review Questions and Exercises

Emphasize critical thinking and problem-solving skills as they relate to real estate law. The Review Questions focus on more specific legal concepts learned in each chapter. The Exercises introduce hypothetical situations and ask students to determine the correct answers using knowledge gained from studying topics in each chapter.



PORTFOLIO ASSIGNMENT

The first title insurance company was chartered in 1876. Read and brief *Watson v. Muirhead*, 57 Pa. 161 (1868), the case largely responsible for the development of title insurance.

Portfolio Assignments

Ask students to use the skills mastered in each chapter to reflect on major legal issues and create documents that become part of the paralegal's portfolio of legal research. The Portfolio Assignments are useful as both reference tools and as samples of work product.

Vocabulary Builders

Provides a crossword puzzle in each chapter that uses the key terms and definitions from that chapter to help students become more proficient with legal terminology.

Vocabulary Builders

Instructions
Use the key terms from this chapter to fill in the answers to the crossword puzzle.
NOTE: When the answer is more than one word, leave a blank space between words.

ACROSS

4. a payment of money or something of value to a person for the purpose of obtaining business from that person.

11. the actual cost of borrowing money, expressed in the form of annual interest rate to make it easy for one to compare the cost of borrowing money among several lenders.

12. the state or states that have the authority to regulate all federal

5. a mortgage format under which the lender is permitted to adjust the mortgage interest rate from time to time in accordance with fluctuations in some external index.

6. a written agreement by which one person assigns or transfers his right to or interest in goods and personal chattels to another.

7. a federal Regulation passed to protect consumers from

Case in Point

At the end of each chapter exposes students to real-world examples and issues through a case chosen to expand on key topics discussed in the chapter.

CASE IN POINT

United States District Court,
D. Hawaii.

Samuel Laureano VIERNES and Imelda Legaspi Viernes, Plaintiffs,
v.
EXECUTIVE MORTGAGE, INC; Argent Mortgage Company, LLC; Ameriquest Mortgage Company; and Lydia Pascual, as an individual, Defendants.

372 F.Supp.2d 576
No. CIV. 04-00212ACKLEK.
Oct. 13, 2004.

BACKGROUND

Mortgagors brought action against mortgage broker, broker's officer, and other defendants, alleging violation of the federal Consumer Credit Protection Act, fraud, intentional infliction of emotional distress, deceptive and unfair trade practices, and breach of fiduciary duty. Mortgage broker defendants moved for summary judgment on federal claim and for **dismissal of state law claims**.

Holdings: The District Court, Kay, J., held that:

(1) mortgage broker and officer were not "creditors" under Truth-in-Lending Act (TILA) and Regulation Z, and

(2) values of economy, convenience, and fairness all favored court's retention of jurisdiction over state law claims against mortgage broker defendants.

Summary judgment motion granted; **dismissal motion denied**.

KAY, District Judge

Plaintiffs filed an Opposition. On October 1, 2004, Defendants filed a Reply to the Opposition. Plaintiffs and Defendants also filed concise statements of fact. On September 24, 2004, Defendants Argent Mortgage and Ameriquest Mortgage filed a statement of no position as to the Motion. A hearing was held on October 12, 2004.

Defendants Argent Mortgage and Ameriquest Mortgage take "no position" on the motion for summary judgment and dismissal. Argent Mortgage and Ameriquest Mortgage stated at the hearing on October 12, 2004 that they have reached a settlement with Plaintiffs but that Plaintiffs have attempted to repudiate the agreement. These Defendants also stated that they intend to file a motion to enforce the settlement agreement. Should it be determined that there is no settlement, these Defendants have indicated that they will move to assert cross-claims for indemnity and contribution against Executive Mortgage.

[Text omitted]

DISCUSSION

I. Motion for Summary Judgment on TILA Issues

The Truth-in-Lending Act ("TILA"), which is contained in Title I of the Consumer Credit Protection Act, as amended (15 U.S.C. § 1601, et seq.), is intended to assure a meaningful disclosure of credit terms so that consumers can compare more readily various credit terms and avoid the use of unfair use of

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Chapter 1

Introduction to Real Property Law

CHAPTER OBJECTIVES

Upon completion of this chapter, you will be able to:

- Identify the concept of property ownership.
- Understand the difference between real property and personal property.
- Discuss the methods of property ownership.
- Identify the sources of real property law.

Throughout history, property ownership rights and control have been very important. Tribes conquered other tribes for the right to control property. Kings fought with other kings for the right to control property. Countries have gone to war for land. For many people, even the American dream centers on the thought of one day owning their own property. Real property has been and still is a valued commodity in almost all societies. The law of real property involves and regulates almost every aspect of the use and ownership of this commodity. This chapter provides an introduction to the law of real property.

GENERAL ASPECTS OF PROPERTY

The term “**property**” has no real legal meaning. It is an ambiguous term that is used by nonprofessionals to describe a variety of physical items, either tangible or intangible. Ownership describes the relationship between an individual and his property. A right of ownership simply describes a person’s right to particular property exclusive of others’ rights to the same property. Ownership to property boils down to a person’s or an entity’s relationship to that property that enables them to control the property with respect to other people or entities. People do not own things; they have a right to possess and control them. The law of property involves a collection of rights of ownership that are typically associated with property. Among those rights is the right to possession. The law associated with real property involves three elements that involve the control of property through ownership. These elements are:

- Exclusivity—the ability to exclude another person from ownership, possession, or use
- Universality—ownership of everything by the state. The state is the origin of all ownership rights.

property

Rights a person may own or be entitled to own, including personal and real property.

FIGURE 1.1**Ownership Rights**

Following is a list of some of the rights that are associated with ownership of property and the effect that these rights may have on property.

| Right | Effect on Property |
|----------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|
| Sell | Subject to provisions of an easement or covenant |
| Mortgage | May have an adverse effect if an easement or covenant causes an inability to obtain maximum financing on favorable terms |
| Bequeath | Could be subject to the provisions of any easement or covenant |
| Lease | Enables someone other than the owner to have possession and use of the property for a period of time as defined in the lease |
| Use and Occupy | Subject to provisions of an easement or covenant |
| Grade, Fill, or Excavate | Could be prohibited without governmental permission unless minimal effect on property |
| Install New Permanent Roads or Widen Existing Ones | Often prohibited without governmental permission |
| Occupy/Use Existing Improvements | Often no restrictions |
| Construct New Improvements | Major effect if the property has development potential. Governmental permission usually required. |
| Subdivide and Develop | Sometimes prohibited or may be limited to large tracts, such as 500 acres. Governmental permission usually required. |
| Farm | Sometimes prohibited, depending on the type and quality of the soil on the property |

- **Transferability**—the ability, recognized by the legal system, to transfer someone’s rights in property to someone else

See Figure 1.1 for a description of ownership rights.

All three of these elements associated with ownership rights must be present in a legal system regarding property in order for it to function properly. These elements define the various relationships that exist between people and property. As stated previously, a person is said to hold an interest, or right, in property. The **interest in property** is defined as any right that the law will protect against being violated by others. Interests that are considered inherent in real property are often referred to as a **bundle of rights**. This term emphasizes the fact that property law is not made up of one simple concept of rights, but rather encompasses many rights that the law associates with a person’s relationship with property. The law of property concerns a person’s ability to possess, transfer, and have access to her property. The theory of a bundle of rights states that ownership of real property embraces a great many rights, such as the right to occupancy; the right to use; the right to sell, bequeath, or transfer; and the right to benefits derived from the occupancy and use of the property. The bundle of rights theory of ownership is often compared to a bundle of sticks. Each stick in the bundle represents a distinct and separate right associated with ownership of the property. These rights may include the rights to use the property, to sell it, to lease it, to enter it, to give it away, and to choose to exercise more than one or none of these rights. Although subject to certain limitations and restrictions, private enjoyment of these rights is guaranteed by law under the United States Constitution.

Two distinct rights that occur throughout the law of property are those of **possession** and **title**. Possession occurs once a person has dominion and control over the property. Title is the formal right of ownership. Title can be held in the name of one person, more than one person, or a legal entity. Title is the legal term that indicates that a person or entity has rights to real property. Most people associate the possession of title as evidence of ownership in real property. Title is typically what the nonprofessional thinks of as ownership.

interest in property

The right that someone may have in specific property.

bundle of rights

The concept of ownership that embraces certain rights of ownership, such as possession, control, use, enjoyment, and disposition.

possession

Having control over a thing with the intent to have and to exercise such control.

title

The right to or ownership in land.

Possession is considered occupation of the land, and that occupation must be demonstrated by visible acts, such as enclosing the property, cultivating crops on the property, constructing structures, and other visible signs of possession. The right of possession is a **right of exclusivity**. The property owner has the right to exclude others from his land.

A landowner also has the right to use her land for profit or pleasure, so long as she does so within the boundaries of the law. An owner of property has the right to dispose of her ownership of the property. The **power of disposition** can occur when the owner sells or leases her property, or it may take place at her death by inheritance or will should she choose to leave her rights in her property to another person or persons as beneficiaries. The law favors the free right to transfer ownership in property. The law will defend the right to transfer ownership in property so long as transfer does not interfere with some important public purpose or private right.

Private property rights are subject to regulation by federal, state, and local governments. These governmental entities have the right to tax, regulate the use of, and take private property for public use.

right of exclusivity
The right to exclude all others from the owner's property.

power of disposition
the ability of an owner to transfer the care and possession of her property to another.

PERSONAL PROPERTY VERSUS REAL PROPERTY

The law recognizes two classifications of property: real and personal. **Real property** relates to land and those things that are more or less permanently attached to the land, such as homes, buildings, and trees. Real property is land, plants growing on the land, and structures that are permanently affixed to the land, as well as mineral deposits that are contained below the land. Real property is not movable. **Personal property** is all property that is not classified as real property. Personal property refers to all other things, such as cars, furniture, stocks, and tools. Personal property is property that is movable. (See Figure 1.2.)

Personal property is property that is movable, transferable, and limited in its duration. It exists independent of its location. Personal property is categorized into two

real property
Land and all property permanently attached to it, such as buildings.

personal property
Movable or intangible thing not attached to real property.

| Item | Real Property | Personal Property |
|--------------------------------------|---------------|------------------------------------|
| Land | YES | |
| Anything Permanently Affixed to Land | | |
| • Bushes | YES | |
| • Trees | | |
| • Houses | | |
| • Buildings | | |
| • Mineral deposits | | |
| Movable items | | YES |
| • Lamps | | |
| • Cars | | |
| • Washing machines | | |
| • Stock certificates | | |
| Fixtures | YES | |
| • May "look" like personal property | | |
| Includes: | | |
| ✓ Wallpaper | | |
| ✓ Pipes in home | | |
| ✓ Central air conditioning | YES | (Air conditioning—window unit) YES |
| Tangible and Intangible Property | | YES |

FIGURE 1.2
Differences between Real Property and Personal Property

tangible property

Personal property that can be held or touched, such as furniture or jewelry.

intangible property

Personal property that has no physical presence but is represented by a certificate or some other instrument, such as stocks or trademarks.

gift

Bestowing a benefit without any expectation on the part of the giver to receive something in return and the absence of any obligation on the part of the receiver to do anything in return.

bailment

The delivery of personal property from one person to another to be held temporarily.

fixture

Personal property that has become permanently attached or associated with the real property.

**SPOT THE ISSUE**

You are going on a trip for a week and you want your dog to be cared for while you are gone. You take the dog to the kennel for it to be cared for in your absence. Is your dog considered property? If so, what type of property? While the dog is in the kennel, what rights to the dog have been transferred to the kennel and by what means has this occurred?

types: tangible and intangible. **Tangible property** can take the form of goods or tangible items of value. Examples of tangible personal property are cars, jewelry, and MP3 players. **Intangible property** is an item that represents something of value. For example, a stock certificate in and of itself may have little value; however, it represents ownership of a share or shares of stock that may be valuable.

Rights to personal property can be transferred. Personal property can be transferred as a **gift** from one person to another. For example, in order to celebrate Martha's graduation from her paralegal program, Martha's grandmother gives her a briefcase. The gift of the briefcase to Martha by her grandmother effectuates a transfer of the property from the grandmother to Martha. A gift of personal property usually transfers possession, ownership, and use of that property. Property can also be transferred by **bailment**. A bailment is the transfer of possession and sometimes the use of a property from one person to another. The laws that govern personal property are expansive and outside the scope of the discussion of this chapter.

Fixtures are items that are attached to the property. While a fixture may resemble personal property, once it is affixed to the land in some manner, it is considered part of the real property. When ownership to the real property is transferred, the fixture is transferred with it. Some of the methods for determining if an item is to be considered a fixture are these:

- The way or method that it is attached to the real property. Is the property embedded into the ground, or does it sit on top of the property?
- How the item is adapted without consideration of the real property. For example, an in-ground pool cannot be adapted outside the scope of the property it is attached to. However, an above-ground pool can be moved to and exist outside the real property, so it is considered to be personal property.
- The intent of the person who affixed the property to the land
- The existence of an agreement that determines the nature of the property

**LEGAL RESEARCH MAXIM**

When dealing with issues of real property and the transfer of rights, it is important to determine which items on the property are considered real property and which are personal property. If the determination is not made, items that are someone's personal property may inadvertently be transferred during a real property transaction.

CASE FACT PATTERN

John makes furniture for a living. John's tools are an integral part of John's business. John uses a skill saw for making his furniture; it is one of his most important tools. In order to be able to build furniture from his home, John built a workshop in his backyard to house the tools of his trade and to provide a workspace. When building the workshop, John affixed the

skill saw to the floor of the workshop with cement so that it would be stable while he worked. Now, John has decided to sell his home and move to another town. What type of property is the skill saw? Will the skill saw be considered personal or real property? Why?

As hinted at above, real property also includes everything beneath the surface of the earth as well as in the air space above the land. An owner of real property typically owns the minerals that exist beneath the surface of the land, such as oil, gas, coal, etc. An owner can also sell the mineral rights separately from the surface of the land, or he can lease them to a company that has the ability to extract them. Usually, the owner will receive royalty payments from the mineral lease. Also, an owner of real property can sell the surface of the land and still maintain the rights to the minerals contained beneath the surface.

The owner of real property also owns the air space above the surface of the land. Air space can be considered a valuable asset if it is located in the center of a city, or it can be valuable because of the views that are seen from the land. Many cities have passed laws that protect an owner's airspace by preventing other owners of real property from planting plants or erecting buildings that might infringe on someone's view from his property.

Trees, plants, and other things that grow in the soil may be considered a part of the real property. Annual crops produced by labor, such as wheat, corn, and soybeans, are considered personal property, as they must be cultivated every year and are not indigenous to the real property. Crops are considered a commodity and are traded on the stock exchange as such. Therefore, they are considered personal property as opposed to real property.

In no jurisdiction can someone own water. A person can own rights to water, but she cannot own the water. A real property owner also has certain rights to water that is located above and below the property. In addition, an owner has certain rights to water that runs through her property. The source of the water determines the rights that a landowner possesses to use that water.

The source of the water dictates to a certain extent what rights an owner of property can claim to the water that is associated with her property. Water is normally categorized into the following areas with the following uses associated with it:

- **Groundwater**—water that is located beneath the surface of the land. Groundwater can be created by streams that flow underground or by rainwater that collects in pools beneath the surface of the property. An owner of property has the right to utilize groundwater located beneath her property in any way that she chooses, provided that the owner does not cause the groundwater to be diverted so that it harms an adjacent or adjoining property.
- **Ocean and lakefront water**—water that borders property. Examples are the ocean, lakes, and ponds. An owner of property that borders a body of water has the right to have access to the body of water. The right to access to a body of water that borders property is known as a **littoral right**.
- **Surface water**. An owner has the right to use surface water in any manner that she wishes, provided that she does not alter the natural flow of the water or cause damage to another property due to her use. For example, suppose that a landowner's property sits at the base of a hill. When it rains, the runoff of rainwater floods the landowner's barn. The landowner decides to divert the runoff away from her barn. The diversion of the water causes the property below the landowner's property to flood. The landowner is not permitted to divert the water so as to cause her neighbor's property to flood. However, if the landowner decided to reclaim the runoff and use it for watering her gardens, this use would be permitted.
- **Riparian rights**—the right of a property owner to the beneficial use of water from streams, rivers, and natural lakes. These bodies of water are owned by the government and not by individual landowners. However, all owners of properties that adjoin these waterways have equal right to the beneficial use of that water. An

littoral right

Use and enjoyment of water rights concerning properties abutting an ocean, sea, or lake rather than a river or stream.

riparian right

The right of every person through whose land a natural watercourse runs to benefit of water as it passes through the person's land, for all useful purposes to which it may be applied.

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