A PLUS REAL ESTATE SCHOOL

REAL ESTATE LAW LESSON ONE

OWNERSHIP RIGHTS

STUDY CHAPTER 7 IN THE REAL ESTATE MANUAL ALONG WITH THIS LESSON
Bundle of rights—An ownership concept describing all those legal rights that attach to the ownership of real property, including the right to control, use, possess, encumber, exclude, and dispose (sell, lease, or will), and enjoy the property. Property is a thing or things owned—it is ownership. It may be a piece of land or real estate. Property is also the legal right to control, use, possess, enjoy, encumber, exclude, and dispose of something. It includes all valuable rights and interests in land. Technically, then, property is not only the thing owned, but also the rights and interests in the thing owned. These rights include the bundle of rights.

REMEMBER: C U P E D = CONTROL USE POSSESS ENJOY DISPOSE
Property—The rights or interests a person has in a thing owned; not the thing itself, but rather the bundle of rights associated with ownership of the thing.

- **Real Property**—All land and appurtenances to the land, including buildings, structures, fixtures, fences, and improvements erected upon or affixed to the same, excluding growing crops (emblements), however. That is, ownership rights in land and its improvements.

- **Chattel**—an article of personal property.

- Chattel is an old term and comes from the word cattle. Cattle was personal property
Title—The right of ownership of something, and the physical evidence of ownership, such as a deed or bill of sale.

- **Estate**—One’s legal interest or rights in land.
- **Fee Simple**—the largest, most complete bundle of rights one can hold in land, the most complete kind of ownership.
- **Estate in severalty**—sole ownership, owned by one person.
- **Concurrent ownership**—ownership by two or more persons at the same time.
- **Deed transfers ownership of property.** **Bill of Sale transfers ownership of personal property**
Joint tenancy—two or more natural persons with the right of survivorship. They can sell, encumber or lease but cannot leave the property to another by will. Upon the death of a joint tenant, the entire interest vests in the surviving tenant(s), without probate. It requires the four unities of Time, Title, Interest and Possession. A corporation cannot be a joint tenant because of its perpetual existence.

- **Right of survivorship**—a feature of joint tenancy in which the surviving joint tenants automatically acquire all rights, title and interest of the deceased joint tenant.

- **REMEMBER “TTIP”** They must take **title**, at the same **time**, same amount of **interest** in the property and **possession**.

- This is common with a husband and wife.
Tenancy in common—shared ownership of a single property among two or more persons, interests need not be equal and there is no right of survivorship.

- **Undivided interest**—ownership by two or more persons that gives each the right to use the entire property.

- Two people buy a house. One puts in 70% of the money and the other puts in 30% of the money. After a year they don’t like each other anymore. A judge would require the house sold as the one owning 70% could not lock the other person out of 70% of the house and not let them use the kitchen or bathroom. However, if they own land, the judge would **partition** the land and give the one party 70% and the other party 30%. They could sell their ownership to someone else without consent of the other party. If one dies, their share goes to their heirs.

- **Partition**—the dividing of common interests in real property owned jointly by two or more persons.
• **Sole ownership**—when one person owns property, also known as tenancy in severalty, it could be by either a legal person or a natural person.

• **Severalty means “one”**

• With regards to these unities, tenants in common always have the unity of possession, and may have others. Tenants in common hold separate title to their individual interests; joint tenants hold single title together. If a joint tenant sells or gives away his property, the new owner becomes a tenant in common with the other joint tenants. Tenants in common do not have the right of survivorship.

• **Note:** Agents may explain joint tenancy and tenancy in common to buyers, but should never advise buyers of the type of conveyance that may be best for them.
Tenancy by the entirety—a form of joint ownership reserved for married persons; the right of survivorship exists and neither spouse has a disposable interest during the lifetime of the other.

This is not practiced in Colorado
Property is a thing or things owned— it is ownership. It may be a piece of land or real estate. Property is also the legal right to control, use, possess, enjoy and dispose of something. It includes all valuable rights and interests in land. Technically, then, property is not only the thing owned, but also the rights and interests in the thing owned. These rights include the following:

• The right to **possess** the property. Possession is controlling the occupancy of the property.
• The right to **quiet enjoyment** of the property. Quiet enjoyment is the right to use the property without legitimate challenges to the use or title.
• The right to **dispose** of a property is the right to transfer its ownership. The right to transfer interest in property includes the right to sell, lease, bequeath, assign or simply give away ownership.
• The right to **encumber** the property. This is the right to mortgage property as collateral (security) for a debt.
• The right to **exclude** or keep others off the property and to remove trespassers.
• Property may also include **easements**, **franchises**, **hereditaments** and **tenements**. Hereditaments are things capable of being inherited, including real and personal property, tangible and intangible property. Tenements include buildings and other improvements that relate to the land and pass with it, and the real property rights associated with them.
REAL vs. PERSONAL PROPERTY

• Personal Property

• Personal property is something that is moveable or temporary, such as a pen, chair, clothing, money, bank account, etc. It is also composed of temporary interests in real estate—leasehold estates. Personal property is referred to as personality or chattel. The word chattel is the old English word for cattle, which are personal property.

• Mobile homes are considered personal property because they are moveable. On the other hand, once they are permanently affixed to land, they become real property.
• Real Property

• We tend to use the terms land, real estate, and real property interchangeably. However, there are important differences between them. Although we usually think of land as only the surface of the earth, it is more than that. Land starts at the center of the earth, passes through the earth to the surface, and continues into space. Land also includes that which is permanently attached to it by nature, such as trees and water.

• Real Estate is land and the man-made improvements to the land --such as buildings, fences, streets, etc.

• Real Property, on the other hand, is land, man-made improvements to the land, and the interests and rights coming with the ownership of real property.
Components of Real Property

• Subsurface Rights
  Subsurface rights are rights to substances in the ground, extending form the surface of the earth to the center of the earth, such as minerals, water, gas, and oil. Minerals, etc., are real property. Subsurface rights may be leased or sold while maintaining surface rights. The separation of subsurface rights from surface rights is called lateral severance. Such separation could give one with a subsurface estate (rights to minerals) the right to drill on the land of someone who owns the surface estate. If the surface estate owner wants to prevent the mineral estate owner from drilling, the surface estate owner must obtain and reserve sole rights to the surface estate. Thus the mineral estate owner would have to enter through an adjacent property.
• **Air Rights**

Just as mineral rights can be sold separately from surface rights, so can air rights. Air rights ownership has been limited by the emergence of air travel. Air flights over one's property are not trespassing. Colorado law, for example, states that estates, rights, and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owners of the land below such areas and shall be deemed to be estates, rights, and interest in land.
• Improvements

Anything attached to land in a permanent way is considered a part of the land and so is real estate. Thus buildings, fences, roads landscaping, and so on are real estate. These are called improvements because they improve or develop the land.

Knowing what is real estate and what is not is very important. In conveying ownership of a house, for example, only the lot is described in the deed. There is no need to describe the house, landscaping, driveway, wiring, plumbing, etc. Items that are not attached to the land--furniture, automobiles, farm machinery, and so on--are personal property. If their ownership is to be transferred, it is done so with a bill of sale, not a deed. Remember, everything that is not real property is personal property and vice versa.
• Fixtures

• Many things can be either real or personal property, depending on their use. When items that are personal property, such as uninstalled or loose doors and windows, are attached to the building they become real property. On the other hand, a growing tree is considered realty; when cut down, or severed, however, it becomes personalty. An item of personal property when permanently attached to real estate becomes a fixture—that is, it becomes realty and is governed by the laws of real property. Thus a fixture is the property of the landowner and when the land is conveyed to a new owner, it is automatically included with the land, unless excluded in the sales contract
The Four Tests of Intention

As a general rule, the primary way of distinguishing real from personal property is whether the item is permanently attached to the land or to a structure attached to the land. Also, whether an object becomes real estate depends on whether it was attached with the intention of being permanently affixed. Four considerations determine whether something was intended to be attached permanently and thus is a fixture:

1. manner of attachment,
2. adaptation,
3. existence of an agreement and
4. relationships of the parties.
Manner of Attachment

The point here, obviously, is how the object is attached to the land. When an item of personal property is attached to the land by being imbedded or affixed by means of cement, nails, bolts, etc., it becomes a fixture. For instance, lumber, pipes, doors, sinks, furnaces, etc. change from personal property to real property when they become a part of the building. Items brought into the house that are not permanently affixed—furniture, clothes, etc. remain personal property. On the other hand, an item may be considered a fixture even though not securely attached if it is vital to the operation of a building, such as a window air conditioner.
Adaptation of the Object

Sometimes the manner of attachment test alone is not enough to determine whether something is a fixture. For example, are those storm windows that for a few months are temporarily clipped to a house a fixture? The only way to know is to apply this second test. That is, is the article uniquely adapted to the building? If so, it may be considered real property, whether easily removed or not. If the storm windows specifically fit the windows of the building, they are fixtures and are included in the sale. Another example is draperies; most are made specifically for one house. Yet another example is a key, which is specifically adapted to a building, and so is a part of it. On the other hand, a lamp would not have to be used in just one building, and thus is personal property.
Existence of an Agreement

The third test is the existence of an agreement between the parties. A seller can stipulate in the contract for sale what he considers personal property and will take with him and what he considers real property and so will leave behind. When it is not clear whether an item is real or personal property, the existence of an agreement (a contract) can avoid later arguments or even lawsuits. That is, clearly state in a written contract what is included in the sale and what isn’t.
Relationships of the Parties

The fourth test of whether an item of personal property has become a fixture is the relationship of the parties. If in a landlord-tenant relationship, items are affixed to real property to conduct a business or trade, the items remain personal property, and thus the property of the tenant, even though attached. This involves a special class of fixtures, trade fixtures, ones that enable a tenant to carry on a business or trade. For example, assume a school moves into a rental building, bolting desks to the floor and attaching blackboards to the walls. These desks and blackboards are trade fixtures. When the school later moves out, these tenant-owned trade fixtures remain the property of the tenant (school owner). Tenant-owned trade fixtures, then, do not become the property of the landlord. However, such items must be removed before the lease expires and without causing serious damage to the building. If they are not, they become the real property of the landowner. When the landowner acquires fixtures in such a way, it is ownership by accession.
• Trees, cultivated perennial plants, and uncultivated vegetation, such as forests and wild berries, (called fructus naturales), are considered part of the land. Landscaping, then, is included in the sale of a house. If a tenant plants a tree or bush in the ground while renting, the tree or bush remains when the lease expires unless agreed by the landlord and tenant that it will not. Plants and trees in moveable pots, on the other hand, are personal property and are not included in the sale or lease. Annually cultivated crops, emblements, are personal property, even though attached to the soil. These are called the fruits of industry.

• For example, a tenant farmer is entitled to his crops even if the landlord terminates the lease during the growing season. When property with harvestable crops is offered for sale or lease, the contract should stipulate who has the right to harvest the crop.
Severance

Real property can be changed to personal property by **severance**. A growing tree, for example, is real estate. Once cut down by the owner, though, it becomes personal property, since it was severed from or separated from the land. It is no longer permanently attached.

Real property, then, can become personal property by detaching it from the land or structure affixed to the land, and personal property can become real property by attaching it to the land or a structure attached to the land.
Water Rights (See the Real Estate Manual.)

The owners of land bordering on a stream have the right to use the water. This is called a riparian right. This is not to say that the landowner has absolute ownership of water flowing past his land, but that he may use it in a reasonable manner. In some states (Colorado is one) riparian rights have been changed by the doctrine of prior appropriation. This doctrine says that the first owner to divert water for usage may continue to do so, even though it may be unfair to other landowners along the stream.
Whereas riparian rights are associated with flowing waterways, **littoral rights** are associated with non-flowing bodies of water. Land bordering on a lake or sea carries littoral rights. Littoral rights allow a landowner the use of water touching his land as long as he does not change the water's line.

Whether riparian or littoral usage, unless otherwise defined, the priority of unappropriated water is first for domestic use, then agricultural, then industrial. The amount of land owned by someone can be increased by **accession**. Accession can result from natural or man-made causes. With regards to natural causes, it results from **alluvial** deposits (the gradual accumulation of rock, sand, and soil) along streams, rivers, and oceans through accretion. **Accretion**, then, is the gradual building of land by alluvial deposits through natural causes along water lines. **Relicition, or dereliction**, results when a sea or lake permanently recedes, exposing dry lands. **Avulsion**, on the other hand, results when land is washed away by water.
• If one owns land bordering a navigable stream or lake, ownership extends to the low water mark; with land bordering a non-navigable stream or lake, ownership extends to the middle of the body; with ocean or tidal waters, to the high water mark.

• Man-made accession occurs when someone (perhaps a renter) attaches personal property to the land. For example, if someone builds a fence on someone else's property without provision for its removal, the fence accedes to the property owner.
• Land ownership usually includes the right to drill for and use subsurface water. If subsurface water is not in a defined waterway, it is **percolating water**.

• In some states, a landowner has the right to draw his share of percolating water along with neighbors.

• Other states, including Colorado, ascribe to the **Doctrime of Prior Appropriation**, which does not embrace equity in use. The **water table** refers to the upper limit of percolating water below the earth’s surface.

• The water table, also called the **groundwater level**, may be a few feet or hundreds of feet below the surface.
Appurtenances

An **appurtenance** is something that passes with the land, but is not necessarily a part of the land. An appurtenance may also be defined as something that belongs to the land, but not forever.

Appurtenances are those rights, privileges, and improvements that transfer with the property, unless the contract for sale states otherwise, but are not necessarily actually a part of the property.

Deeds usually describe the property granted, then state "together with all appurtenances."

Examples of appurtenances are easements, water rights, condominium storage and parking spaces, buildings, fences, and so on.
INTERESTS IN LAND

An interest in the real estate is the ownership of one or more of the rights to real property. The rights, again, would be to control, use, possess, enjoy, and dispose of the property. An undivided interest is ownership by two or more people with each having the right to use the entire property.

Some examples of interests in land are:
• an owner with his rights of ownership;
• a tenant who temporarily has the right of possession;
• a lender with the right to encumber the property through a mortgage or trust deed;
• a utility company with the right of access through an easement; or
• a buyer with the right to receiver ownership at a certain future time under a sales contact.

An interest holder with the right of possession has an **estate in land**. An interest holder without the right of possession has an **encumbrance**. An encumbrance is any impediment restricting clear title or fee simple title to property, such as mortgages, leases and easements. The restriction may be either private or public.
TYPES OF OWNERSHIP

The type of ownership (also called tenancies), or how one takes title to property, can have far reaching consequences upon the owners. Recall that an estate is the character of ownership. It determines the duration of the individual rights of possession and use. Here we are talking about the type of ownership. These consequences may involve the future rights of the owners in the property, income taxes, transferability rights, and a whole host of other things. An agent should understand the methods of owning property and their effects. Agents should be very careful, however, not to recommend a specific type of ownership, as such a recommendation would go beyond the agents expertise. Instead, the agent should recommend that the customer or client obtain expert tax, legal, or other advice.

There are essentially two categories of ownership: sole ownership, ownership by one person and concurrent ownership, ownership by two or more people.
Sole Ownership (An Estate in Severalty)

An estate or tenancy in **severalty**, or sole ownership, is when title to property is held by one person, whether a legal or natural person. (Think of severalty not as several people, but as severed ownership).

Ownership in severalty is available in all states and can be held by single or married people.

In general, property acquired before marriage remains the sole property of the owner during marriage.

Property acquired during marriage may be held in severalty if it were bought with separate monies or if there is a written waiver of rights by one spouse.
Partnerships

The Uniform Partnerships Act defines a partnership as "an association of two or more persons who carry on a business for profit as co-owners." The partners may take title in the partnerships name, in which case ownership would be in severalty, (in the sole name of the legal person, the partnership) or in their own names, in which case ownership would be concurrent (discussed below). Property held in the partnership’s name is held by a tenancy in partnership.

A major advantage of partnerships is that they do not pay taxes. The partners are taxed individually, but the partnership itself, unlike a corporation, is not taxed. A partnership can maintain a real estate broker license, as will be discussed in greater detail later.
• Similarities among partnerships exist in most states because of the adoption of the Uniform Partnership Act. Forty-nine states, including Colorado and the District of Columbia, have adopted the act either with or without changes. Only Louisiana has not.

• There are two kinds of partnership—general and limited. General partnerships consist of only general partners. Limited partnerships consist of both general and limited partners.
General Partnerships

- In general partnerships, each partner is personally responsible for the obligations of the partnership. Thus a general partner can lose much more than his investment in the partnership. For example, if one partner makes a commitment for the partnership, all partners are responsible for that commitment. Moreover, if the partnership is sued, each partner is fully responsible.
Limited Partnerships

• Limited partnerships are made up of at least one general partner and one or more limited partners. It developed because of the unlimited financial responsibilities of partners in the general partnership form. Forty-nine states and the District of Columbia have adopted the Uniform Limited Partnership Act, the exception, again, is Louisiana.

• The general partners operate the partnership and accept full financial liability for it. Although limited partners usually provide most of the investment capital, they have little to say about the day-to-day management of the entity, are not bound by the obligations of the partnership, and cannot bind nor speak for the partnership. The financial liability of limited partners is usually confined to the amount invested.
Joint Ventures

• A joint venture is a joining together of two or more people or entities to carry out a single business endeavor. This association is similar to a partnership. If more than one project is undertaken, the association probably would be considered a partnership. For tax purposes, a joint venture is treated as a partnership. A major difference between a joint venture and a partnership (other than one vs. more than one project) is that a general partner can bind the partnership to a contract, whereas a joint venturer cannot so bind other joint venturers. An example of a joint venture would be the purchase of land by a group of people to re-zone and sell as lots to a builder. When the project ends, so does the association between the people.
Syndications

- Syndications are not a form of ownership, although they are often spoken of as if they were. Instead, they refer to two or more people investing together in a project too big for any one of them to do alone. Syndications also allow small investors a chance to invest in a project managed by an experienced expert. The form of ownership might be a partnership, joint venture, corporation, tenancy in common, or joint tenancy. Real estate syndications are usually limited partnerships—the syndicators are general partners, the investors, limited partners.
Corporations

- All states have laws permitting one or more individuals to incorporate. A corporation is formed by filing articles of incorporation with the Secretary of State. Unless legally dissolved, corporations last indefinitely. Because the law takes corporations to be legal entities, corporations must pay taxes on profits. What remains can be paid to stockholders in dividends. Stockholders then pay personal income taxes on the dividends. This double taxation is the primary disadvantage to the corporate form of ownership. On the other hand, because corporations are legal entities, the investor is protected from unlimited liability. Even if the corporation ends up owing more than it owns, the worse that can happen to an investor is that the value of stock will drop to zero. That is, the investor does not have to participate in paying the corporation’s debts. Because corporations are legal entities, they take title to real estate in severalty.
• Corporations are made up of officers, directors, and shareholders. Shareholders, in theory, control the corporation by electing the board of directors, who then elect the officers. In truth, unless one is a major shareholder, one has no control over management.

• Some states prohibit corporations from acquiring real property when their primary purpose for being is ownership of real estate. In Colorado corporations may purchase or otherwise acquire real property.

• Most real estate investors have typically stayed away from corporations because of double taxation. In 1958, however, the Internal Revenue Service first allowed Subchapter S corporations. Such corporations maintain the liability protection of corporations, while allowing the profit-loss pass-through of partnerships. Since S corporations have come into being, regular corporations have become known as C corporations
QUIZ TIME
CHECK TO SEE WHAT YOU KNOW

- Take the Real Estate Law Lesson 1 Quiz 1
- Take the Real Estate Law Lesson 1 Quiz 2