

CHAPTER 1 THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

LEARNING OBJECTIVES

Students should be able to do the following:

- Identify, explain, and classify the various kinds of property, such as real and personal property or probate and nonprobate property.
- Recognize and understand the terminology associated with property law.
- Distinguish the various forms of ownership of real and personal property and explain the requirements for their creation and function.
- Understand and explain why courts do not favor the creation of joint tenancies between parties other than spouses.
- Identify the community property states and differentiate between community and separate property.
- Explain the kinds, methods of creation, and characteristics of estates in real property.

LECTURE OUTLINE

I. Scope of the Chapter

- A. Property (real and personal) is the essential component that establishes the need for and purpose of wills and trusts.
- B. Everyone owns some type of property.
- C. Property can be transferred by its owner during the life of the owner by gift, by sale, or by creating a trust.
- D. After the owner dies, property can be transferred in a will, by provisions of a testamentary trust, or by intestate succession laws.
- E. Understanding the law of property and its terminology is required before paralegals can draft wills and trusts and assist clients with estate administration. Such understanding includes the following:
 1. Terminology of the law of property
 2. The law of property's association with wills, trusts, and estate administration
 3. Related statutes and court decisions
 4. Forms in which property can be owned
 5. Estates in real property, including freeholds and leaseholds

II. Property: Terminology and Classification

- A. Property is anything subject to ownership.
 1. Property can be classified as real property.
 2. Property can be classified as personal property.
- B. Real property is immovable, fixed, or permanent.
 1. Real property is also called realty or real estate.
 2. Real property includes land; structures affixed to land such as houses, apartment buildings, condominiums, and office buildings; objects attached to land and buildings called fixtures; and things grown on land except those for the purpose of sale.
 3. Real property owners also have rights to airspace above their land and to the earth below it, including any minerals in the earth.
- C. A fixture is real property that once may have been personal property but now is permanently attached to land or buildings.
 1. Examples of fixtures: a tree; carpeting nailed to a floor; a built-in dishwasher.
 2. Not fixtures: crops that are annually cultivated such as corn, wheat, and vegetables.

3. State courts apply three tests—annexation, adaptation, and intention—to determine if personal property has been converted into a fixture.
 - a. Annexation means that the personal property has been affixed or annexed to the real property.
 - b. Adaptation means that the personal property has been adapted to the use or purpose of the real estate.
 - (1) Is the property necessary to the function or enjoyment of the real estate?
 - (2) Is the property beneficial to the function or enjoyment of the real estate?
 - c. Intention refers to the intention of the person who annexed the personal property to the real property. In most states, this has been the controlling test that determines the existence of a fixture.
 - d. There is substantial variation among courts throughout the country on what constitutes a fixture.
 - (1) Generally, examples of fixtures are doors, fences, windows, stoves, wall-to-wall carpeting, refrigerators, and electric lights.
 - (2) Compare: *Mortgage Bond Co. v. Stephens*, 181 Okl. 419, 74 P.2d 361 (1937), in which a refrigerator was a fixture, and *Elliott v. Tallmadge*, 207 Or. 428, 297 P.2d 310 (1956), in which a refrigerator was held to be personal property.

—**TEACHING SUGGESTION:** If students can perform legal research, ask them each to locate one case in your state jurisdiction where the court either determined personal property to be a fixture or determined it not to be a fixture. Ask the students to identify which test applies in your jurisdiction and to explain the court’s reasoning and holding.

If students cannot perform legal research, provide copies of various cases from your jurisdiction for this exercise.

As a classroom exercise, students can present their findings to expand their appreciation of what is considered a fixture and why.

4. Tenants who install fixtures on property they rent may remove that property if it falls under one of three exceptions known as tenant’s fixtures.
 - a. Trade fixtures are property placed on the land or in a building to help the tenant carry on a trade or business.
 - b. Agricultural fixtures are property annexed by the tenant for farming purposes.
 - c. Domestic fixtures are property attached by the tenant to make an apartment more comfortable or convenient.
- D. When real property is transferred by gift or sale, the title or ownership is conveyed to the donee or buyer by a formal written document called a deed.
 1. Transfer is an act by which the title to property is conveyed from one party to another, whether the party is a person, corporation, or the government.
 2. Conveyance is any transfer by deed or will of legal or equitable title to real property from one person to another.
 3. Disposition is the parting with, transfer, or conveyance of property.
 4. Grant is a transfer of title to real or personal property by deed or other instrument.
 5. Grantor is the person who conveys or transfers real or personal property to another.
 6. Grantee is the person to whom real or personal property is transferred or conveyed.
 7. Deed is a written, signed, and delivered legal document that transfers title or ownership of real property such as land or buildings.
 8. Title is the right to and evidence of ownership of real or personal property.
 9. Legal title is a title that is complete, perfect, and enforceable in a court of law, granting the holder the right of ownership and possession of property.
 10. Equitable title is title held by a party that gives the party the right to have the legal title transferred to him/her. For example, a person who purchases a house through a mortgage

has equitable title and is in possession of the house while paying off the installments on the mortgage to the bank that holds legal title until the mortgage is paid off and legal title is transferred to the possessor by delivery of a deed.

11. Interest in property entitles a person to some right in the property, but that right may be less than title or ownership. For example, a renter has an interest in the apartment that is leased but does not have title, which is held by the owner of the property, who is usually the landlord.
 12. To vest means to deliver possession of land.
 - a. At death, state law automatically vests title to a decedent's real property in the beneficiaries of the will or in heirs if a decedent dies without a will.
 - b. Title to the real property is vested "subject to" the right of the personal representative to divest or divest or take away the property to pay claims of the decedent's creditors.
 13. To divest or divest means to withdraw or take away title from the possessor.
- E.** Personal property is movable property and encompasses everything subject to ownership that is not real property. It is sometimes referred to as chattel.
1. Title to a decedent's personal property passes to the personal representative (administrator or executor) appointed by the probate court to administer the decedent's estate. If creditors must be paid, generally, the decedent's personal property is used first to obtain the necessary funds.
 2. There are two categories of personal property.
 - a. Tangible personal property has a physical existence; it can be touched and is movable.
 - b. Intangible personal property has no physical existence; it cannot be touched.
 - (1) It establishes and represents the right to receive something of value.
 - (2) Ownership is established by documents such as bank statements, stock or bond certificates, and written contracts for life insurance and annuities.
 - (3) It includes a chose in action, a right to personal property that the owner does not possess but does have a right of action for, e.g., a right to receive payment of a debt or to sue for damages for another's negligence.
- TEACHING SUGGESTION:** Because students may not be familiar with various types of financial or business documents and terminology, it is a good idea to review the examples of intangible personal property items such as annuities, pension plans, profit-sharing plans, stocks, bonds, and so forth.
3. Paralegals play a major role in helping the personal representative find, collect, preserve, value, and liquidate or distribute the decedent's personal assets.
 - a. Paralegals list and classify all the decedent's assets as real property or personal property, whether tangible or intangible.
 - b. Accurate classification is essential in administering an estate; therefore, the paralegal must learn to distinguish the different types of property and verify the classifications with the supervising attorney.
- F.** Probate property or a probate estate differs from the gross estate of a decedent.
1. An estate or gross estate is all the property, real and personal, owned by a living person or all the assets owned by a decedent at the time of death.
 2. The only type of property owned by a decedent that can be passed by will is probate property, also called the probate assets, the probate estate, or the estate of the decedent.
 3. Probate property is all real or personal property that the decedent owned either individually as a single or sole owner, called ownership in severalty, or as a co-owner with another person or persons in the form of ownership called tenancy in common.
 4. Probate property is subject to estate administration by the personal representative according to the terms of the will or, if the decedent died intestate, according to the appropriate state intestate succession statute.
 5. The following probate property is subject to creditors' claims and federal and state death taxes: real property owned in severalty or in a tenancy in common; personal property owned in severalty or in a tenancy in common; life insurance proceeds payable to the estate

or a policy in which the decedent retained the incidents of ownership; debts owed the decedent for mortgages, promissory notes, contracts for deed, loans, rents, interest, stock dividends, income tax refunds, royalties, and copyrights; gain from the sale of a business; Social Security, Railroad Retirement, and Veterans Administration benefits; civil lawsuits for money damages; and testamentary trusts.

- G.** Nonprobate property is real or personal property that is not part of the decedent's probate estate except for figuring the decedent's gross estate for federal and state death tax purposes.
1. Nonprobate property is not distributed according to the decedent's will.
 2. Nonprobate property is not distributed according to intestate succession statutes.
 3. Nonprobate property is not subject to estate administration (probate) of the decedent's estate.
 4. Nonprobate property is not subject to a spouse's claims.
 5. Nonprobate property is not subject to the claims of the decedent's creditors.
 6. Nonprobate property includes property that has been converted into nonprobate assets such as the following:
 - a. Real and personal property owned and held in joint tenancy or tenancy by the entirety, both with the right of survivorship and real property subject to transfer under a transfer on death deed or beneficiary deed
 - b. Real and personal property transferred to living (*inter vivos*) trusts prior to the settler's death
 - c. Money placed in a bank account as a Totten trust or pay-on-death (POD) account
 - d. Proceeds of a life insurance policy payable to a named beneficiary and not to the decedent's estate as long as the decedent relinquishes the incidents of ownership
 - e. Employment contract benefits, such as profit-sharing plans, pension plans, group life insurance, 401(k) plans, employee stock ownership plans (ESOPs), and self-employment plans, that name a specific beneficiary
 - f. Annuity contracts with a named beneficiary
 - g. Individual retirement accounts (IRAs) with a named beneficiary
 - h. U.S. savings bonds payable on death to a beneficiary other than the decedent's estate
 - i. Tenancy in partnership property
 7. Nonprobate property goes directly to the named beneficiary or the surviving joint tenant(s) by operation of law.
 8. Even though nonprobate property avoids the probate process, paralegals must identify and keep accurate records of each item for the preparation of federal and state estate, death, or inheritance tax returns.

III. Statutes That Govern the Passage of Property

- A.** Property law is mostly statutory law.
1. States have the power to enact statutes that govern the passage of property.
 2. States derive the power to legislate in this area from the U.S. Constitution, which gives states the right to levy and collect taxes, and from their duty to protect the citizenry.
 - a. Owners of property have the right to distribute their property as they wish, so long as it does not conflict with the rights of others.
 - (1) Generally, a spouse cannot be disinherited.
 - (2) Generally, minor children are entitled to support.
 - (3) Creditors have the right to be compensated for their valid claims, and states establish statutory procedures for creditors to make claims against estates.
- B.** All activity during the administration of a decedent's estate must be carefully and accurately recorded.
1. This accuracy is required so that the state can fairly and accurately calculate the amount of tax that may be due from the estate of the decedent.
 2. The state becomes a creditor of the estate.

- C. The state protects the decedent's rights by statute.
 1. Statutes provide for the right to make a will.
 2. Descent and distribution or intestate succession statutes provide that if someone dies without a will, the property of the decedent will be distributed to those whom the decedent would probably have chosen if the decedent had made a will.

—**TEACHING SUGGESTION:** To accompany Assignment 1.3, students should research, locate, and read their state statute dealing with descent and distribution. Any words or phrases that are different from those identified in the New York statute should be identified and defined.

IV. Forms of Property Ownership

- A. Tenancy in severalty means that one person is the sole owner of real property or personal property.
 1. The individual owner has absolute ownership with exclusive rights, privileges, and interests.
 2. The owner may voluntarily dispose of the property while living, either by gift or sale, or may voluntarily dispose of it at death through a will.
 3. If the owner has not made a disposition of the property by the time of death by gift, sale, or through a will, the property remains in the owner's estate and passes to certain specified takers under intestate succession statutes.
- B. There are various forms of concurrent ownership, ownership shared by two or more persons, of real or personal property.
 1. Joint tenancy is the ownership of real or personal property by two or more persons, joint tenants, who obtain an equal and individual interest in the property by gift, purchase, will, or inheritance.
 - a. On the death of one joint tenant, the right of survivorship passes the decedent's interest in the property automatically to the surviving joint tenant(s) by operation of law without the need for probate and with the last surviving joint tenant entitled to the whole property in severalty.
 - b. To create a joint tenancy, common law requires "four unities": unity of time, unity of title, unity of interest, and unity of possession.
 - (1) Unity of time requires that joint tenants take their interests in the property at the same time, meaning that they must receive their interest in the property together.
 - (2) Unity of title requires that the tenancy be created and the tenants receive their title from a single source such as the same will or deed.
 - (3) Unity of interest requires that each tenant have an interest in the property that is identical to that of the other tenants.
 - (a) The interest must be of the same quantity.
 - (b) The interest must be of the same duration.
 - (4) Unity of possession requires that each joint tenant own and hold the same undivided possession of the whole property held in joint tenancy.
 - (a) Each joint tenant has an equal right to possess the entire property.
 - (b) Each joint tenant has an equal right to share in the profits derived from the property.
 - c. When a joint tenant dies, the surviving joint tenants receive the interest of the deceased with nothing passing to the beneficiaries' heirs or devisees of the decedent, under the right of survivorship.
 - (1) Joint tenants cannot transfer joint property by will.
 - (2) If all joint tenants die except one, the joint tenancy is destroyed and the lone survivor owns the property solely, in severalty.
 - d. Joint tenants are entitled to the equal use, enjoyment, control, and possession of the property since they have an equal and undivided identical interest in the same property, meaning that no joint tenant owns a specific or individual part of the property.