Chapter 2
Legal Foundations to Value

What Are Rights?
• Claims that the government is obligated to enforce
  – Derived from the Constitution
  – Different from raw power
• Nonrevocable
  – Can be reduced in the interest of health, safety, and welfare
• Enduring
  – Not limited to the memory of owners or others
  – Cannot be nullified by government

Real Property: a Bundle of Rights
• What do we mean by rights?
• What are property rights?
• What is real property?
• What is personal property?
• What do we do when the difference is unclear?

Rights in Our Society

Personal Rights vs. Property Rights
• Personal rights
  – Freedoms guaranteed by Constitution
  – Supreme Court interpretations of Constitution
• Property rights
  – Exclusive possession
  – Enjoyment of the use or benefit: Use, collect rents, harvest.
  – Freedom to dispose as one pleases (within the limits of safety): sell, convert, rebuild, etc.
Real Property Interests

A “Bundle of Rights”

Disposition
Use
Possession
Exclusion

Real vs. Personal Property

- Real property: Rights in land and its permanent structures
  - Surface of the earth and improvements
  - Air, up to reserved air space or tallest structure
  - Beneath the earth as far as technology allows: Minerals, oil and gas, water
- Personal property: All other property
  - Personal and household goods
  - Intellectual property
  - Music

Real Property: Rights in Three Dimensions

Built on Air Rights

Distinguishing Real vs Personal Property

Which are personal property and which are real property?

- Construction materials
- Valuable chandelier
- Custom drapes
- Kitchen range and refrigerator
- Retail display cases
- Restaurant booths
- Basketball goal on a garage
- Backyard playhouse

Fixtures

- Fixture: Real property that formerly was personal property
- Rules for determining when something becomes a fixture:
  - Manner of attachment
  - Character of the article and manner of adaptation: custom screens or storm windows, church pews, custom designed furniture
Fixtures - continued
– Intention of the parties
  • Dominant rule
  • Customary assumptions of the realm
  • Example: Kitchen appliances in a single-family residence vs. appliances in an apartment
– Relation of the parties
  • Variant of rule of intention
  • Trade fixtures (personal property)
  • Fences and other agricultural improvements
  • Items installed by tenant in a residence

Real Property Interests
• Interest: Any set of rights in real property
• Estate: A real property interest that includes the right of exclusive possession
• Nonpossessory interests:
  – Easements
  – Restrictive covenants
  – Liens

Modern Leasehold Interests
• Tenancy for years
  – For a specific period of time (few days to many decades)
  – Must be written if for more than one year
  – Written lease contract governs entirely
• Periodic tenancy
  – No definite length of time
  – Often by oral agreement
  – State law governs notice of termination
  • Time required is usually half of the payment period

Modern Leasehold Interests
• Traditional leasehold law evolved from an agricultural society
• Concepts and precedents were inadequate for a modern apartment setting
• Florida and other states adopted residential landlord and tenant laws to solve the problem
Model Residential Landlord - Tenant Act

Establishes a more equitable relationship between landlords and tenants

Non-Possessory Interests in Land
- Easements
- Liens
- Restrictive Covenants

Limitations on Ownership
- Complete Removal
- Restrictions On Use
- Division of Use or Possession
- Share in Value
- Eminent Domain
- Police Regulatory Power
- Liens
- Deed Restrictions
- Easements
- Leases
- Taxation

Easements
- Easement: The right to use land for a specific and limited purpose

Easement Appurtenant
- Right of use a (dominant) parcel of land "enjoys" over an adjacent (servient) parcel
- Affirmative easements:
  - Driveway or access right-of-way
  - Sewer line
  - Drainage
  - Common wall
- Negative easements:
  - Light and air easement
  - Scenic easement
- "Runs with the land": Rights and obligations are inseparable from the parcels involved

An Easement Appurtenant Involves a Dominant Parcel and a Servient Parcel
Easements in Gross ("Commercial Easements")

- Right to use land, unrelated to any other parcel
  - Extract minerals or oil and gas
  - Build a roadway or railway
  - Lay a pipeline, power line, or cable
  - Run an irrigation ditch
  - Place and maintain a billboard or communications tower
  - Harvest timber or crops
- Transferable separately from land title or ownership
  - No dominant parcel – only servient parcels

More Easement Concepts

- Exclusive & nonexclusive easement in gross
  - Exclusive: Conveys all rights of the easement
    - recipient can convey access to others
  - Nonexclusive: Rights limited to one user only
    - Recipient cannot extend access to others
    - Owner can convey access to others
  - License: Similar to an easement in gross, but conveys permission rather than right
    - Revocable
    - Automatically terminated at the death of the grantor or sale of the land

Restrictive Covenants (Deed Restrictions)

- Covenants that impose restrictions on land use
- Created at conveyance of land to a new owner
- Examples:
  - Setback lines, height restrictions for structures
  - Minimum floor area
  - No freestanding structures
  - No chain-link fences
  - No RVs or boats parked in view of the street
  - No cars regularly parked in the driveway
  - No garage door facing the street
  - Required architectural review
  - No external antenna, satellite dish or clothesline
  - Required use of professional lawn service

Restrictive Covenants - continued

Two methods of creation:

- Restriction in a deed conveying a single parcel of land to a new owner
- Restrictions imposed on an entire subdivision at its creation
  - A list of restrictions recorded as a separate document
  - Mutually binding on all purchasers in the subdivision
Restrictive Covenants: Enforcement

- Enforcement by court injunction
- Enforcement only by "parties at interest"
  - Isolated deed restriction: Grantor or grantor's heirs
  - Subdivision restrictions: Owners, mortgage loan holders, and renters
- Courts reluctant to enforce in case of:
  - Delayed enforcement (abandonment)
  - Changed neighborhood
  - Changed public policy
- Mandatory retirement in some states

Liens

- Lien: An interest in property as security for an obligation
  - Usually a debt
- General Liens: Arise from events unrelated to the property
  - Court awarded damages
  - Federal tax liens
- Specific liens: Arise from ownership and use of the property
  - Mortgage
  - Mechanics' lien
  - Property tax or assessment lien

Three Levels of Liens on a Personal Residence:

1. Property Tax Liens and Assessment Liens (Always first priority)
2. Mortgages and Mechanics' Liens (Priority is by chronology)
3. Judgment Liens (May be nullified by homestead, or by a tenancy by the entirety if suit is against only one spouse)

Forms of Co-Ownership

- Direct Co-Ownership
- Tenancy in common
- Joint tenancy
- Tenancy by the entirety
- Condominium

- Indirect Co-Ownership
- General Partnership
- Limited Partnership
- Limited Liability Co.
- Corporation (Co-op)
- Trust

Forms of Direct Co-ownership

- Example: A house with multiple owners
  - All share the right of exclusive possession
  - Cannot obstruct each other's use
  - May hold different sizes of shares
- Tenancy in common
- Joint Tenancy
- Tenancy by the entirety
- Condominium
**Forms of Direct Co-ownership**

- **Tenancy in common:**
  - Default form except in special cases
  - Multiple owners of same fee simple interest
  - Each owner can sell or mortgage their interest independently
  - Bad form for owning an operating business

- **Joint tenancy**
  - “Right of survivorship” restricts inheritance to heirs of the last surviving owner
  - Difficult to create and easily disrupted
  - Prevented or restricted by law in some states

- **Tenancy by the entirety**
  - Joint tenancy for husband and wife
  - Simplifies effect of homestead if minor children are present
  - Protected against liens arising from either spouse alone, including judgments

**Direct Co-ownership - continued**

- **Condominium**
  - Combines single ownership and tenancy in common
  - Created by condominium declaration
  - Bylaws define owner rights:
    - Share of all obligations
    - Restrictions on sale or rental
    - Methods of altering bylaws
  - Creates additional level of (private) government
  - History of owners not understanding the restrictions and obligations

**Direct Co-ownership: Condominiums**

- **Cooperative**
  - Corporation owns property
  - Each owner holds shares and a proprietary lease (no term and no rent)
  - Cannot mortgage individual interests
  - Owner’s mutually liable for any specific liens
Cooperative Corporation holds title to all land, improvements

Automatic Ownership from Marriage: Early Forms

- Dower/courtesy
  - Automatic one-third life estate for a surviving spouse in real property of a decedent spouse
  - Common law roots (traditional English)
  - Dower is widow’s claim; curtesy is widower’s
  - Applies to all real property ever owned during the marriage
- Problems with dower (widow’s interest):
  - Life estate unmarketable
  - Much of modern wealth not in real property
  - Real property may be in multiple states

Automatic Ownership from Marriage: Modern Forms

- Elective share
  - Modern substitute for dower
  - Surviving spouse receives up to one-third of all decedent’s personal property and in-state real property
  - Must be chosen by explicit “election” within specified time
  - Adopted in some form by 25 states

- Community property
  - One-half interest in all property acquired “out of the fruits of the marriage”
  - Not property owned before the marriage
  - Not gifts or inheritances to one spouse
  - Found in states of Spanish tradition, plus Louisiana, Wisconsin and Alaska
  - Growing in acceptance as a superior arrangement to elective share

Exhibit 2-10 Two Main Forms of Marital Property Rights

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<tr>
<th>Elective Share</th>
<th>Community Property</th>
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Timeshare

- Range in “quality” of ownership:
  - Condominium share
  - Leasehold
  - License
- Choice of floating time intervals (e.g. within three months) and choice of resorts
- Industry with a questionable history
- Never a financial investment
- Key is ability of organization to deliver enduring service
Issues in Rights to Water

- Who owns the land under a body of water?
- Who controls use of land under a body of water?
- Who has the right to use the surface?
- Who has the right to use the water itself?
- Who has the right to use groundwater?
- For answers, see on-line appendix to text

Rights to Oil, Gas, and Minerals

- Rights carry implied easement for removal
- In some states, mineral rights imply ownership of the space minerals occupy
- Oil rights have two forms
  - Ownership states: Oil is simply another mineral
  - Law of capture states: Oil flows, and is not owned until removed.
  - Traditional “rule of capture” (If you could remove it, it was yours) is being limited due to extensive secondary recovery methods.

End of Chapter 2