

## **Chapter 5**

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## §500 Introduction

Real property procedures are used in almost every area of the law, including litigation, family law, estate planning and probate.

This chapter summarizes basic real property transactions, including recording procedures, and defines classes of property, forms of ownership, promissory notes, deeds and trust deeds.

## §510 Classes of Property

There are two classes of property:

1. Real property (immovable) and
2. Personal property (movable)

Real property includes land and everything attached to it, such as buildings, fences and trees. It also includes rights in the land of another in the form of “easements” (the right to cross another’s land) and “profits” (the right to take minerals from another’s land).

Personal property is defined as all property other than real property, including all movable property, such as automobiles, boats, furniture, stock and jewelry.

## §520 Ownership of Real Property

Ownership of property refers to a claim or right to property. Real property may be owned by one or more individuals, a partnership, a corporation, a joint venture or unincorporated association. When there is more than one owner, ownership or title to the property may be held in one of many forms. The four most common forms of ownership by individuals are:

1. Joint Tenancy
2. Tenancy in Common
3. Community and Quasi-Community Property
4. Separate Property

## §521 Joint Tenancy

Joint tenancy is a type of ownership by two or more persons in which each individual owns an equal share in the land. The primary and most important characteristic of joint tenancy is the right of survivorship. In the event of one joint tenant’s death, his or her share in the property automatically reverts to the other surviving owner or owners; it is not inherited or transferred by will.

### *§522 Tenancy in Common*

Tenancy in common is joint ownership of an undivided interest in real property by two or more persons in which each person owns a portion of the property, without the right of survivorship. The individual owners may sell their undivided interest or may devise it by will, without the consent the other owners.

### *§523 Community and Quasi-Community Property*

Community property is property acquired by a husband and wife during their marriage which is not acquired as the separate property of either. Quasi-Community property is property acquired by either spouse while residing in another state, which would have been community property if the acquiring spouse had resided in California at the time of its acquisition. Community and quasi-community property belongs one-half to the husband and one-half to the wife.

### *§524 Separate Property*

All property that is owned separately by either spouse, acquired before marriage, after separation with separate funds, or during marriage by gift, bequest, devise or descent, is the separate property of the acquiring spouse.

### *§530 Transfer of Real Property*

Most real estate transactions begin with an offer to purchase directed to the seller from a prospective buyer. The real estate purchase contract is usually prepared by a real estate broker or agent, but it may also be prepared by an attorney. The purchase contract must contain the names of the buyer and seller, the location and description of the property to be purchased, the purchase price, the method of financing to be used, and the date of closing on which the deed and possession of the real property is to be delivered. The contract usually requires a deposit

payment, the amount of which depends on the purchase price.

### *§531 Escrow*

Generally, the parties use the sales contract and deposit to open an escrow. In an escrow, a third party, the escrow holder, acts as the agent for the buyer and the seller to ensure that the parties fulfill the contract terms. The escrow company oversees the proper conveyance of real property.

### *§532 Title*

Title is proof of ownership. An owner of real property is said to have "title" to the property. Thus, prior to entering into any real property transaction, it is essential to verify that the seller has clear title to the property in question. To accomplish this, the parties usually use a title insurance company that conducts a title search on the property.

#### *§532.1 Title Search*

A title search is a search of all public records involving a piece of property. Title searches are routinely conducted whenever property is sold or transferred and a loan is made that is secured by the property. Before making a secured loan, a lender wants to know that the buyer is getting good title to the property, free and clear of all liens and encumbrances.

In order to verify that the seller has clear title to the property and that no liens or encumbrances exist against the property, a title insurance company searches the public records and issues a preliminary title report. A preliminary title report contains the owner's name, the property's legal description, the amount of property taxes for the current year, and all recorded liens, restrictions, easements and other encumbrances. An encumbrance is any legal claim on property that affects an owner's ability to transfer title. Common encumbrances include deeds of trust, mortgages, past due property tax liens, and civil judgments. If liens or encumbrances exist against the property, the seller must pay them through escrow before the title company will issue a title insurance policy to the buyer.

Once the escrow is completed, the title company will issue a title insurance policy to the buyer guaranteeing he is receiving clear title to the property.

### *§532.2 Title Insurance*

Title companies guarantee their title search results by issuing a title insurance policy to the buyer that is equal to the value of the property. Title insurance protects the buyer (or the person or company that loaned money to finance the purchase) against losses resulting from a title defect that is discovered to have existed when the policy was issued. For example, a title insurance policy covers the buyer's resulting losses if the transfer documents were discovered to be fraudulent or forged, or if a lien were discovered that was not disclosed when the title search was conducted.

### *§533 Promissory Notes and Deeds of Trust*

A "Note Secured by Deed of Trust" and a "Deed of Trust" (see samples 533-1 and 533-2) are the documents used for real property loans in California. The terms "deed of trust" and "mortgage" are used synonymously in California, although the legal effect of the documents themselves is somewhat different. With a deed of trust, there is a present conveyance of legal title to the trustee for the benefit of the lender, whereas, with a mortgage, the borrower holds legal title to the property and the lending agency has a lien against the property. This distinction is important: A deed of trust affords the lending institution a more effective means of recovering the loan amount if the borrower defaults.

A buyer of real property is usually unable to pay the full purchase price at the time he or she buys real property. Thus, the buyer often uses the property as security for the loan. The buyer usually pays a portion of the purchase price, and the remainder is given to the seller by a lending institution, such as a bank or savings and loan. When this is done, the buyer gives the lender a security document known as a deed of trust or trust deed and executes a note which is secured by the deed of trust.

The parties to a trust deed include the following:

- **Trustor.** The trustor is the borrower and the buyer of the property. The trustor owns the property but signs the deed of trust which gives the trustee power to sell the property if he or she defaults on the loan.
- **Trustee.** The trustee is the person or company, frequently a title insurance company, who holds legal title to the property in trust for another person's benefit (the beneficiary), and who must carry out specific duties with regard to the property. The trustee named in the deed of trust does not exercise any control over the property, but has the power to sell the property if the trustor defaults on the loan.
- **Beneficiary.** The beneficiary is the lender who is repaid from the proceeds when the property is sold or when the note is paid in full.

### *§534 Transfer Deeds*

A deed is a written document evidencing ownership of real property. It is used to transfer title to real property from one person to another. A deed contains the names of the parties to the sale or transfer, the conveyance information, and the property's legal description. The seller is referred to as the grantor and the buyer is referred to as the grantee.

Most deeds are prepared on printed forms supplied by title insurance companies. Although there is no fixed or absolute form, a deed must:

- be in writing,
- be signed by the seller,
- indicate the seller's intention to transfer title to the property,
- contain the legal description of the real property,
- be acknowledged in the presence of a notary public, and
- be recorded with the county recorder in the county where the real property is located.

Although reciting the status of the grantor or grantee in a deed is not essential, it is usually included. For example, "Jane R. Jones, an unmarried woman; Carol P. Jones, a single woman; Sue Ann Jones and Douglas R. Jones, husband and wife;

Paul D. Jones, as trustee of the Jones Family Trust dated June 1, 19\_\_.”

**Note:** It is extremely important that all legal descriptions concerning the property be written precisely and all deeds be recorded in the correct county.

*§534.1 Grant Deed*

A “Grant Deed” (see sample 534.1-1) transfers title to real property in return for consideration. The term “grant” guarantees that the grantor has not previously conveyed title to the property to any other person and that it is free from liens and encumbrances. The grantor is the person transferring the property and the grantee is the person receiving the property.

*§534.2 Quitclaim Deed*

A “Quitclaim Deed” (see sample 534.2-1) transfers all right, title or interest which the grantor may have in the real property at the time of the conveyance. Although a quitclaim deed is just as effective as a grant deed to transfer ownership of property, the important distinction is that a quitclaim deed gives no promise or guarantee of clear title.

*§535 Acknowledgment by a Notary Public*

An acknowledgment is a formal declaration, made before a notary public or other officer, by the person who has executed a document, that he or she did in fact execute the document. Proof of an acknowledgment is evidenced by a Certificate of Acknowledgment (see sample 535-1) made by the notary public or other officer before whom the acknowledgment is made. The certificate follows the signature of the person executing the document or may be attached to the document. Most documents submitted for recording, including deeds and other documents affecting title to real property, must be acknowledged.

By executing an acknowledgment, a notary certifies that (1) the signer personally appeared before the notary on the date and in the county indicated; (2) the signer was positively identified

by the notary through personal knowledge or satisfactory evidence (such as a driver’s license); and (3) the signer acknowledged signing the document. It is not required that the document be signed in the notary’s presence.

*§535.1 Certificate of Acknowledgment*

For many years the Civil Code prescribed various forms of the certificate of acknowledgment for use by individuals, corporations, partnerships, and attorneys-in-fact. In 1990, Civil Code Section 1189 was amended to establish one form for general use for the acknowledgment of a document executed in California and effective January 1, 1993, it became mandatory to use only the California all-purpose acknowledgment certificate. Any certificate of acknowledgment for documents to be filed and/or recorded in California must be in substantially the following form:

State of California \_\_\_\_\_)

County of \_\_\_\_\_)

On \_\_\_\_\_ before me, (here insert name and title of the officer), personally appeared \_\_\_\_\_

\_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

(Seal)

\_\_\_\_\_  
(Signature of Notary)

An acknowledgment provided prior to January 1, 1993, and conforming to the applicable former code sections has the same force and effect as if those code sections had not been repealed.