CHAPTER EIGHT

OWNERSHIP OF REAL PROPERTY

KEY TERMS

attractive nuisance doctrine
CERCLA
common elements
common interest subdivision
community apartment project
community property community property with right of survivorship
condominium corporation fictitious name
general partner Homeowner Association (HOA)
joint tenancy joint ventures limited common elements limited liability limited liability company limited partnerships partition action partnership planned unit development
recreational user immunity
real estate investment trust
severalty
standard subdivision stock cooperative survivorship
tenancy by the entirety tenancy in common time-share
undivided interest subdivision
unincorporated association

Every property must have an owner. In Pennsylvania, a 600-acre forest that was deeded to God reverted to the state for nonpayment of taxes.
Ownership in severalty is ownership by one individual or corporation. (A corporation is a legal entity.) It is singular ownership with no other party or parties having a common ownership interest. A city (municipal corporation) would own city property in severalty, as would an individual owning property by himself or herself.

Tenancy in common is undivided ownership—of real or personal property—by more than one party without the right of survivorship. An undivided interest means that the tenant in common has a share in the whole and not ownership of a separate portion. For example, a tenant in common having a one-half interest in ten acres of land would have a one-half interest in the entire ten acres and not one-half of the land (five acres).

The right of survivorship means the right of other co-owners to receive one co-owner’s interest upon his or her death. Upon the death of a tenant in common, his or her interest does not pass by survivorship to the other tenants in common. The interest passes by will or intestate succession to the heirs of the decedent. If the tenant in common dies intestate (without a will) and leaves no heirs, the interest will escheat (pass) to the state. (Unmarried partners who live together will often choose tenancy in common as their form of ownership when the survivorship feature is not desired.)

Interests of tenants in common do not have to be equal and can be created at different times by different instruments; however, each tenant in common has an equal right of possession. Therefore, if one tenant in common is in sole possession of the premises, that tenant in common will not be obligated to the other tenants in common for rent unless he or she agrees to it. A tenant in common cannot, in the absence of an agreement to the contrary, exclude other tenants in common from the property.

One tenant in common cannot give an exclusive lease to a third party without the agreement of all of the tenants in common because such a lease would be inconsistent with the other tenants’ equal rights of possession.

A tenant in common who farms the property does not have to share the crops with the other tenants in common. However, if a tenant in common receives rents or royalties from a third person, the other tenants in common have the right to share in the income based on their proportional ownership.

If one tenant in common pays reasonable and necessary property expenses or taxes, that tenant is entitled to recover proportional shares of the expenditures from the other tenant(s) in common.

While a tenant in common can get contributions for repairs, one tenant in common cannot get contributions for improvements from the others if the others have not agreed to the improvements. Otherwise, it would be possible to make unauthorized improvements beyond the payment ability of another tenant in common. The result would be that the tenant in common who could not pay his or her share of the cost could end up losing his or her interest.

One tenant in common can get an injunction against another tenant in common to stop waste. One tenant in common also can force another to make an accounting for rents, royalties, expenses, and profits of a property held in common.

Under extremely unusual circumstances, a tenant in common who has exclusive use may acquire title from the other tenants in common based on adverse possession. Should a tenant in common who has exclusive possession of the jointly owned property clearly indicate that his or her possession is intended to preclude the possession by the other tenants in common, that action could be considered an ouster. The tenant’s use would be hostile and would enable him or her to obtain title by adverse possession by continuing the open, notorious, and hostile use continuously for a five-year period and paying the taxes for that period (see Chapter 9).

No consent of the other tenants in common is required to transfer an interest or even a portion of an interest to another.

A tenant in common can encumber his or her own undivided interest. Any subsequent foreclosure by a creditor would apply only to the interest of that tenant in common.

A conveyance to two or more persons, other than spouses, that fails to indicate how title is to be held will pass title as a tenancy in common.

**JOINT TENANCY**

Joint tenancy, like tenancy in common, is an undivided interest in either real or personal property (or both). Unlike a tenancy in common, however, joint tenancy has the right of survivorship. Upon the death of a joint tenant, the interest the deceased joint tenant held ceases to exist. The interest is incapable of being transferred by will or by intestate succession. The surviving joint tenants receive the interest of the deceased joint tenant. Joint tenancy property does not need to be probated, because it could not be part of the estate of the deceased person. Because of survivorship, the property interest passes to the surviving joint tenants free of claims of the personal creditors of the deceased.
Assume Annie, Brenda, and Connie are joint tenants. If Connie dies, Annie and Brenda will be joint tenants. If Brenda then dies, Annie will be an owner in severalty.

Annie______ Brenda______ Connie ______ Joint tenants
Each owns an undivided one-third interest.

Connie dies:
Annie______ Brenda______
Annie and Brenda are joint tenants; each owns an undivided ½ interest.

Brenda dies:
Annie______
Annie owns the entire property in severalty.

Because corporations can live forever, which would defeat survivorship, corporations cannot hold title as joint tenants. Also, because of potential conflicts with community property laws, an unmarried person ordinarily should not own property in joint tenancy with a married person unless the spouse of the married person signs a quitclaim deed or otherwise consents to the joint tenancy.

The legal principle that a murderer cannot inherit from the victim applies to joint tenancies. The courts will not allow the murderer to profit by survivorship. They will view the victim as being a tenant in common, and the interest will pass to the heirs.

In the event of the simultaneous deaths of all of the joint tenants, the Uniform Simultaneous Death Act will treat the interest of each of the joint tenants as if he or she had survived the other(s). This would result in separate probates of each of their interests.

For title purposes, when a joint tenant dies, the survivor(s) should record, in the county where the property is located, either

- a certified copy of a court decree determining the fact of death and describing the property, or
- a certified copy of the death certificate (an affidavit identifying the deceased as one of the joint tenants in described property) and an affidavit of survivorship normally would be attached.

The conveying instrument must expressly state that ownership will be held in joint tenancy; otherwise any conveyance to two or more persons, other than spouses, will be considered a conveyance to tenants in common.
Two couples could own property as tenants in common with each couple’s interest a joint tenancy. A deed could express this through language such as “Tom and Helen Smith (as joint tenants) as tenants in common with Frank and Ethyl Jones (as joint tenants).” Also required to create a joint tenancy are the four unities of

1. time,
2. title,
3. interest, and
4. possession.

Memory Tool: TTIP

Time. Joint tenants must get their interests at the same time. Formerly, if a person who owned property in severalty wished to create a joint tenancy with another, the grantor had to convey interest to a third party (a straw man), who would then convey the property back to the grantor and the other party(ies) as joint tenants. One problem with this procedure was that if any judgments against the straw man existed, they would become encumbrances on the property the instant the straw man took title. The property conveyed as the joint tenancy thereby could be subject to liens. Now, Section 683 of the Civil Code makes it unnecessary to follow this procedure. A joint tenancy can be created by an owner simply deeding the property to himself or herself and the other party(ies) as joint tenants.

Title. Joint tenants must acquire their interests by the same document.

Interest. Joint tenants, unlike tenants in common, must have equal interests. A grant that provides for unequal interests will create a tenancy in common even if it states that the property being conveyed will be owned in joint tenancy.

Possession. Possession is the only one of the four unities that is also applicable to tenants in common. The joint tenants’ rights as to use and contributions are identical with those of tenants in common.

The sale or transfer by a joint tenant of an interest terminates the joint tenancy as it applies to that interest.

Assume Art, Bart, and Curt are joint tenants. If Curt sells to Dirk, then Art and Bart will remain joint tenants, each with an undivided one-third interest, and Dirk will have an undivided one-third interest as a tenant in common.

Art___ Bart ___Curt ___ Joint tenants
Art___ Bart ___Curt

Dirk

If Bart dies, Art will take Bart’s interest by survivorship, and Art will be a tenant in common with Dirk. The joint tenancy cannot continue because no two owners have the four unities of joint tenancy. Art will have an undivided two-thirds
interest as a tenant in common with Dirk, who will be a tenant in common with an undivided one-third interest.

Art ______Dirk

Tenants in common

One of the problems with a joint tenancy is that a joint tenant can convey their interest to another, and the other joint tenant(s) might be completely unaware that the survivorship rights have been defeated.

Case Study
The case of Riddle v. Harmon (1980) 102 C.A.3d 524 held that one joint tenant can terminate the joint tenancy by a conveyance to himself or herself as a tenant in common.

Bankruptcy of a joint tenant terminates the joint tenancy as it applies to the bankrupt party’s interest.

A judgment against one joint tenant does not sever the joint tenancy, but levying execution against the property and having a sale does end the joint tenancy. If the joint tenant dies prior to the execution of the judgment against the property, the property will pass free and clear of the debt to the surviving joint tenant(s).

A joint tenant can borrow on their personal interest without destroying the joint tenancy. If the loan is foreclosed, the joint tenancy, of course, will be broken. However, if the borrower dies, the surviving joint tenant(s) will get the interest free and clear. In lending on a joint tenant’s interests, a lender would want to couple the loan with a life insurance policy that would pay off the loan in the event of the borrower’s death.

Because of changing relationships, a person might no longer wish to remain a joint tenant or tenant in common. In that case, a partition action can be brought to break up the joint tenancy or tenancy in common. (By agreement, the parties can give up their rights to a partition action.) If possible, the court will order the property divided among the co-owners.

When division is not possible or practical, the property will be sold under judicial supervision and the sale proceeds divided among the co-owners.

Case Study
In the case of Formosa Corp. v. Rogers (1952) 108 C.A.2d 397, the plaintiff sought a sale of a movie studio where Mary Pickford Rogers owned a 41/80 ownership. The court held that the party seeking partition by sale had the burden of proof that sale was necessary for equitable distribution. In this case, the court determined that the value of the separate properties was less than the value of the whole because the property as a whole had added value resulting from its adaptation for use in making motion pictures.
Note: A number of states, other than California, have a special form of joint tenancy for husband and wife known as tenancy by the entirety. It differs from joint tenancy in that neither spouse can separately convey an interest during the lifetime of the other spouse.

**COMMUNITY PROPERTY**

Community property, originally a Spanish concept, holds that property acquired by a husband and wife during marriage is owned equally by the husband and wife. This principle differed greatly from the early English concept that the wife’s property became the property of the husband.

As noted earlier, the Treaty of Guadalupe Hidalgo ending the Mexican War in 1848 called for the rights of Mexican ownership of property to be respected. Mexico had adopted the Spanish concept of community property. The California Constitution specifically adopted the community property concept.

There are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Puerto Rico allows ownership of community property, and in Alaska, parties can agree to community property ownership.

Formerly, in California, property acquired in the wife’s name alone was presumed to be her separate property. Now, property acquired by either spouse alone during marriage is presumed to be community property. The burden of proving it to be separate property falls on the spouse claiming separate property.

Property that is acquired with community property funds is community property.

Property that is acquired by one spouse using the credit of the other spouse is community property.

Separate property remains separate property unless it becomes commingled so as to be indistinguishable from community property, in which case it could become community property by the commingling. One spouse’s use of community property to improve the separate property of the other spouse is considered a gift and is not commingling. One spouse’s use of community property to improve their separate property could be commingling, which would convert the separate property to community property. However, the courts are more likely to give a community property interest proportionally based on the community property investment.

**Exclusions**

In California, excluded from the equal ownership of community property are:

- property separately owned by husband or wife prior to marriage,
- rents and profits from separate property,
- property acquired by either spouse by gift or inheritance,
- property acquired with separate property funds,
■ damages received for personal injuries, and
■ earnings and accumulations of a spouse while living separate and apart (includes legal separation).

Case Study
The case of *Marriage of Rico* (1992) 10 C.A.4th 706 involved a couple who lived together and purchased a house as tenants in common prior to their marriage. After their marriage, they refinanced their home and converted title to joint tenancy. In dividing the community property upon the couple’s divorce, the court determined that each party should receive their separate property contribution before the appreciated value was equally divided. However, the court ruled that proper measure of reimbursement was the fair market value of each spouse’s separate property at the time of conversion to community property, not the original contribution. This case shows how complicated the division of separate and community property can become upon dissolution of marriage.

Case Study
*In re Marriage of Branco* (1996) 47 C.A.4th 1621 involved a situation where community property funds were used to pay off a mortgage on the separate property of one spouse. The court held that the community is entitled to its share of the appreciation during the marriage.

Generally, when there is no marriage, there is no community property. When one or both spouses believe that a valid marriage existed, however, the property acquired that would have been community property had a valid marriage existed will be considered quasi-marital property and will be divided as if it were community property.

**Domestic Partnerships**

As of January 2005, same sex domestic couples, although not married, may register with the California Secretary of State. Property acquired with earned income after registration will be considered equally owned as if community property. This registration is also available to unmarried opposite sex couples where one party is at least 72 years of age.

**Note**: The purpose of domestic partnerships for older, opposite sex couples was likely to allow couples to retain greater Social Security benefits and also have property rights similar to community property.
Case Study

*Estate of Leslie* (1984) 37 C.3d 186 involved a couple married in Mexico who lived together for nine years in California. The probate court determined that the marriage was invalid because it was not recorded as required under Mexican law. The supreme court reversed the decision and held that as a matter of fairness, a putative spouse (reputed or commonly established spouse) is entitled to succeed to the property of the deceased spouse in the same manner as a legal spouse.

Case Study

*Estate of Vargas* (1974) 36 C.A.3d 714 involved a decedent who had led a double life. He had two separate families, neither of which knew of the other’s existence. The Court of Appeal affirmed the trial court’s finding that the second wife was a putative spouse even though the second marriage of 24 years was void. She had married with the good-faith belief that her husband had been divorced from his first wife. The court deemed it equitable to divide the property equally between the legal and putative spouses.

Premarital agreements about property rights generally are valid.

Agreements entered into after marriage may be valid if undue influence is not a factor.

Many unmarried people living together enter into contracts concerning their property rights. These agreements may provide community-property-like rights should the relationship terminate, or may otherwise specify property rights and/or division of property. California courts will enforce these nonmarital agreements unless they are based on the consideration of sexual services.

Case Study

In the case of *In re Marriage of Stitt* (1983) 147 C.A.3d 579, a couple agreed to live together and combine their earnings. During this period, the woman acquired a vacant parcel of land in her name alone, and a residence was constructed with a loan in her name. Payments were made on the loan from a joint account. In a proceeding for dissolution of their subsequent marriage, the court held that the property was community property upon marriage. The parties had purchased the property with the intention that it be co-owned. The court held that unmarried cohabitants may enter into express or implied contracts respecting their property rights and earnings.
Case Study
The case of Marvin v. Marvin (1978) C. 3d 660 involved actor Lee Marvin and his live-in girlfriend of six years, Michelle Triola, who changed her name to Marvin. She claimed that Lee Marvin had promised to support her for life at the time they began living together.

The California Supreme Court ruled that Michelle Marvin had not proven the existence of the alleged contract and that California had abolished common law marriage in 1896. While nonmarital contracts—whether oral, implied, or written—may be enforced, they must be provable. The court also held that while unmarried couples can contract as to property division, if the agreement is explicitly based upon sexual services (as Lee Marvin alleged), it will be unenforceable.

Note: This was the “palimony” case that determined that living together did not in itself give property rights.

Community Property Rules
Prior to January 1, 1975, the husband was by law the manager of the community property. Community property assets were subject to the premarital and postmarital debts of the husband, but only the postmarital debts of the wife. Since January 1, 1975, each spouse has had coequal management and control of the community property. Community property now is liable for the debts of either spouse after marriage. The earnings of a spouse are not liable for the debts of the other spouse incurred prior to marriage. An exception to equal rights of management is that one spouse alone can have sole management of a business owned as community property.

Neither spouse can make a gift of community property to a third person without the other spouse’s permission, because this could defeat community property rights. A gift of one spouse to the other of property that would otherwise qualify as community property would become the separate property of the donee spouse.

A married person cannot use community property funds to form a joint tenancy with a third person. Despite the language of the deed, a tenancy in common would be formed, with the married person and their spouse owning their shares as community property.

Community real property transfers, as well as leases for more than one year, require the signatures of both spouses. Neither spouse alone can encumber or obligate community real property.

Neither spouse can partition community real property by selling their one-half interest to another.

Neither spouse can encumber or sell the furniture or furnishings of the home without the other spouse. Neither spouse can sell the clothes of the other spouse or of the minor children without the other’s approval.
Because community property actually is owned equally by both spouses, either spouse can transfer their one-half interest by will. If a spouse dies intestate (without a will), the community property interest will pass to the surviving spouse without probate.

Community property is divided equally upon dissolution of marriage. For the purpose of division of property or separate maintenance only, joint tenancy property is presumed to be community property. To overcome this presumption, strong and persuasive evidence to the contrary must be present (Civil Code Section 4800.1). However, a spouse is entitled to reimbursement for separate property contributions toward community property assets unless he or she has made a written waiver of that right (Civil Code Section 4800.2).

**Case Study**

*In re Marriage of Campbell* (1999) 74 C.A.4th 1058 involved a house owned by the husband prior to marriage. Because the husband had little income during the first years of marriage, the wife contributed money from her separate property to keep the marriage afloat. She also contributed $34,000 to buy equipment for the husband’s business, and $66,000 to remodel her husband’s house. The wife claimed that she relied on a promise to place her name on the title to the house. At marriage dissolution, she claimed an ownership interest in her husband’s house claiming fraudulent conduct. The husband claimed that Family Code Section 852, which requires a written agreement, does not allow oral transmutation from separate to community properties. The wife claimed equitable estoppel as an exception to the statute of frauds.

The Sonoma County Superior Court ruled that the house was the separate property of the husband. The Court of Appeal affirmed, explaining that a writing is required for transmutation (conversion) of separate property to community property and extrinsic evidence could not be allowed. There must be a written agreement if separate property is to become community property.

*Note:* While contributions did not change separate property to community property, the wife could be entitled to her separate property contributions toward the property.

If property acquired in other states by California residents would have been considered community property had it been in California, it will be treated as community property upon marriage dissolution or death (quasi-community property). New residents of California should understand that once they take California residency, property owned in other states by one or both spouses will be regarded as community property if that property would have been community property had it been acquired in California.
A former advantage of community property over joint tenancy was that community property acquired a new cost basis stepped up to market value upon the death of a spouse, while only the deceased spouse’s half interest in joint tenancy property acquired a new cost basis. This distinction has been removed by Revenue Ruling 87–98, which allows both joint tenancy and community property to acquire a new cost basis upon the death of a spouse if the property was acknowledged as community property before the death of the spouse. For property that has appreciated in value, this reduces the taxable income upon a later sale to the difference between the new cost basis and the sales price.

Table 8.1 shows the differences and similarities among tenancy in common, joint tenancy, and community property.

Community Property with Right of Survivorship (CPRS)

This form of ownership applies only to real estate instruments created after July 2, 2001 (Civil Code 682.1). To be effective, the Community Property with Right of Survivorship (CPRS) ownership must be expressly declared on the deed. When one spouse dies, the surviving spouse, as in joint tenancy, takes title regardless of any will. CPRS, as in joint tenancy, avoids probate costs and delays. Prior to death, either or both spouses can terminate the tenancy by executing and recording a new deed as to their interests.

- The major reason for using the CPRS form of ownership rather than community property is that the CPRS property is not subject to the will of the deceased and must pass to the surviving spouse.

**TENANCY IN PARTNERSHIP**

Two or more persons associated to carry on a business for profit compose a partnership. An agreement to share in the profits and losses would create a presumption of a partnership’s existence.

A general partner is an active partner in the partnership who has unlimited personal liability for the debts of the partnership. A new general partner to an existing partnership would have unlimited liability for future debts of the partnership, but liability for the existing partnership debts would be limited to the extent of their contribution to capital (partner’s investment).

Under the Uniform Partnership Act (Corporation Code Sections 15001–15004) general partners

- have equal rights to use partnership property for partnership purposes,
- cannot transfer their interests to another without the consent of the other partners, and
- the death or bankruptcy of a general partner dissolves the partnership.

Creditors of the partnership have first claim on the assets of a partnership. Partnership assets are not subject to attachment or execution for the private debts of
<table>
<thead>
<tr>
<th>Common Ownership Forms</th>
<th>Tenancy in Common</th>
<th>Joint Tenancy</th>
<th>Community Property</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parties</strong></td>
<td>Any number of persons (can be husband and wife).</td>
<td>Any number of persons (can be husband and wife).</td>
<td>Only husband and wife.</td>
</tr>
<tr>
<td><strong>Division</strong></td>
<td>Ownership can be divided into any number of interests, equal or unequal.</td>
<td>Ownership interests cannot be divided and must be equal.</td>
<td>Ownership interests are equal.</td>
</tr>
<tr>
<td><strong>Title</strong></td>
<td>Each co-owner has a separate legal title to an undivided interest.</td>
<td>There is only one title to the whole property.</td>
<td>Title is the “community” (similar to title being in a partnership).</td>
</tr>
<tr>
<td><strong>Possession</strong></td>
<td>Equal right of possession.</td>
<td>Equal right of possession.</td>
<td>Equal right of possession.</td>
</tr>
<tr>
<td><strong>Conveyance</strong></td>
<td>Each co-owner’s interest may be conveyed separately by its owner.</td>
<td>Conveyance by one co-owner without the others breaks the joint tenancy.</td>
<td>Both co-owners must join in conveyance of real property; separate interests cannot be conveyed.</td>
</tr>
<tr>
<td><strong>Purchaser’s Status</strong></td>
<td>Purchaser becomes a tenant in common with the other co-owners.</td>
<td>Purchaser becomes a tenant in common with the other co-owners.</td>
<td>Purchaser can acquire only whole title of community, cannot acquire a part of it.</td>
</tr>
<tr>
<td><strong>Death</strong></td>
<td>Upon co-owner’s death, their interest passes by will to the devisees or heirs; no survivorship right.</td>
<td>Upon co-owner’s death, their interest ends and cannot be willed; survivor owns the property by survivorship.</td>
<td>Upon co-owner’s death, half goes to survivor in severalty; up to one half goes by will or succession to others (consult attorney with specific questions).</td>
</tr>
<tr>
<td><strong>Successor’s Status</strong></td>
<td>Devisees or heirs become tenants in common.</td>
<td>Last survivor owns property in severalty.</td>
<td>If passing by will, tenancy in common between devisee and survivor results.</td>
</tr>
<tr>
<td><strong>Creditor’s Rights</strong></td>
<td>Co-owner’s interest may be sold upon execution sale to satisfy a creditor; creditor Purchaser becomes a tenant in common.</td>
<td>Co-owner’s interest may be sold upon execution sale to satisfy creditor; joint tenancy is broken, and creditor becomes tenant in common.</td>
<td>Co-owner’s interests cannot be seized and sold separately; the whole property may be sold to satisfy debts of either husband or wife, depending on the debt (consult attorney with specific questions).</td>
</tr>
<tr>
<td><strong>Presumption</strong></td>
<td>Favored in doubtful cases except husband and wife (see Community Property).</td>
<td>Must be expressly stated and properly formed.</td>
<td>Strong presumption that property acquired by husband and wife is community property.</td>
</tr>
</tbody>
</table>
the partners. However, bankruptcy of a partner would dissolve the partnership as it applies to the bankrupt partner, which would allow the creditors to reach the bankrupt partner's share of partnership assets.

Partners' interests are undivided. The interests need not be equal, but in the absence of any agreement, the partners have equal rights in the partnership.

Spouses of partners do not have a direct community property interest in partnership property. Partnership property can be conveyed by the partnership without the signatures of the spouses of the partners.

The heirs of a deceased partner have no right to the partnership business, because a partnership requires consent. The heirs are entitled only to the value of the deceased partner's share of the assets over the liabilities, or surplus, not to the continuing business.

General partnership agreements need not be in writing to be valid.

A partnership can acquire property in the name of the partnership. The recording of a statement of partnership that has been signed, acknowledged, and verified by two or more partners is proof of membership in the partnership. A bona fide purchaser for value from the partnership can rely on the statement about the identity of all of the partners and be protected against unnamed parties claiming a partnership interest.

If a partner takes title to partnership property in their separate name, other partners can claim their interests by showing it to be partnership property.

While a partner is entitled to an accounting of cash or property from other partners, a partner cannot sue the partnership; in so doing, the partner in effect would be suing himself.

A partner cannot compete with her partnership. See *Leff v. Gunter* (1983) 33 C.3d 508 for an example of this.

**Case Study**

*Enea v. Superior Court* (2005) 132 C.A. 4th 1559 involved a falling out between partners when a partner questioned the below-market rent being paid by one of the partners to rent the partnership property (his law office). The defendant moved for summary judgment on the grounds that Corporation Code 16404(b) and (c) state there is no duty or obligation when a partner's conduct furthers the partners own business. The defendant claimed that they owned no fiduciary duty to the plaintiff to pay fair market rent. After judgment for the defendant, the plaintiff appealed.

The Appeal Court reversed ruling that the conduct of the defendant general partnership in charging themselves below-market rent violated their fiduciary duties as partners. They pointed out that a partnership is a fiduciary relationship, and partners cannot take advantages for themselves at the expense of the partnership.
**Fictitious Name**

A fictitious name is a name that does not include the surname of every partner. If a partnership fails to comply with the fictitious name statutes, the partnership cannot sue or defend a suit in the partnership name on contracts made using the fictitious name.

To comply with the fictitious name statutes, the partnership must

- file, within 40 days of beginning business, a fictitious name statement with the county clerk that identifies the principals, the business, and its fictitious name; and
- publish, within 30 days of filing, the fictitious name statement in a newspaper of general circulation within the county where the principal place of business is located, once a week for four successive weeks.

All fictitious name statements expire at the end of five years from December 31 of the year filed with the county clerk. Renewal statements again must be filed, but need not be advertised.

A partnership can abandon a fictitious name by filing a statement of abandonment.

**Taxation of Partnerships**

An advantage that partnerships have over corporations is that partnerships do not pay income tax. Taxes are paid by the individual partners, while a corporation has double taxation: corporate profit is taxed, and then the stockholders also are taxed on their dividends.

**Termination of Partnerships**

Partnerships may be terminated by

- agreement,
- bankruptcy of a partner or the partnership,
- court order that results when a partner petitions the court for a dissolution of the partnership, or
- death of a general partner.

**Joint Ventures**

Joint ventures are partnerships for a single undertaking rather than a continuing business. Because a joint venture is set up for a limited purpose, the implied authority of its members is more limited than in a general partnership.

A joint venturer does not necessarily have the power to bind the other joint venturers. A joint venture is generally considered a partnership. A joint venture is taxed in the same way as a partnership (taxes are paid by the individual joint venturers), and joint venturers also have the joint and several liability of partners as to third parties. Unlike in a partnership, one joint venturer can sue the joint venture. The death of a partner automatically terminates a partnership, but the death of a joint venturer does not necessarily dissolve the joint venture. Control of the joint venture is normally given to a managing partner.
Limited partnerships are partnerships in which the limited partners have limited liability rather than the unlimited liability of a general partnership. Limited partners are liable only to the extent of their investment. However, a limited partnership must have at least one general partner who has unlimited liability.

Limited partnership names must end with “A California Limited Partnership.” The agreement must be in writing, and a formal certificate of limited partnership must be filed. A limited partner cannot allow their name to be used in a manner that would indicate he or she is a general partner.

The 1983 Revised Limited Partnership Act (Corporation Code Sections 15611–15721) allows partners to contribute services, but not a promise concerning future services (formerly, a limited partner could not provide anything other than money).

A limited partner can get an accounting from the general partner, and the limited partners can oust the general partner for cause.

Case Study
The case of BT-1 v. Equitable Life Assurance Society (1999) 75 C.A.4th 1406 involved a partnership that owned real property. Equitable was the general partner, and BT-1 was the limited partner. Equitable purchased $62.5 million in loans against the property for the discounted price of $38.5 million. Equitable then demanded payment and took sole title to the property by foreclosure. BT-1 sued Equitable for its loss of equity as well as the gain from the discharge of indebtedness.

While the trial court entered judgment for Equitable, the Court of Appeal reversed. It ruled that the acquisition of partnership debt by a general partner is a breach of fiduciary duty and the duty cannot be contracted away in the partnership agreement. Equitable was BT-1’s partner, not its lender, and it lost sight of this basic distinction in its haste to pounce upon the loan. A general partner cannot take advantage of a limited partner by self-dealing.

Relatively few new limited partnerships are being formed today because of the advantages offered by another form of operation known as the limited liability company, covered later in this chapter.

Syndicates. Syndicates are generally limited partnerships. Real estate syndicates fall under the jurisdiction of the Department of Corporations.

Real estate brokers are authorized by the Corporation Code to sell real estate security interests without having to obtain a broker/dealer license from the Department of Corporations.

An investor in a real estate syndicate has the advantage of the limited liability of a corporation investor. That is, the investor’s liability is limited to the amount invested.
A major attraction of syndicates to investors formerly was their unlimited tax shelter aspect; losses from depreciation could be passed through to the investors. Current tax laws do not allow the use of losses on these passive investments. Consequently, interest in syndicates has greatly diminished.

**Trusts.** Property may be held in the name of a trust for a specific purpose, such as for a charitable purpose. Living trusts (revocable) are used for estate planning purposes, as probate can be avoided. Community property placed in a living trust would still entitle each spouse to community property interests.

### REAL ESTATE INVESTMENT TRUSTS

Real estate investment trusts allow smaller investors to pool their resources for quality investments with limited liability. Under federal law, a **real estate investment trust (REIT)** is an unincorporated trust or association managed by a trustee that meets the following criteria:

- It cannot hold property for sale to customers in the ordinary course of business.
- It must be owned by at least 100 investors.
- Five persons or fewer cannot hold more than a 50% interest.
- Interests must be in the form of transferable shares or certificates. California requires that each share carry with it an equivalent vote in determining trust policy.
- Investments must account for at least 90% of the trust’s gross income.
- Up to 75% of the trust’s gross income may result from short-term gains on sales of stocks or securities held for less than six months plus sales of real estate held for less than four years. This does not apply to involuntary conversion, such as eminent domain.

If the real estate investment trust distributes 90% or more of its ordinary earnings to shareholders, it is taxed only on its retained earnings at the corporate rate.

The trustee in a real estate investment trust must have exclusive power to manage the trust. Trusts are either equity trusts (real estate), mortgage trusts (investments in mortgages and trust deeds), or hybrid trusts (investments in both real estate and mortgages).

Unlike syndicate interests, which are often difficult to resell, many REITs are listed on major stock exchanges so that interests are more readily salable.


### CORPORATIONS

A corporation is a separate legal entity established under state law by the filing of articles of incorporation with the secretary of state. It can own property in the corporate name.

Shareholders of a corporation have limited liability and have no direct management of the corporation.

A disadvantage of corporations is double taxation. The corporation pays income tax on its profits and dividends paid to stockholders from the profits are taxed to the stockholders.

Shareholders elect the directors, who set corporate policy. The directors appoint the corporate officers, who operate the corporation. The authority of the corporate officers is set forth in the corporate bylaws, which are the rules of the corporation.

Because a corporation is a separate legal entity, shareholders can sue the corporation. Also, because it is a legal entity, corporations have an unlimited life and theoretically “live” forever.

A corporate conveyance that involves a sale of all or a majority of the corporate assets must be approved by a majority of the stockholders.

If a corporation exists in name only—that is, individual funds are commingled with corporate funds—the courts will “pierce the corporate veil” and determine that the corporation is in fact a partnership or sole proprietorship, and the limited liability protection of the corporation will be lost.

A closely held, or close, corporation is one in which the stock is held by a few persons who actively control the business. Closely held corporations often are able to avoid significant corporate taxation by not showing a profit. They accomplish this through salaries, benefits, and bonuses to the officers, who are also the stockholders.

### Foreign Corporations

A domestic corporation is a corporation organized in California. A corporation organized in any other state is a foreign corporation in California. To do business in California, a foreign corporation must get permission from the secretary of state; otherwise it cannot sue in California courts. The foreign corporation also must file, with the secretary of state, a consent to allow legal process to be served against the corporation by service on the secretary of state; this eliminates the need to go to the state of incorporation to bring suit.

### S Corporations

As mentioned earlier, corporations are subject to double taxation. To avoid this, a small corporation can elect to be taxed as a partnership by becoming an S corporation. An S corporation must meet the following criteria:

- It must have fewer than 75 shareholders.
Chapter 8  Ownership of Real Property

- Only one category of stock may be issued.
- All stockholders must be individuals, not corporations.
- The business cannot receive more than 20% of its income from interest, rents, dividends, and royalties. (This excludes many real estate–related businesses.)
- The corporation cannot be affiliated with any other corporation. It must be independent.
- It must be incorporated in the United States.

Limited Liability Companies (LLC)

Limited liability companies (LLCs) provide the limited liability protection of corporations without the regulations associated with S corporations. The advantages offered by an LLC have resulted in fewer decisions to form S corporations or limited partnerships. LLCs have operating agreements that are similar to corporate bylaws, but unlike corporations, they do not have perpetual existence. One or more members can file articles of organization with the secretary of state to engage in any lawful business activity. They must also file annual statements.

While it takes at least two members to form a limited partnership, one person can form an LLC. In a limited partnership, a limited partner would lose the liability protection by actively engaging in business matters. In an LLC, member activity does not affect the protection from personal liability.

UNINCORPORATED ASSOCIATIONS

An unincorporated association is a nonprofit organization that under common law could not hold title because it is not an entity. In California, however, unincorporated associations for religious, scientific, social, educational, recreational, or benevolent purposes may hold title to real property necessary for their purposes in the name of the organization. Property nonessential to the operation of the organization cannot be held for more than ten years.

An unincorporated association can convey property by a deed executed by the president and secretary or others as authorized by the bylaws. Recording a verified certificate listing the names of officers and other persons authorized to convey would be conclusive proof that a deed so executed was a properly executed conveyance.

In California, members of such associations are not personally liable for leases or purchases of property used by the association unless they agree to liability in writing.
■ MULTIPLE HOUSING DEVELOPMENTS

Under the Subdivided Lands Law, the division of property into five or more parcels for the purpose of sale, lease, or financing is considered a subdivision. Subdivision classifications include the following:

- **Standard subdivision**: A standard subdivision is a land division with no common areas.

- **Common interest subdivision**: A common interest is a division whereby owners own their unit, separate interests, and an area in common with other owners. Common interests include condominiums, planned developments, stock cooperatives, community apartment projects, and time-share projects.

- **Undivided interest subdivision**: An undivided interest is a development in which owners are tenants in common with all other owners without an exclusive right of ownership of a particular lot or unit. An example would be many of the large, member-owned recreational vehicle parks. Purchasers in an undivided interest subdivision have a three-day right of rescission. (The subdivision process and the Interstate Land Sales Full Disclosure Act are covered in Chapter 13.)

There are several types of ownership forms for common-interest and undivided-interest subdivisions.

**Condominiums**

A **condominium** is an interest in real property consisting of an undivided interest in common in a portion of a parcel together with a separate interest in space. The property can be residential, commercial, or industrial. Most condominium owners own their unit in fee simple.

A condominium is really a vertical subdivision with the unit owner having a separate deed showing ownership of the airspace in fee simple but owning the common areas, including the land, as a tenant in common with the other owners.

Each unit owner can encumber their unit interest separately without affecting the interests of the other owners. Each unit owner pays separate real property taxes that include a share of the common areas. A condominium owner may not sell his or her unit without conveying the rights to the common areas.

Areas for use of all of the owners in a common interest development are known as **common elements**. Common areas for the exclusive use of designated owners (such as a parking space or storage locker) are known as **limited common elements**.

A **homeowners’ association** (HOA) board of directors, elected by the owners, is the governing body for the condominium. (Homeowners’ associations also govern cooperatives, community apartment projects, planned developments, and time-shares.) Homeowners’ associations can place reasonable assessments against the
units, which if unpaid are liens against the individual units. Homeowner associations can record their lien against a member’s property for unpaid assessments if the amount exceeds $1,800. There is a 90-day redemption right after lien foreclosure. Membership in a homeowners’ association is generally a deed covenant that runs with the land. A homeowners’ association must prepare an operating budget and must perform a reserve study every three years to determine adequacy of reserves.

What are homeowner responsibilities and what is the responsibility of the homeowners’ association can be a matter of contention.

**Case Study**

The case of *Dover Village Assn. v. Jennison* (2010) 191 C.A. 4th 123 involved a sewer line that ruptured beneath a homeowner’s unit. The sewer line exclusively serviced the homeowner’s unit and joined to the condominium project’s main sewer line. The HOA claimed that the homeowner should bear the repair costs, and the homeowner contended it was common area and the HOA had the duty to maintain it.

The trial judge ruled that sewer pipes within the concrete slab were part of the common area and the HOA had a duty to maintain it. The homeowner was awarded attorney fees and costs.

The Court of Appeal affirmed, pointing out that a sewer system is one of interconnecting pipes and it would be unreasonable to differentiate between parts of the system.

**Case Study**

In the case of *Sui v. Price* (2011) 196 C.A. 4th 933, homeowners had a disabled vehicle parked in their exclusive parking space for three years before the HOA amended rules to prohibit storage of inoperable vehicles in parking spaces. The homeowners refused to remove the vehicle, and the HOA had it towed away. The homeowners sued for trespass and emotional distress and discrimination because the HOA association rule prohibits discrimination against owners.

The Court of Appeal upheld the trial court in that the new rules were not discriminatory and were reasonable.

*Note:* Just because only one homeowner is affected by a rule does not in itself make it discriminatory.

**Stock Cooperatives**

A stock cooperative is a corporation formed for the purpose of holding title to an improved property. Each shareholder has the exclusive right to the occupancy of a unit through a proprietary lease with the elected governing body. The transfer of shares also transfers occupancy by a sublease.
While a condominium owner can freely transfer their unit, most cooperative associations have the right to approve the purchaser of stock before the stock seller can sublease to the stock purchaser.

There are two basic disadvantages of cooperatives:

1. The stockholder does not have ownership of a unit, so borrowing on equity can be more difficult.

2. There could only be one tax bill. If tax payments are not made by all owners, a lien can be placed on the entire property. If there is only one deed of trust, the failure of one or more owners to make their share of the payment also could result in the entire cooperative’s being foreclosed unless the other owners pay the defaulting owner's share.

Sale of developments of five or more cooperative units fall under the jurisdiction of the real estate commissioner. Cooperatives with four or fewer units are under the jurisdiction of the corporation commissioner.

In a community apartment project, the owners purchase the property together as tenants in common with the right to exclusive occupancy of their units through a lease agreement.

Owners could have difficulty borrowing on their undivided interest. Because there is only one trust deed, the failure of one owner to pay could jeopardize all of the owners. Because of these problems, resale of an owner's interest is often very difficult.

Sale of developments of five or more units are under the jurisdiction of the real estate commissioner.

A planned development, better known as a planned unit development (PUD), is a subdivision with the unit and the land under it owned by the individual unit. Areas for the use of all of the owners, such as recreational facilities or common areas, are owned by all of the owners as tenants in common. The major difference between a planned development and a condominium is that in a planned development, owners actually own their own land and not just airspace. Many California developments are PUDs.

A time-share is an interval or fractionalized ownership whereby the owner gets the exclusive use of a unit annually for a set period of time. Time-share interests may be in perpetuity, for life, or for a stated number of years.

Twelve or more time-share estates of five years or more are considered a subdivision and fall under the jurisdiction of the real estate commissioner. A real estate license is required to sell any time-share interests in California. Because of abusive sales tactics of some time-share developers, purchasers have a rescission right of seven days following their offer.
Time-shares are often marketed based on exchange privileges with other time-share developments. The buyer must be informed that the purchase does not guarantee a right to use or occupy accommodations other than the unit purchased.

A resort vacation club is similar to a time-share, except the investor does not purchase an ownership interest. The investor has the right to rent a unit and use club facilities. These developments are now under the control of the real estate commissioner and are classified as time-share projects.

Sale of Units

Prior to transfer of title, owners of condominiums, community apartment projects, cooperatives, and planned developments must provide purchasers with a copy of restrictions, bylaws, and articles of incorporation, plus an owners’ association financial statement including any delinquent assessments and costs.

An owners’ association must furnish the owner with a copy of the latest version of documents within ten days of request by an owner. A reasonable fee for doing this may be charged. A homeowners’ association cannot charge a transfer fee when units are sold that exceed their actual cost of changing their ownership records.

**OWNER LIABILITY**

An owner of real property is liable for injuries to other persons and/or property caused by negligence in maintaining or operating the property.

**Case Study**

In the case of *Salinas v. Martin* (2008) 166 C.A. 4th 1098b, a homeowner who was having construction work done at his residence allowed a contractor to store equipment and material in the fenced backyard. The contractor and his employee, Salinas, had permission to enter the backyard at any time to retrieve equipment and material. The homeowner also hired gardeners who had two pit bulls. The owner consented to the dogs running free in the yard when the gardeners were working. The contractor told the homeowner he was afraid of the dogs and that they should not be on the property. Salinas was attacked and bitten by the dogs when he attempted to retrieve material. He managed to get away by climbing on top of the owner’s car.

The trial court granted summary judgment for the homeowner. The trial court used a residential landlord standard of care that requires actual knowledge that the dogs were dangerous.

The Court of Appeal reversed. Even though the homeowner had no knowledge of the danger, he allowed the gardeners to keep the dogs in the yard and permitted the contractor’s entry. He could have prevented a problem by requiring the animals to be restrained. The homeowner therefore bears a measure of blame.

*Note:* The owner has a duty of care as to contractors.
Civil Code Section 1365.9 has given individual owners in a common interest subdivision some protection from liability resulting from injuries relating to the common areas. If the association carries specified minimum liability coverage, then the individual owners will not be held liable. The coverage required is as follows:

- At least two million dollars ($2,000,000) if the common interest development consists of 100 or fewer separate interests
- At least three million dollars ($3,000,000) if the common interest development consists of more than 100 separate interests

If dangerous conditions are obvious, an injured party might be denied relief if he or she could be said to have assumed the risk.

**Case Study**

The case of *Melton v. Boustred* (2010) 183 C.A. 4th 521 involved a defendant who advertised a house party on Myspace.com with live music and alcoholic beverages. At the party, several guests were stabbed by unknown persons. The victims sued the homeowner for negligence and premises liability. The trial court sustained a demurrer to the complaint.

The Court of Appeal affirmed. The homeowner has no duty to a guest unless the homeowner creates a risk of criminal conduct that could injure a guest. Without knowledge that guests will be violent, the owner has no duty to foresee criminal conduct even though it was an open invitation.

*Note:* The plaintiffs asserted that the defendant had a duty to hire security guards and to control the number of guests.

**Case Study**

The case of *Privette v. Superior Court* (1993) 5 C.4th 689 involved an employee of an independent contractor who was injured by hot tar and sought to recover damages from the property owner (in addition to workers’ compensation). The California Supreme Court held that employees of independent contractors, even those performing high-risk activity, can recover only their workers’ compensation benefits and cannot receive damages from the property owner.

The duty of care an owner of real property owes to others extends beyond tenants or invitees. An owner’s liability could extend to trespassers as well as neighbors who are injured because of dangerous conditions on the property.
Case Study
In the case of *Preston v. Goldman* (1986) 42 C.3d 108, the California Supreme Court held that a former landlord is not liable for patent defects after he or she relinquishes possession and control. In this case, the Kubichans built a pond and then sold the property to the Goldmans, who leased it with an option to buy to the Reids. The two-year-old son of the visiting plaintiff fell into the pond and suffered brain damage. While the Court of Appeal held that a landowner who creates a dangerous condition is liable for resulting injuries after transfer, the California Supreme Court reversed, ruling that the controlling factors are possession and control as to liability for patent defects, so the previous owner was not liable.


Case Study
The case of *Brunelle v. Signore* (1989) 215 C.A.3d 122 involved a weekend houseguest who was bitten by a brown recluse spider. The guest sued the homeowner for damages. The court held that negligence exists only when there has been a breach of duty. In this case, brown recluse spiders had not previously been seen on the premises, so the defendant was held not to have a duty to prevent the spider bite. The court pointed out that an owner or occupier of a property is not an insurer of the safety of persons on the premises.

Recreational User Immunity
Under Civil Code Section 846, an owner of an interest in real property owes no duty of care to keep the premises safe for entry by others for recreational purposes or to give warning of hazardous conditions. This does not apply to willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity that is not obvious.

*Recreational user immunity* is not limited to rural property, as indicated in *Ornelas v. Randolph* (1993) 4 C.4th 1095.

Attractive Nuisance
California has abandoned the *Attractive Nuisance Doctrine* that placed strict requirements on property owners to protect children trespassers from dangerous conditions on their property. In California, owners are generally not liable for natural dangers and are only liable if they create or maintain a specified dangerous situation where there would be a reasonable expectation that children would be attracted. The requirement of foreseeability has reduced owner liability.

Owner liability for injuries to tenants and invitees is covered in Chapter 15.
Case Study
The case of *Shipman v. Boething Treeland Farms Inc.* (2000) 77 C.A.4th 1424 involved trespassers who were injured when their all-terrain vehicle collided with a vehicle driven by a farm employee. The accident occurred at a tree-obstructed intersection on the property. The trespasser, Shipman, sued for negligent operation of a motor vehicle and premises liability. The superior court granted summary judgment for the defendant ruling that Civil Code Section 846 bars liability to recreational user trespassers.

The Court of Appeal affirmed, explaining that Section 846 affords broad immunity protection to property owners from liability to trespassers.

*Note:* Apparently, the immunity would extend even if the owner’s employee had been driving negligently.

Case Study
The case of *Miller v. Weitzen* (2005) 133 C.A. 4th 732 involves an equestrian who was injured when her horse lost its footing while crossing a paved driveway that the riding trail went across. The property owner had paved the driveway without a permit. The rider belonged to the Rancho Santa Fe Association and her dues included a trail maintenance fee. She sued both the property owner and the Rancho Santa Fe Association for negligence.

The trial court ruled that Civil Code Section 846 (Recreational user immunity) protects both the property owner and the association from liability. However, there is an exception where a fee was paid. The trial court ruled that since the association received a fee, they were liable for the injury.

The Court of Appeals affirmed the ruling that the property owner was protected from liability and the fact that a paving permit was not obtained was irrelevant. The owners received no consideration, but the association was not so protected.

*Note:* There are two exceptions to the recreational user immunity statute:
1. When consideration is paid to the land owner for entrance.
2. When the property owner knows of a dangerous condition that is not obvious, not clearly marked, or not disclosed.

Case Study
In *New v. Consolidated Rock Prods.* (1984) 171 C.A.3d 681, two motorcyclists were injured when they drove their motorcycle over a 20-foot cliff at the end of an abandoned road. The owner had posted “no trespassing” signs, but the signs had little deterrent effect on motorcyclists. The court held that the defendant had acted willfully or in conscious disregard of the duty to warn plaintiffs of a dangerous condition under Civil Code Section 846 and was therefore liable for the resulting injury.
Hazardous Substance Disclosure

Health and Safety Code Section 25359.7(a) requires that owners of nonresidential real property before they sell or lease give notice to buyers or lessees of the release of hazardous substances that they know of; they also must give notice when they have reasonable cause to believe hazardous substances are located on or beneath the property.

Section 25359.7(b) requires that lessees (both nonresidential and residential) give written notice to owners regarding hazardous substances they know to have been released or believe to exist on or beneath the property. Failure to disclose constitutes a default by the tenant under the lease.

Lead Paint

Purchasers (and renters) of one to four residential units built prior to 1978 must be given a Watch Out for Lead-Based Paint booklet, and they have up to ten days after signing the sales contract to have the residence inspected for lead-based paint. While sellers cannot refuse to allow this inspection, this right can be waived by the buyer. Foreclosed residences and housing designed for the elderly or disabled, where children under six years old are unlikely to reside, are exempt. Penalties include fines up to $10,000, criminal prosecution, and/or treble damages to the buyer and renter.

When a landlord who receives federal subsidies or loans is confronted with deteriorating paint in a pre-1978 housing unit, the landlord must alert affected tenants to the possible health dangers and use government-certified workers and special containment practices to abate any risk of public exposure.

CERCLA

Under the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, CERCLA owners, operators, and lessees of real property have cleanup liability for actual or threatened release of hazardous substances. Also liable are those who generated, transported, or disposed of the hazardous substances. Under federal law, landowners may raise the defense of innocence when they conducted appropriate inquiry prior to acquiring the property. Because California law requires prior owner and lessee disclosure, the defense of innocence will likely be removed if any disclosure was made.

Case Study

The case of Wiegmann & Rose International Corp. v. NL Industries, Inc. (1990) 735 F. Supp. 957 involved a sale of land where the seller had dumped hazardous waste. The sale provision included an "as is" clause. The court held that the "as is" provision in the deed did not absolve the seller because the purchaser of the contaminated property had no knowledge, actual or constructive, of the presence of hazardous waste. Applying federal law, the U.S. district court ruled that NL Industries was strictly liable for cleanup costs. The liability imposed by CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980) is not absolved by an "as is" clause.
In several states the hazardous substance removal liens take precedence over all other liens, which could effectively wipe out a lender’s interests. While both California and federal laws set forth landowner liability for removing hazardous substances, neither California nor federal law provides for such super liens.

**Case Study**
The case of *United States of America v. Maryland Bank & Trust* (1986) 632 F. Supp. 573 involved a bank that foreclosed on a mortgage it held. At the foreclosure sale, the bank bid $381,500 and took title to the property. The prior owners had used the site as a dump for hazardous waste. The EPA ordered the bank to clean up the site, and when it failed to do so, the EPA removed the toxic material at a cost of $551,713.50. The bank was held liable for the cleanup costs. The court’s ruling indicates that lenders must protect themselves. Before lenders foreclose, they should consider possible liability from activities of former owners and tenants.

In California, Code of Civil Procedure Section 726.5 allows a lender to waive its security interest (lien) on environmentally impaired property and to proceed directly against the borrower for the debt. In this way the lender is spared the possible liability of cleanup costs.

Disclosures are also required for natural hazards (see Chapter 6).

**Gatto Act**
The Gatto Act gives cities, counties, and housing authorities the authority to compel cleanup of contaminated properties by a nuisance action. They also have the right to require property owners to disclose environmental information.

**SUMMARY**
Ownership of property can be held in the following forms:

- **Ownership in severalty:** This is ownership by one person or corporation alone.
- **Tenancy in common:** This is an undivided ownership by two or more persons without the right of survivorship.
- **Joint tenancy:** This is an undivided interest by two or more persons with the right of survivorship. Upon the death of a joint tenant, their interest immediately passes to the surviving joint tenant(s). To form a joint tenancy, the four unities of time, title, interest, and possession are necessary.
- **Community property:** Property acquired by husband or wife during marriage is, with some exceptions, considered to be owned jointly and equally by the spouses. Both spouses must agree to the transfer or encumbrance of community real property.
- Community Property with Right of Survivorship: Community property where neither spouse can will their portion to a third party.
- Domestic partnerships: In California, domestic partnerships that are registered have property rights similar to community property.
- Partnership: A partnership is two or more persons associated to carry on a business for profit. Property can be held in the name of the partnership.
- Joint venture: A joint venture is a partnership for a particular undertaking rather than a continuing business.
- Limited partnership: This is a partnership that has limited partners who are inactive and have limited liability. They are liable only to the extent of their investment. Limited partnerships must have at least one general partner who is active and has unlimited liability.
- Real estate investment trust (REIT): This type of trust, having 100 or more investors, issues certificates or shares to the investors. The shares are freely transferable.
- Corporation: A corporation is an artificial person created by law that can own property. Corporations pay taxes on their profits, and the dividends paid to the shareholders are taxed to the shareholders (double taxation). S corporations are small corporations that have elected to be taxed as partnerships to avoid double taxation.
- Limited liability company (LLC): Because of ease of formation (e.g., they can be formed by a single individual) and fewer restrictions, LLCs are becoming more popular with investors than limited partnerships and S corporations.
- Unincorporated associations: These are nonprofit organizations. In California, unincorporated associations for specific purposes can hold title to real property.

Following are a number of forms of ownership for housing developments:
- Condominium: A condominium interest is a separate interest in the airspace of a unit coupled with an undivided interest in common in the common areas.
- Stock cooperative: A stock cooperative is a corporation in which each shareholder also has a lease interest that entitles him or her to occupancy of a unit.
- Community apartment project: A community apartment project is an undivided tenancy-in-common interest in the real property, with each owner having the right to occupy a unit.
- Planned development: A planned development is a subdivision in which some areas are owned in common. Individual unit owners own their own units and the land under the units.
Time-share: A time-share is a fractionalized ownership in which each owner has exclusive use of the property for a set time period.

Owners of real property are liable for injuries to other persons and/or property resulting from negligence in maintaining their property. Owners, however, are not absolute insurers regarding the safety of others.

Owners generally have no duty of care to keep their premises safe for recreational users, but must warn against known dangers.

Owners and lessees have duties of disclosure regarding hazardous substances, and owners can be held liable for removal of hazardous waste even when they were not responsible for the waste being on their property.

**DISCUSSION CASES**

1. When a property is given to two or more parties as life tenants, what is the relationship between the life tenants?

   *Green v. Brown* (1951) 37 C.2d 391

2. One joint tenant used a property for 22 years, paid the taxes, and maintained the property. In a quiet title action, he claimed title to the entire property by adverse possession. **Does his claim have merit?**

   *Dimmick v. Dimmick* (1962) 58 C.2d 417

3. A property settlement between joint tenants gave the former husband exclusive possession for life. The husband agreed not to convey his interest and to pay the taxes and maintain the property. **What is the form of ownership, and what are the rights of the former wife?**

   *Cole v. Cole* (1956) 139 C.A.2d 691

4. A cyclist was injured in the Los Angeles National Forest when he was hit by a U.S. service truck. **Does the California recreational immunity protect the U.S. government?**


5. A corporation authorized to enforce the provisions of a recorded declaration of restrictions assessed residents for expenses incurred in suing the city to abate airport noise. The restrictions covered activities within the complex but not those outside the complex. **Was the assessment proper?**

6. Several investors purchased a 300-acre tract for $71 million. The tract was to be broken up with parcels sold by the managing partner. It was agreed that the managing partner was not to receive any sales commissions. The managing partner marked up invoices by 5% without notifying his partners and received sale commissions in the form of kickbacks from brokers. What, if any, damages are the other investors entitled to?  

7. A man purchased a tenant in common’s interest in an island-type property used for waterfowl hunting. He wanted the entire parcel, but the other tenant in common refused to sell. He brought a partition action and asked that the property be sold. Should the court order a sale?  

8. A trespasser crawled through a hole in the fence of a paint-stripping plant. He climbed on top of a vat and fell through a thin plywood cover into acid. The owner who leased the premises to the operator was unaware of the vats of acid. Is the owner liable for the injuries to the trespasser?  

9. A husband whose wife was in a mental hospital acquired an interest in real property with a woman with whom he was living. He used community property for his contribution, and she used her separate property. Can they hold title as joint tenants?  
_Yeoman v. Sawyer_ (1950) 99 C.A.2d 43

10. During the process of marriage dissolution, a husband alone gave a trust deed to property held in joint tenancy. The court later gave the wife title to the property. What would be the effect of foreclosure of the trust deed?  

11. While standing outside the door of an arcade, the plaintiff was shot by a security guard who had been hired by a tenant of the landlord. The guard was a convicted felon who was unlawfully in possession of the gun. Is the landlord liable for the plaintiff’s injury?  

12. A law student was assaulted after leaving the school property and walking in a public area toward his car. The student alleged the school did not properly light the area. Assuming the area was dark and the darkness allowed the student to be assaulted, is the school liable?  
13. After leaving a convenience store, a customer was assaulted and injured in a vacant lot adjacent to the store, where customers often parked. The defendants had a nonexclusive right to use the lot for extra parking under their lease and knew customers used the lot. On several occasions, they had sought police assistance to remove loiterers from the lot. **What, if any, were the duties of the defendants?**


14. A husband signed a contract to sell community property. The buyer was unaware of the existence of the wife, who refused to perform, that is, sell. **Can the buyer obtain specific performance?**


15. A motorcyclist fell into a percolation test hole and sued the landowner as well as the responsible contractor and subcontractor. **Are the defendants entitled to raise the recreational use immunity?**


16. A wife quitclaimed her interest in a community property residence to her husband for value while separated. During subsequent reconciliations, she lived in the house with her husband, and community funds were used to pay the mortgage. **In a subsequent marriage dissolution, would the wife have a community property interest in the residence?**


17. A lessee of 40,000 acres under a U.S. Forest Service grazing permit placed a barbed wire gate across a forest service road to control his cattle. The land was also open for recreational users. The plaintiff drove his off-road motorcycle into the wire and was injured. **Is the lessee liable?**


18. A passerby slipped on dog feces on the public sidewalk in front of a store. The owner of the store did not create the hazard; however, a municipal ordinance required landlords to keep city sidewalks clean. **Is the landlord liable for the pedestrian’s injuries?**


19. A park brochure described a trail as safe for cycling and advertised its bikes. A tourist died from a cycling accident. **Does recreational immunity protect the defendant?**

*Pau v. Yosemite Park* (1991) 928 F.2d 880
20. Migrant farmworkers built a camp without the permission or knowledge of the owner. A fire in the encampment led to personal injury. Should the owner of the property be held liable?


21. A wife used $40,000 of her separate property to extinguish a $53,000 debt against community property. (The debtor agreed to settle for $40,000.) What were the wife's rights upon marriage dissolution?

*In re Marriage of Tallman* (1994) 22 C.A.4th 1697

22. A five-year-old girl was jumping up and down on her bed in a second-story apartment. She sustained injuries when she fell through a window screen, dropping 30 feet. (The window ledge was 44 inches from the floor.) The building was in compliance with local codes, but the tenant claimed that the window should have had bars. Is the landlord liable?


23. Two couples owned a beachfront town house as partners. On default on the trust deed, one couple purchased the property at the lender's trustee's foreclosure sale. Was this a breach of fiduciary duty?

*Jones v. Wagner* (2001) 90 C.A.4th 466

24. A mother and her child were visiting a friend who had a pool. The mother and homeowner were watching the children play in the front yard. When the mother went to make a phone call, her child went in the back yard and drowned in the pool. Did the homeowner have a duty to supervise the child?


25. A private farm road led to public road 172. There was no evidence of the public using the farm road. Because the road ran through rows of trees, farm vehicles traveled the road at relatively slow speeds. A truck from another farm used the private road to get to 172. It was moving at excessive speed and hit a van full of agricultural workers upon entering 172. Was the farm owner negligent in failing to install a stop sign where the private road entered 172?

CHAPTER QUIZ

1. What would be the ownership form for property that is solely owned by a married woman?
   a. Community property
   b. Tenancy in common
   c. Ownership in severalty
   d. Ownership in partnership

2. Which ownership form is matched with an incorrect characteristic?
   a. Joint tenancy/undivided interest
   b. Tenancy in common/survivorship
   c. Community property/equal ownership
   d. Severalty/alone

3. To convey your property to a son and daughter on a one-third/two-thirds basis, you would want to convey title as
   a. community property.
   b. tenancy in severalty.
   c. tenancy in common.
   d. joint tenancy.

4. Agnes and Alfred, who were recently married, want to purchase a house together. They each want their interest to pass to their individual children from previous marriages in the event of death. They should buy the house
   a. in partnership.
   b. in severalty.
   c. as tenants in common.
   d. as joint tenants.

5. A single tenant in common may NOT
   a. sell her interest without approval of the other tenants in common.
   b. will her interest to her children.
   c. use the property without compensating the other tenants in common.
   d. give exclusive possession to another.

6. Which statement accurately describes a tenancy in common?
   a. Interests must be equal.
   b. There is an equal right of possession.
   c. Interests must be acquired at the same time.
   d. Interests must be acquired from the same documents.
7. Albert, Baker, Charlie, and David are joint tenants. What form of ownership exists when David sells to Edith and Albert then dies?
   a. Baker, Charlie, and Edith are tenants in common.
   b. Baker and Charlie are joint tenants, and Edith is a tenant in common.
   c. Albert’s heirs, Baker, Charlie, and Edith are tenants in common.
   d. None of these describes the existing ownership.

8. Thomas and Andrew own property in joint tenancy. Thomas put a $50,000 mortgage on his interest. A short time later Thomas died. Who owns the property and how?
   a. Andrew owns the property clear of the mortgage.
   b. Andrew owns the property with a mortgage against it.
   c. Because the mortgage destroyed the joint tenancy, Andrew and the heirs of Thomas own the property as tenants in common.
   d. Andrew and the mortgagee own the property as tenants in common.

9. Which is an example of a partition action?
   a. Dividing an apartment building into condominiums
   b. Any land subdivision
   c. A court proceeding to divide jointly owned property
   d. Breaking large apartments into smaller units

10. After Albert and Helen were married, they purchased a home. The $40,000 down payment was the separate property of Helen. Payments on the home were made with community property funds. Upon marriage dissolution, what are the rights of the parties to the sale proceeds from the house?
    a. Albert and Helen share the proceeds equally.
    b. Albert gets one-half of the payments made, but Helen gets the remainder.
    c. Helen is entitled to $40,000 plus one-half of the balance of the sale proceeds (if any).
    d. None of these is true.
11. Without the consent of the other spouse, one spouse can
   a. buy real estate using community property funds.
   b. sell community real property.
   c. give community real property away.
   d. lease community real property for 18 months.

12. According to community property rules, one spouse alone may
   a. sell community real property interest.
   b. encumber community real property interest.
   c. will community real property interest.
   d. do none of these.

13. Jim and Tom are general partners in a real estate office. Jim dies, leaving all
    of his property to his wife, Lois, who is also a real estate broker. What is the
    result?
    a. Lois and Tom are general partners.
    b. Lois has an interest in the partnership assets but not in the business.
    c. Lois becomes a limited partner.
    d. Lois has no interest in the business or the assets of the business.

14. A partnership that has NOT complied with the fictitious name statute
    a. would be a limited partnership.
    b. cannot sue in the partnership name.
    c. is an unincorporated association.
    d. is all of these.

15. Which statement is TRUE of a joint venture?
    a. One joint venturer can sue the joint venture.
    b. The death of a joint venturer automatically dissolves the joint
       venture.
    c. Joint venturers have the same power to bind other joint venturers as
       partners have to bind other partners.
    d. All of these are true.
16. A new limited partnership MUST
   a. end its name with “A Limited Partnership.”
   b. have a written agreement.
   c. file a formal certificate of limited partnership.
   d. do all of these.

17. Under federal law, a real estate investment trust must have
   a. a corporate charter.  
   b. fewer than 100 investors.
   c. 100 or more investors.  
   d. 1,000 or more investors.

18. Two separate corporations could hold title together as
   a. tenants in severalty.  
   b. joint tenants.
   c. community property.  
   d. a partnership.

19. Which is (are) true regarding income tax?
   a. Partnerships do not pay income tax.
   b. A disadvantage of corporations is double taxation.
   c. An S corporation does not pay taxes.
   d. All of these are true.

20. Rights of occupancy of owners in a cooperative are based on
   a. a proprietary lease.
   b. the articles of incorporation.
   c. the bylaws of the association.
   d. individual deeds to each unit.

21. Ownership as tenants in common with a right to occupy a unit describes a
   a. cooperative.
   b. community apartment project.
   c. planned development.
   d. None of these
22. Interval exclusive occupancy coupled with a joint ownership likely refers to a(n)
   a. cooperative.
   b. community apartment project.
   c. undivided interest subdivision.
   d. time-share.

23. The seller of a condominium property must provide the purchaser with
   a. a copy of the restrictions.
   b. the association bylaws.
   c. the owners’ association financial statement showing delinquent assessments.
   d. all of these documents.

24. An owner is likely to be liable to a recreational user of his or her property when
   a. he or she failed to post “No Trespassing” signs.
   b. he or she failed to warn against a dangerous condition.
   c. the property is urban in nature.
   d. all of these conditions exist.

25. Notice of known hazardous substances on the premises must be given by
   a. owners to buyers.  
   b. owners to lessees.
   c. lessees to owners.  
   d. all of these.