Chapter 6:
Interests in Land History

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

I. Introduction

Modern real property law has evolved from the English feudal system of land ownership. The basic concept of the feudal system was that the king, as owner of all the land, would grant large tracts of land to faithful lords in return for allegiance and service. The lords then granted portions of their land to lesser nobles, and so on. These grants, called "feuds," continued on down to the "villeins" who lived on and cultivated the land. Except for the monarch and the villeins, each person occupied a dual position as both overlord to their tenant and tenant to their overlord.

The land itself was considered to owe services to the lord; the tenant performed those services. The service due was specified at the time the tenant received a land grant. Thus a tenant might owe rent to the overlord and this same lord might owe "knight (or military) service" on the same land to a higher lord. In addition to the services, there were certain "incidents" due from all feuds, such as homage (a ceremonial pledge of personal loyalty) and relief (the payment of a sum by the heir of the tenant for the right to inherit—an ancient inheritance tax).

Land ownership is the basis of power and wealth. More than a system of land ownership, the feudal system was also a system of government, establishing an economic structure and a military organization. Because there was no centralized administration for the kingdom, discipline and order were effectively maintained through the series of lord-and-vassal relationships.

The relationship between the English Crown and the American colonies was essentially feudal. For example, according to the Maryland Charter, the feudal services due were the delivery of two Indian arrows on Tuesday of Easter week and one-fifth of all the gold and silver ore found within the boundaries of the land grant. After the revolution the feudal position of the English Crown presumably passed to the states. In most states, the concept of feudal tenure was abolished by statute or judicial decision. In a few, the technical concept of feudal tenure may technically still exist. As a practical matter, all states now follow the **allodial theory** of land ownership, meaning an owner holds land in absolute independence, owing nothing to the state as overlord. Of course, the state always retains jurisdiction over land within its borders, including the four governmental rights discussed in this chapter.

II. Kinds of Interests in Land

A unique concept of Anglo-American land law is that of "estates." An estate is the type of ownership in land, and determines the duration of an individual's right of possession and right of use. If a "fee simple" owner leases property to a tenant for ten years, both have interests in the property. The tenant's estate is called an "estate for years," and entitles the tenant to assert the right of exclusive possession against anyone, including the owner. The tenant must not abuse the property and has a limited right of use. The owner retains the right

to possession at the end of the lease term—a present right to future possession. This interest of the owner is known as a **reversion**.

Estate types also derived from the feudal system and are either "freehold (ownership) estates" or "non-freehold (non-owned) estates." Freehold estates were normal holdings under the feudal system, and are: (a) fee simple absolute, (b) defeasible (or base- or qualified-) fee, (c) fee tail, and (d) life estate. Non-freehold estates appear to have begun primarily as a moneylender's device and did not have the dignity of feudal stature. Non-freehold estates are: (a) estate for years, (b) estate from period-to-period, (c) estate at will, and (d) estate at sufferance.

The law concerning interests in land is extremely technical and complex. The following discussion is simplified and condensed.

A. Freehold estates

Fee simple absolute

Often called a fee or a fee simple, this is the most comprehensive bundle of ownership rights known in law. This bundle of rights includes the rights to possess, use, enjoy, control, and dispose. A condominium is a fee simple estate created in air space.

Although fee simple is the highest degree of land ownership recognized by law, it is never absolute ownership such as you have when you own a book. An owner's fee simple title is always subject to governmental and private limitations. which apply equally to all types of estates in land.

The four major **governmental limitations** on land are:

1. **police power** – the right to impose reasonable limitations to protect and promote the health, safety and general welfare of the public;
2. **eminent domain** – the right to take private property for public use in return for payment of just compensation;
3. **taxation** – the right to impose taxes for governmental support and to proceed against the land for non-payment; and
4. **escheat** – the right to acquire title to property owned by a person who dies without leaving a will (intestate) or heirs-at-law.

Private limitations upon the use of land are usually classified as:

1. **deed restrictions** – imposed by a grantor, such as requiring that all structures built upon the land must be of brick veneer, or that the property may only be used for a specific purpose;
2. **mortgages** – a security claim of the mortgagee (lender) upon the property preventing use or change that would injure the property's value;
3. **leases** – suspends the fee-holder's right to use and possess for some period of time; and
4. **easements** – a right to cross over the property of the fee holder without interference.

Defeasible fee

A defeasible fee, also called a base, or qualified fee, is a fee simple subject to a special limitation, a condition subsequent, or an executory limitation.

A fee simple subject to a **special limitation** automatically terminates the fee upon the happening of a specified event. Example: An owner in fee simple absolute conveys to another person and his or her heirs so long as the land is used for church purposes. This conveyance may last forever. But if the land ceases to be used for church purposes, ownership automatically reverts to the grantor, or to the grantor's successors-in-interest.

A fee simple subject to a **condition subsequent** gives the grantor, or the grantor's successors-in-interest, the power to terminate the grantee's estate upon the happening of a specified event. Example: If an owner in fee simple absolute conveys with a restriction against alcohol being sold on the premises, the owner shall have the right to re-enter for breach of this condition. Differing from a special limitation described above, this interest does not revert automatically upon the breach of the condition, but continues until the original owner exercises power of termination by re-entry.

Unlike the first two types of defeasible fees, a fee simple subject to an **executory limitation** does not return to the grantor but passes automatically to some third party upon the happening of a specified event. Example: An owner in fee simple absolute conveys with a limitation holding that if the grantee dies without surviving children, then fee automatically passes to a third party named in the deed.

Fee tail

A fee tail estate historically created an estate along family lines. The first grantee could not re-convey the land, but was obligated to continue downward inheritance as long as there were lineal descendants. Upon failure of the chain, the land would automatically revert to the grantor or grantor's successors-in-interest. Fee tail estates are considered unsuited to American culture, and have been abolished or modified in all states. Some states provide that a conveyance, which under common law would have created a fee tail, now conveys a fee simple absolute. Other states, including Colorado, provide that the first grantee holds a life estate and the first heirs take a fee simple title. (38-30-106 C.R.S.)

Life estate

A fee simple owner conveying to another for his or her lifespan creates an estate for life. Upon the grantee's death, the fee reverts to the grantor or grantor's successors-in-interest. Similar to a lease, the grantee may not make unreasonable use of the property or do anything that would decrease the value of the grantor's reversionary interest.

A life estate could also be created by a conveyance for as long as the grantee lives and then to a third party named in the deed. Alternatively, a life estate may also be based on the life of a third party instead of the grantee.

Although abolished in Colorado, there are two "legal" life estates automatically created by law and recognized in a few states today: dower and curtesy. (15-11-112 C.R.S.)

Dower

Dower is a life interest of one-third of any real estate owned by a husband during the marriage given to his wife upon his death. The husband could not defeat the dower by

conveying before death. If a wife had joined her husband in conveying the property, she was held to have waived her dower right.

Curtesy

Curtesy is a life estate in all of the real property owned by a wife during the marriage given to her husband upon her death, provided a child was born from their marriage. As in dower, a conveyance by the wife would not terminate the husband's curtesy right unless he joined in the conveyance.

B. Non-Freehold Estates.

Non-freehold estates are **leasehold** interests. These are more fully discussed in Chapter 20: Property Management and Leases.

Estate for years (tenancy for years)

An estate for years is one for a **fixed period of time**, whether for a day, one year, or 99 years. A conveyance from landlord to tenant for ten years creates an estate for years.

Estate from period-to-period (periodic tenancy)

Such an estate exists when there is **no definite agreed upon duration** or termination date, but the rental period is fixed at so much per week, month or year. These estates are usually created by implication rather than express provision. Either party may terminate this estate by giving the statutory notice of termination at the expiration of any rental period.

Estate at will (tenancy at will)

Expressed or implied, an estate at will **may be terminated at the will of either party**. Upon the giving of proper notice, either the tenant or landlord may cancel the estate at any time.

Estate at sufferance (tenancy at sufferance)

This estate arises when the **tenant wrongfully holds** over after the expiration of the lease term.

III. Concurrent Interests

An estate in land may be owned by one person (in severalty), or by two or more persons concurrently. The two most important types of co-ownership are joint tenancy and tenancy-in-common.

A. Joint Tenancy

All co-owners are equally entitled to the use, enjoyment, control and possession of the land, or its equivalent in rents and profits. The best-known characteristic of joint tenancy is the **right of survivorship**. Upon the death of one joint tenant, the decedent's rights pass immediately to the surviving tenant(s). Death of a joint tenant does not affect title, as the title is vested equally in all joint tenants rather than individually.

According to common-law, joint tenancy must feature **"four unities": time, title, interest, and possession**. Joint tenants must acquire title at the same time, be named in the same deed, hold exactly equal interests, and be entitled to equal rights of possession. A conveyance from an owner in severalty to herself and her spouse could not have created a

joint tenancy under common-law because the unities of time and title were missing. However, under Colorado law such a deed would create a joint tenancy:

> ***38-31-101. Joint tenancy expressed in instrument – when.***
>
> (1) Except as otherwise provided in subsection (3) of this section and in section 38-31-201, no conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real property, it is declared that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning as the phrases "in joint tenancy" and "as joint tenants". Any grantor in any such instrument of conveyance may also be one of the grantees therein.
>
> (2) Repealed
>
> (3) A conveyance or devise to two or more personal representatives, trustees, or other fiduciaries shall be presumed to create an estate in joint tenancy in real property and not a tenancy in common.
>
> (4) An estate in joint tenancy in real property shall only be created in natural persons; except that this limitation shall not apply to a conveyance or devise of real property to two or more personal representatives, trustees, or other fiduciaries. Any conveyance or devise of real property to two or more persons that does not create or is not presumed to create an estate in joint tenancy in the manner described in this section shall be a conveyance or devise in tenancy in common or to tenants in common.

As one author put it, there is nothing sacred about joint tenancy. Any joint tenant can terminate the relationship by a conveyance or a contract to convey, or through involuntary transfer (e.g. foreclosure or tax sale). When a joint tenancy is terminated, either voluntarily or involuntarily, the remaining co-owners then become tenants-in-common.

B. Tenancy in Common

Tenancy in common is an estate in land held by two or more persons with **only the unity of possession**. Unlike joint tenancy, tenants-in-common may hold varying size interests, may take title at different times, and may receive their interests through different deeds. But each is entitled to the undivided possession of the property, according to their proportionate share and subject to the rights of possession of the other tenants. Upon the death of a tenant-in-common, there is no right of survivorship. The decedent's interest passes according to his or her will or the state law of descent and distribution.

IV. Concurrent Conveyances

Ownership of a home by a husband and wife is usually declared by the deed to be in "joint tenancy" or as "tenants-in-common." Each has advantages and disadvantages.

The automatic and immediate right of survivorship that accompanies joint tenancy eliminates some legal complications of probate in the event of the death of one of the parties. However, inheritance taxes are assessable and evidence of the death must be recorded. Joint tenancy assures the survivor a fair share of the marital property and the property does pass free of the claims of unsecured creditors.

Disadvantages of joint tenancy may arise if marital difficulties occur, or if one of the parties has obligations or responsibilities (children) resulting from a previous marriage. The financial and tax situation of the parties may also favor tenancy-in-common.

Although it is helpful and proper to explain the meaning of "joint tenancy" or "tenancy-in-common," a broker must **never advise a client what type of conveyance is best**. To do so exceeds the role of broker and constitutes the unauthorized practice of law.

V. Homestead Exemption

* Under Colorado law (38-41-201, C.R.S.),

> Every homestead in the state of Colorado shall be exempt from execution and attachment arising from any debt, contract, or civil obligation not exceeding in actual cash value in excess of any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution thereon:
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> (a) The sum of sixty thousand dollars if the homestead is occupied as a home by an owner thereof or an owner's family; or
>
> (b) The sum of ninety thousand dollars if the homestead is occupied as a home by an elderly or disabled owner, an elderly or disabled spouse of an owner, or an elderly or disabled dependent of an owner.

The terms "householder" and "owner of the property" also include a person holding equity under a land contract or other agreement where such person possesses the property, but the sellers' or vendors' rights are always superior to any homestead.

If the debt, contract, or civil obligation which is the basis for the execution and attachment was entered into or incurred **after** July 1, 1975, the homestead exemption **will be created automatically** as long as the requirements outlined in sections 34-41-203 and 205 are met (38-41-202, C.R.S.). Section 34-41-203 states that homesteaded property is only exempt while occupied as a home by the owner or owner's family. Section 34-41-205 mandates that "[t]he homestead . . . may consist of a house and lot or lots or of a farm consisting of any number of acres."

If, however, "the debt, contract, or civil obligation . . . was entered into or incurred prior to July 1, 1975," the owner or spouse must record in the office of the clerk and recorder of the county where the property is situated an instrument in writing (which should be acknowledged) describing the property, setting forth the nature and source of the owner's interest therein, and stating that the owner is homesteading the property.

A surviving joint tenant spouse will have the same homestead exemption as the deceased joint tenant. If there is no surviving spouse, the surviving minor children will hold the exemption. This survival occurs without the need for occupancy. Homestead exemptions will not pass to an unrelated joint tenant (i.e. only to spouse, parent, minor child).

If the homestead was created automatically, the owner may convey or encumber without the signature of the owner's spouse. If the owner or owner's spouse recorded the homestead exemption as described above, then both spouses must execute any conveyance or encumbrance.

A homestead exemption may be released in writing signed by the party or parties who could convey the property. A statement contained in a mortgage, deed of trust or other instrument creating a lien and waiving or releasing the homestead, subordinates the homestead to that particular lien. The homestead exemption would stand against any other judgment creditor who had not secured such a waiver.

If a homestead property is sold, the person entitled to the homestead may keep the sale proceeds separate, and, if identified, the proceeds will be exempt from execution or attachment for one year. If the proceeds are used to buy a new home, there will be a homestead exemption on the new home. However, the homestead exemption will not stand against the rights of the holder of a purchase-money mortgage.

Before any creditor may proceed with execution and attachment of a homesteaded property, the creditor must file an affidavit with the clerk and recorder attesting that the equity in the property exceeds the amount of the exemption. This must be supported by the affidavit of an independent appraiser stating the fair market value of the property. If the amount offered at the sale does not exceed 70 percent of fair market value as shown in the affidavit, all proceedings to sell the property will terminate. If the sale succeeds, the creditor must pay the expenses of the sale, prior liens and the homestead exemption before satisfying the creditor's own judgment. The balance, if any, would go to the homesteader.

VI. Easements

An easement is a limited right to enter and use another person's land.

An **appurtenant** easement attaches to and benefits the land owned by the easement holder. This is the **dominant estate**. The land burdened by an easement is the **servient estate**. Appurtenant easements pass with the title to the dominant estate, pass with the land, even if not mentioned in the deed. Easements for light and air are appurtenant, although they may limit the usage of the land subject to the easement.

An easement in gross belongs to and benefits the owner personally rather than the land itself. The right to run a utility line across another person's land is an example of an easement in gross. Easements in gross are assignable and permanent.

Easements are normally created by written contract or an express grant in a deed signed by the owner of the land over which the easement lies (servient estate). Easements may also be created by prescription, i.e., by long uninterrupted use without the consent of the owner. Abandonment would terminate a prescriptive easement.

Easements may also be created by implication of law. Such an easement may be so implied when an owner sells land that is inaccessible except through land belonging to the seller. Because the new owner must have access to owned land, an easement may be implied.

Ordinarily, easements are terminated by a written release or quitclaim deed given by the holder of the dominant estate to the owner of the servient estate. Easements may also be terminated by destruction of the servient estate or by a merger of the dominant and servient estates into one parcel.

VII. Adverse Possession

Adverse possession is the right of an occupant of land to acquire superior title against the owner of record without the owner's concurrence, provided the occupancy has been actual, notorious, hostile, visible, and continuous for a required statutory period. This right of adverse possession can be inherited, but there can be no intervening tenancy.

In Colorado the required adverse possession statutory periods are:

1. 18 years – without the consent of the owner of record, without color of title or payment of property taxes. (38-41-101 C.R.S.)
2. 7 years – with color of title and/or with payment of seven years of property taxes. (38-41-108 C.R.S.)

VIII. Combined Types of Ownership

Colorado law (38-32-101 C.R.S.) provides that estates or interests above the surface of the ground may be validly created in persons or corporations other than the owners of the land below ground, and shall be deemed to be estates, rights, and interests in lands.

The Condominium Act effective prior to July 1, 1992 defined a condominium as an individual air space unit together with an interest in the common elements appurtenant to such unit. This definition means that an owner does not individually own the land underneath the structure. A condominium owner holds title to his or her unit within a defined air space, and the unit owners own the land, the hallways and all the common elements as tenants-in-common.

Although a condominium complex may visually appear similar to an apartment complex, it is really a subdivision with many owners. Because each unit is truly an estate in land above the surface, a "declaration" must be filed with the county clerk and recorder so that each unit is properly and legally described, and may be taxed or mortgaged separately.

Pursuant to the Colorado Common Interest Ownership Act (CCIOA) effective July 1, 1992, **"Common Interest Community"** means real estate described in a declaration that obligates each unit owner to pay for real estate taxes, insurance premiums and maintenance or improvement of other real estate described in a declaration. Ownership of a unit does not include leasehold interests of less than forty years, including renewal options measured from the date the initial term commences. (38-33.3-103(8) C.R.S.)

Pursuant to CCIOA, **"Condominium"** means a common-interest community in which portions of the real estate are designated for separate ownership and the separate owners commonly own the remainder. A common interest community is not a condominium unless the undivided interests in the **common elements** are vested in the unit owners (38-33.3-103(9) C.R.S.). Prior to 7/1/92, a condominium was defined only as an air space estate, but under CCIOA a condominium may include single-family lots.

CCIOA defines **"Planned community"** as a common-interest community that is not a condominium or cooperative. A condominium or cooperative may be part of a planned community (38-33.3-103(22) C.R.S.). A planned community may have homeowners' association ownership of the common elements rather than as undivided interests by the individual unit or lot owners as tenants-in-common. A planned community may also include a common-interest community with no common elements. However, the individual unit or lot

owner is obligated to pay for such expenses as real estate taxes, insurance premiums, maintenance or improvement of other real estate, such as private roads or a common greenbelt as described in a declaration.

A **"planned unit development"** (PUD) may also be a common interest community, and may consist of unit owners in duplexes, townhouses, condominiums and single-family residences. Some or all of the owners may either hold common ownership in land or facilities such as a greenbelt, a playground or a swimming pool, or are obligated for payment of expenses in addition to the individually owned land underneath each owner's residence. Commonly owned elements, expenses, conditions or obligations must be in a recorded declaration.

"Time-share or **interval"** estate is a variation in conventional ownership. Time-shares are usually sold to vacation-seeking consumers in recreational areas. Time-sharing is based on the premise that most people do not require a year-round vacation home. Condominium units are time-shares when sold or leased for specific periods repeated each year (e.g., four weeks out of each year). Several owners of one condominium unit each have a specified annual period of ownership or tenancy.

Time-share interests may be either fee simple deeded, or a non-deeded "right-to-use." Right-to-use is a contractual or membership interest granting exclusive occupancy to either a specified or any available unit for a set time period each year. Right-to-use interests usually run for a limited number of years and have the effect of a leasehold interest. Although right-to-use purchasers do not hold actual fee interest, bankruptcy laws extend equal protection to such owners in the event of a bankruptcy by the owner or developer.

Time-shares may be created by dividing a fee simple estate into several time period fee simple estates or leases, or by dividing a lease into several subleases. Dividing owned or leased property into a number of right-to-use contracts for defined time periods may also create time-shares. Tenant-in-common owners can, by contract, create time-shares for certain periods of the year. Membership agreements may also create time-shares.

Exchange companies facilitate trading owned or leased time-shares for the use of someone else's time-share in another recreational area for annual fees.

Time-share developers must register with the commission as subdivision developers, and licensed real estate brokers must conduct all sales.

Ownership in a community apartment project may be accomplished by having all unit owners become tenants-in-common with each owner being given the exclusive right to occupy a specific apartment.

A stock cooperative or **cooperative housing corporation** is formed as a non-profit corporation intended to provide each stockholder with the right to occupy a house or an apartment in a building owned or leased by the corporation. Each stockholder receives a proprietary lease or right-of-tenancy document.

Although sales of such interests in a cooperative housing corporation have elsewhere been regarded as a sale of securities, such sales in Colorado are deemed by statute to be real estate and are exempt from the Colorado Securities Act. The same statute also enables banks and associations to make first mortgage loans on a stockholders interest. (Title 38, Article 33.5 C.R.S., 11-7-103 C.R.S. and 11-41-110 C.R.S.)

Cooperative housing corporations, condos and time-shares are treated as subdivisions.

(See C.R.S. Title 38, Article 32 – Estates Above the Surface
Article 33 – Condominium Ownership Act
Article 33.3 – Colorado Common Interest Ownership Act
Article 33.5 – Cooperative Housing Corporation, and
C.R.S. Title 12, Article 61, The Subdivision Act, printed in Chapter 4.)