Chapter 14
Real Property and Personal Property

INTRODUCTION

The purpose of this section is to acquaint real estate practitioners with some of the laws and regulations concerning real property in Georgia. It is by no means a comprehensive treatise on real estate law, nor is it intended to be a substitute for legal advice. Rather, it offers a concise overview of the various aspects of the nature of ownership as well as the various phases of the sale, lease, and management of real property in Georgia. Real estate practitioners and their clients should always seek legal advice if they have questions about how their plans and decisions are affected by applicable law.

REAL ESTATE AND REAL PROPERTY

The term real estate is difficult to define, and its meaning can be slightly different from state to state or even community to community. Generally, real estate (or realty) is a physical commodity consisting of land and its attachments. By comparison, real property is generally defined as real estate and the rights arising from real estate.

GEORGIA DEFINITION OF REAL PROPERTY

The State of Georgia defines real property in its compilation of laws (O.C.G.A. § 44-1-2) as:

- (a) All lands and the buildings thereon;
- (b) All things permanently attached to the land or to the buildings thereon;
- (c) Any interest existing in, issuing out of, or dependent upon land or the buildings thereon.

PERSONAL PROPERTY

Comparing and contrasting real property and personal property may seem like an academic exercise, but the distinction is a very important one. The rights of ownership and the methods by which these two categories of property are transferred are very different. One important practical concern for real estate licensees is in drafting sales contracts. Any items that are considered real property, such as houses, trees and other landscaping, plumbing fixtures, and permanently-installed kitchen appliances (such as a stovetop or dishwasher) will be included in the sale unless otherwise specified in the contract. On the other hand, items of personal property such as potted plants, furniture, and countertop appliances will not be included in the sale unless otherwise specified. At closing, all items of real property will be transferred by deed, whereas items of personal property will be transferred by a bill of sale.

GEORGIA DEFINITION OF PERSONAL PROPERTY
Georgia Law defines **personal property** as, "all property which is movable in nature, has inherent value or is representative of value, and is not otherwise defined as realty." [O.C.G.A. § 44-1-3(a)]. For practical purposes, personal property is anything that is movable and is not intended to be affixed to the land permanently. As with real property, title to personal property gives the owner the right to control it, enjoy it, and dispose of it. Unfortunately, the distinction between real and personal property is not always clear. An item of personal property, such as a dishwasher or garbage disposal, instantly becomes part of the real property upon installation. Likewise, real property can become personal property, such as when a tree, which is part of the real property when growing on the land, becomes personal property immediately upon being cut down.

**IMPROVEMENTS**

Any improvements made to land or its attachments become part of the real estate. For example, if a homeowner adds a room onto her house, the new room becomes attached to the building and is part of the real estate. She may have started with nails, plywood, wallboard, and shingles (which are personal property), but they convert into real property, as an improvement to the land, when they are put together to form the new room.

**FIXTURES**

Fixtures are a special category of improvements. A fixture is an item of personal property that, by the process of attachment and by intent, has become real property. This transformation occurs through the same process as the nails and plywood in the example given for improvements. The reason fixtures merit a special category is that they do not lose their individual character by attachment to real estate. A brick loses its individual character in a brick wall, but a chandelier attached to a ceiling does not lose its character as a light fixture.

In one case between a landlord and a tenant, the court held that a chandelier attached to the ceiling by screws did not lose its character as personal property and was removable by the tenant at the end of the lease. A more recent case also treated a chandelier as personal property, but suggested that such articles may become real property by agreement of the parties. A furnace begins as personal property, but generally becomes part of the realty when installed. Items such as drapery rods have ambiguous status as real property or personal property, and the law must resort to tests to see which form of property they are. Sometimes local customs will prevail. In some communities it may be customary to treat an oven or refrigerator as personal property that the seller will remove when selling the house. In other communities, these items are real property and customarily are left with the house.

The issue of whether an item is a fixture is very important to real estate licensees, particularly in drafting contracts. The seller and buyer may have different intentions about whether an item is meant to stay with the house or is meant to be removed by the seller. A licensee is free to rely on case law or community custom, but the best way to ensure there are no ambiguities or conflicts has always been to specify those items in the sales contract.

**TRADE FIXTURES**
A trade fixture is an article of personal property that a tenant has attached to leased premises because it is necessary or convenient to the tenant's trade or business. Examples include everything from display cases and shelving to bar stools and barber chairs. Unless the lease agreement says otherwise, a commercial tenant may remove trade fixtures that he or she installed in the course of business at the end of the lease term. (O.C.G.A. § 44-7-12). A residential tenant may also remove domestic fixtures installed for convenience. However, items that have become so merged with the realty as to suffer a substantial loss of identity cannot be removed by the tenant even if they were intended for the convenience of the tenant and can be removed without serious damage to the realty. If the tenant moves out at the end of the lease and does not take the fixtures, they become part of the realty and the tenant cannot return at a later time and remove them. Neither can the tenant normally remove replacement fixtures that the tenant installed to replace worn out fixtures originally installed by the landlord.

**TESTS FOR FIXTURE STATUS**

Unfortunately, sales contracts and lease agreements do not always specify which items are to be considered fixtures and which are not. When a dispute about a fixture arises, there are certain tests or criteria courts use to determine the status of the object. None of these tests is conclusive alone, and the courts may apply more than one. Some criteria that the courts can apply are the following:

- **(a)** EASE OF REMOVAL - An article removable without essential injury to the real estate or to the article itself has more of the characteristics of personal property than real property. In an 1858 case, the Georgia Supreme Court summed up the rule on removal, stating "Wherever the article can be removed without essential injury to the freehold or the article itself, it is a chattel [personal property]; otherwise it is a fixture." However, some items may become part of the realty without actual attachment, such as paving stones laid into a driveway or a rail fence with no buried posts.

- **(b)** LOSS OF IDENTITY - When an article loses its identity as personalty, it is considered to be real estate. Thus, construction materials such as lumber, nails, window locks, and bricks are real estate once they have been assembled into a structure. The Georgia Court of Appeals has stated:

  > The separate nomenclature "fixtures" would help us to determine between things attached to the realty which do not lose their identity - "fixtures" - and personal property or things incorporated into the realty, such as nails, brick, lumber, door locks and the like, which, when used in the construction of a house, lose their identity as separate things, and their individual existence is so completely merged into the house that they are not included in the separate nomenclature of "fixtures."

- **(c)** USEFULNESS AND ADAPTABILITY AS REAL ESTATE - The courts give weight to the overall plan and design of real estate and look at ambiguous articles in the context of their usefulness as part of the real estate. Under this test, uninstalled items such as stage props for a
theater and switchboards for telephone equipment have been held to be fixtures, and thus part of the real estate.

(d) INTENTION OF THE PARTIES - Intent plays a large part in determining fixture status, as it does in other areas of the law. If a buyer and seller agree to treat an item as personal property, the courts will normally honor their intention unless the rights of other parties are involved. Thus, a buyer and seller could agree to treat drapery rods as personal property removable by the seller, but could not treat an attached garage as personalty if a lender had a mortgage against the house and the garage.

FIXTURES AS COLLATERAL

The Georgia Uniform Commercial Code allows lenders to acquire security interests in personal property. If a lender finances items of an ambiguous character that will be placed on realty and attached, such as machinery, the borrower and lender may agree that the machinery will remain personal property but still be part of the collateral for the loan. In that case, the borrower and the lender would enter into a security agreement (to cover the personal property) along with the security deed (to cover the real property). The lender is permitted to file a financing statement in the county where the land lies, to put the world on notice of its security interest much like the deed to secure debt serves as public notice of the lender’s mortgage interest in the realty. Upon default by the borrower, the lender may then repossess the personal property in addition to foreclosing the real property.