

USES OF LAND TRUSTS IN PRESERVING FAMILY FARMS

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I. DEVELOPMENT OF LAND TRUST LAW.

A. The development of trust under the common law.

1. In the middle ages, the features of feudal tenure, primogeniture and forfeiture for treason very often resulted in transfers of land to family friends for the benefit of the grantor.

2. The Statute of Uses, adopted at the time of Henry VIII, was adopted so as to execute these kinds of arrangements. The result of execution of a trust, under the Statute of Uses, was to vest the holder of the use with the legal estate.

3. After the enactment of the Statute of Uses, English courts found that it was inapplicable to active trusts and the concept of trusts became, and remains, part of present day law.

4. English rule brought the Common Law to the United States with it the Statute of Uses. The Statute of Uses continues as one of the problems in the legal background of land trusts. The Statute of Uses in Florida is found in Florida Statutes Section 689.09. The Statute of Uses as adopted in Florida reads as follows:

"By deed of bargains and sale, or by deed of lease and release, or of covenant to stand seized to the use of any other person, or by deed operating by way of covenant to stand seized to the use of another person, of or in any lands or tenements in this state, the possession of the bargainer, releaser or covenantor shall be deemed and adjudged to be transferred to the bargainee, releasee or person entitled to the use as perfectly as if such bargainee, releasee or person entitled to the use had been enfeoffed by livery of seizin of the land conveyed by such deed of bargain and sale, release or covenant to stand seized; provided, that livery of seizin can be lawfully made of the lands or tenements at the time of the execution of the said deeds or any of them."

5. It is important to note that the land trust differs significantly from trusts as they were contemplated under the Statute of Uses. In a land trust, the trustee receives both the legal and equitable title to the real property and is generally given some purely administrative duties. Robinson v. Chicago National Bank, 176 N.E.2d 659, 661 (Ill. 1961).

6. Land trusts had their beginning in the state of Illinois and for that reason the land trust is many times referred to as the "Illinois Land Trust". Hart v. Seymour, 147 Ill. 598 (Ill. 1893), is generally regarded as the first case recognizing the existence of land trusts.

7. In a later case, Schumann-Henk v. Folsom, 159 N.E. 250 (Ill. 1927) the court equated the land trust to the Massachusetts business trust from which the land trust undoubtedly evolved. However, it is important to note that unlike a Massachusetts business

trust, a land trust is generally viewed as a vehicle for holding title to real property rather than as an operating business entity. As we will see later, there are important tax implications to treating the land trust as an operating business entity.

8. In jurisdictions in which the Statute of Uses is strictly construed, there are difficulties in establishing land trusts, see Janura v. Fencel, 261 Wis. 129, 52 N.W. 2d 144.

a. The liberal interpretation of the Statute of Uses by Illinois courts has made the land trust possible in that state.

b. The court in Illinois has held that the trustee's duty to deal with the title, on the direction of the beneficiary, and to sell the property, if any property remains at the end of twenty years, is sufficient to create an active trust and to avoid the operation of the Statute of Uses. Chicago Title and Trust Company v. Mercantile Bank, 300 Ill. App. 328 (1939).

c. Land trusts are widely used in the State of Illinois. The court in Chicago Federal Savings and Loan Association v. Cacciatore, 25 Ill. 2d 538 (1962), stated:

"The law of this State and the reviewing Courts for more than eighty years have encouraged public reliance upon the real property concept exemplified in the land trust now before us. Millions and probably billions of dollars have been and are now invested in similar trust arrangements and thousands of titles depend thereon for their validity."

d. In states such as Wisconsin, where the Statute of Uses similarly construed, it may still be possible to use land trusts by expanding the duties of the trustee. Doing so will impose additional duties on the trustee, in other respects the trust agreement would be the same as the standard form.

(1) An example of language to include in the standard trust agreement is "land trustee is empowered to manage the trust estate for the best interests of the beneficiaries, to make and modify lease agreements, to incur expenses in the printing of the trust instruments, certificates and books of record, to borrow funds and to compromise and settle claims"

(2) It is important to review these matters with a title underwriter in states such as Wisconsin to make sure that title will be insured in the trustee under these circumstances.

B. The trustee holds full legal and equitable title to the real estate but the complete management of the property plus full power to direct the trustee with respect to the title is in the beneficiaries. The land trust is set-up through the use of two instruments -- a deed in trust, whereby real estate is conveyed to the trustee and a trust agreement under which the trustee acts. Land trusts have been found to have several advantages:

1. Interests in land trusts cannot be partitioned, and transferring beneficial interests is relatively easy.

2. Interests of beneficiaries cannot be disclosed without order of court.
3. Judgments against the beneficiaries do not affect legal title.
4. The beneficial interest in the land trust is personal property. Since it is personal property non-residents of Florida can avoid ancillary administration.
5. The death of a beneficiary does not terminate the trust, and testamentary dispositions can be made in the trust agreement.

C. In Florida, land trusts are a creature of statute rather than case law. In 1963, the Florida legislature passed Florida Statutes Section 689.071 which created the Florida Land Trust.

1. Section 689.071 recognizes and confirms the creation and establishment of land trusts described in the act.
2. Courts have held that the statutory land trust is not an ordinary inter vivos trust which is administered under the trust administration chapter, Chapter 737, Florida Statutes. See Taylor v. Richmond's New Approach Association, Inc., 351 So.2d 1094 (Fla. 2d DCA 1977).
3. Case law in Florida confirms that a grantee from a land trustee need not look beyond the trustee's deed in trust to determine his powers. Gramer v. Roman, 174 So.2d 443 (Fla. 1965).
4. The beneficiary retains full power of management of the property under Robinson v. Walker, 63 Ill. App. 2d 204 (1965).

D. Section 689.071, Florida Statutes, provides that the land trustee receives legal and equitable title to the real property.

1. Under Section 689.071 the trustee receives full rights of ownership over the real property described in the deed with full power as granted in the recorded deed to deal with the property when the grantee is designated as "trustee", when the deed does not name the beneficiaries of the trust, and whether or not reference is made in the recorded deed to an unrecorded trust instrument.
 - a. The deed must be recorded and must give to the trustee full power and authority either to protect, conserve and to sell or to lease, or to encumber or otherwise to manage and dispose of the real property described in the deed.
 - b. The trustee can only deal with the property within the power and authority granted in the recorded deed.
2. Section 689.071(2) states that any grantee from a trustee holding title to real property in trust under a recorded trust deed which meets the requirements of 689.071, does not have to inquire into the identification or status of any named or unnamed beneficiary, their heirs or assigns or to the authority of the trustee to act within the powers granted in the

recorded deed, nor is there any requirement that the grantee inquire into the provisions of an unrecorded trust document whether such document is referenced in the deed or not.

a. Section 689.071(2) is applicable to recorded deeds in trust whether or not the beneficiary is named or unnamed.

b. The deed prepared pursuant to Section 689.071 creates a valid trust and there is no need to inquire into any unrecorded trust instruments which may or may not be referenced in the deed.

c. Care should be taken to insure that beneficiaries are not inadvertently named, either in the deed or subsequently recorded documents. By naming beneficiaries on the public record, notice may be given to a title examiner requiring further investigation as to the ownership of the property. See Fund Note 31.02.03.

3. Section 689.071(3) provides that all persons dealing with the trustee under any recorded instrument which has been prepared in accordance with the section takes free and clear of the claims of all named or unnamed beneficiaries of the trust and of any unrecorded declarations or agreements collateral to the trust, whether they are referred to in the agreement or not. This subsection further provides that anyone claiming under the beneficiaries, including claims arising out of any dower or curtesy interest of the spouse of a beneficiary, does not have a claim against the grantee if all of the provisions of this section have been met.

a. It should be noted, however, that the beneficiary can enforce the terms of the unrecorded trust instrument against the trustee.

b. If the grantee is dealing directly with the beneficiary, this subsection may not apply.

4. It is important to note that Florida Statutes Section 660.41 was modified so as to permit corporations to act as trustees under a land trust agreement.

5. Florida Statutes Section 689.071(4) states that in all cases where the recorded instrument prepared in accordance with the section contains a provision declaring the interest of the beneficiary to be personal property only, that provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of the State of Florida. It is important to note that this provision makes it possible for a beneficiary to convey his interest in the real property by assignment of beneficial interest rather than by the execution and recording of a deed.

E. In other states, land trusts have been recognized, some by statute and some by court case.

1. Land trusts have been codified in the State of Virginia, North Dakota and Indiana in a similar manner as they are in Florida.

2. Courts in states such as Arizona, Kansas and California have moved in the direction of acknowledging land trusts by case law.

II. LAND TRUSTS IN GENERAL.

A. A land trust requires two essential instruments, the deeds that convey property into and out of the trust and the land trust agreement. It is important, however, to understand some of the terminology that relates to land trusts before discussing these documents.

B. Terminology.

1. Trust Agreement. The Trust Agreement is the agreement entered into between the trustee and the beneficiary which establishes the trust. Attached hereto as Exhibit B is a copy of a form of trust agreement.

2. The Trustee. The Trustee is the party designated in the trust agreement to hold legal and equitable title to the land trust property.

3. Beneficiary. The Beneficiary is the party designated in the trust agreement as having the power to direct the trustee with regard to the trust property, the control of the management, operation, rental and sale of the trust property and the right to the earnings, avails and proceeds of the trust property.

4. Power of Direction. The Power of Direction is the right to control the trustee's disposition of title to the trust power and the execution of trust documents affecting the trust property.

5. Deed in Trust. The Deed in Trust is the instrument which conveys title to the real property into the land trust. A form of Deed of Trust is attached hereto as Exhibit A.

6. Trustee's Deed. An instrument by which a land trustee conveys title to the trust real property to another party is a Trustee's Deed. A trustee's deed form is attached hereto as Exhibit C.

III. GENERAL USES OF LAND TRUSTS.

A. With the foregoing as background information, it is easier to explore some of the uses of land trusts.

1. Interests in a land trust cannot be partitioned. Since the interest of the beneficiary under a land trust is personal property and since the trust agreement expressly precludes the vesting of title legal or equitable in a beneficiary, partition is not available. Some cases on point are Aronson v. Olson, 348 Ill. 26, 180 N.E. 565 (1932), and Breen v. Breen, 180 N.E. 206, 103 N.E. 625 (1952). Wisconsin courts have held that if there is a valid active trust, partition is not available to the beneficiaries of such a land trust. Kinger v. Bidwell, 55 Wis 2d 749, 201 N.W. 2d 9 (1972).

a. The unavailability of partition is a reason to have properly drafted beneficiary agreements. In situations where there are multiple beneficiaries, the standard trust agreement will not handle operational problems.

b. In some forms of land trust agreement, operational problems have been dealt with by means of specific additional provisions in the trust agreement. In Harden v. Desideri, 20 Ill. App. 3d 590, 315 N.E. 2d 235 (1974), the trust agreement specified a management agent and provided that the agent was to operate and manage the trust property as directed by two-thirds (2/3) of the owners of beneficial interest in the trust. Although the trust agreement dealt with management of the property, it can be extended and amplified to deal with a variety of other problems.

c. There are, of course, many problems that can arise in the operation of property. Well drafted beneficiary agreements can deal with problems such as buy-sell arrangements, dispute resolution as well as other governance issues. The terms of beneficiary agreements can be incorporated in the trust agreement. See Ferraro v. Parker, 229 So. 2d 621 (Fla. Ct. App. 1969).

2. Other uses of land trusts.

a. In situations where multiple owners hold title to real property, the potential exists for judgments, divorce, death, bankruptcy or incompetency of a single beneficiary to cloud the title to all or a part of the real property. The use of the land trust prevents the possibility of clouds on the title in these situations.

b. It is important, however, to realize that the ownership of a beneficial interest in the trust can, however, be reached if a creditor learns of the beneficiary's ownership interest in the land trust.

c. Under well-drafted trust agreements, provision can be made to avoid deadlocks among multiple owners. A general partnership, limited partnership or other form of beneficiary ownership can be prepared to spell out the rights and obligations of multiple owners in situations where disagreements may arise.

d. Where real estate projects are syndicated, the use of a land trust can reduce delays where signatures must be obtained from remote locations and can facilitate the many conveyances of lots in subdivisions and units in condominiums.

3. Interests of beneficiaries may not be disclosed without order of court.

a. There are situations where good reasons exist for purchasers of real estate not to publicize their ownership of that real property. The land trust permits such individuals to keep their names from the public record.

b. An important use of the land trust arises in the situation in which a developer, seeking to develop an area in which there are many owners of small parcels, uses the land trust to minimize the potential for a few owners to hold out for exorbitant prices by keeping his name off the public records and notifying them of his intentions.

4. Judgments against the beneficiaries do not affect the legal title to the real property held in a land trust.

a. Judgments can, however, be enforced against a beneficiary's beneficial interest [the beneficial ownership of beneficiaries] in a land trust.

b. The title to the real property held in a land trust can be conveyed free and clear of the lien of judgments against a beneficiary.

5. The beneficial interest in the land trust is personal property.

a. Non-residents of the state in which property is held in a land trust can, by placing title to their real estate in a land trust, avoid ancillary probate administration in the event of death.

b. The existence of a land trust under these circumstances permits ease and simplicity in dealing with title to the real property.

c. Beneficiaries may make dispositions of the beneficial interest upon death of the named beneficiary. These dispositions can be handled by providing in the trust agreement for the remaindermen to succeed to the beneficial interest of the beneficiary. The provision for remaindermen has been held not to be testamentary. See In Re: Sacks Estate, 231 N.E.2d 688 (Ill. 1967).

d. Since the interest of a beneficiary is personal property, marital rights of dower and curtesy do not apply; therefore, title can be conveyed without the joinder of the spouse. Duncanson v. Lill, 322 Ill. 328 (1927).

6. The death of a beneficiary does not terminate the trust.

7. Where mortgage financing is used in connection with a land trust, personal liability of the beneficiary can be avoided if the lender does not require personal guarantees.

a. With the use of an appropriate exculpatory clause, no personal liability is imposed on the beneficiaries or trustee and exposure to deficiency judgments in the event of foreclosure can be avoided. Conkling v. McIntosh, 324 Ill. App. 292 (1944).

b. An example of an exculpatory clause for a mortgage is as follows:

"This instrument is executed by (Trustee), not personally but as Trustee as aforesaid, in the exercise of the power and authority conferred and vested in it as such Trustee and it is expressly understood and agreed by the mortgagee herein and by every person now or hereafter claiming any right or security hereunder that nothing contained herein or in the note secured by this instrument shall be construed as creating any liability on the (Trustee) or on any of the beneficiaries under said trust agreement personally to pay said note or any interest that may accrue thereon, or any indebtedness accruing hereunder or to perform any covenants either express or implied herein contained, all such liability, if any, being expressly waived and that any recovery on this mortgage and the note

secured hereby shall be solely against and out of the property hereby conveyed by enforcement of the provisions hereof and of said note, but this waiver shall in no way affect the personal liability of any co-signer, endorser or guarantor of said note."

c. Care should be taken to exculpate the trustee from personal liability for condominium assessments. See Taylor v. Richmond's New Approach Association, Inc., 351 So.2d 1094 (Fla. 2d DCA 1977).

B. Use of the land trust as a vehicle for holding title to real property permits the preservation of tax benefits under the Internal Revenue Code.

1. All of the tax advantages of individual ownership may be retained when a land trust is properly used to hold title to real property.

2. The deduction for expenses flows directly through the beneficial owners, assuming of course that all of the criteria to prevent the land trust from becoming an entity taxable as a corporation are met.

3. If C-Corporation tax consequences are desired, place the beneficial ownership of the trust in a C-Corporation.

IV. CREATION OF LAND TRUST.

A. The deed in trust generally sets forth the powers and authority of the trustee. It should specifically state that the interest of the beneficiary is personal property and that no beneficiary has any title, legal or equitable, in the real property.

1. A form of deed into a land trust is attached hereto as Exhibit A.

2. In states where land trusts are created by statute, it is important to review the statute carefully to insure that the deed contains the language required by the statute. In Florida, for example, Florida Statutes Section 689.071 requires certain language to validly establish a land trust.

B. The trust agreement is the instrument entered into by the trustee and beneficiary.

1. It should provide that the interests of the beneficiaries have the powers to direct the trustee to deal with the title, control and operation of the property.

2. It also should provide that the interest of the beneficiary is personal property and that at the death of the beneficiary the trust will not terminate.

3. The trust agreement sets forth the duties of the trustee and generally provides that it is not the duty of any purchaser to see to the application of the purchase money, nor does any such person have the right to inquire into the necessity of any act of the trustee.

4. The trust agreement should not be recorded.

5. An example of a trust agreement is attached hereto as Exhibit B. Note that mortgages may also be placed in land trusts. When this is done the Land Trust Agreement should be modified accordingly.

C. There may be other collateral agreements among beneficiaries which are generally called "Beneficiary Agreements" which relate to the relationship among beneficiaries.

1. The kind and variety of collateral agreements and beneficiary agreements is a very wide one. Some take the form of co-ownership agreements. Some others are very sophisticated partnerships.

2. Limited partnerships, corporations and limited liability corporations may be beneficiaries under a land trust agreement.

D. It is important to make provision for a successor trustee where a human being is the trustee.

1. When such provision is made in the deed, a copy of the death certificate for the deceased trustee may be recorded thereby showing that legal and equitable title is in the successor trustee.

2. If the recorded deed in trust makes no provision for a successor trustee. A successor trustee can be appointed by a court on petition of the beneficiaries. Then the interests of the beneficiaries become public record.

E. With respect to the relationship of the trustee to the beneficiary, it has been held that the trustee is not the agent of the beneficiary Robinson v. Chicago National Bank, 32 Ill. App. 2d 55 (1961), and the beneficiary is not the agent of the trustee, Brazkowski v. Chicago Title and Trust Company, 280 Ill. App. 2d 293 (1935).

1. In connection with the assignment of beneficial interest, a Florida court in Goldman v. Mandell, 403 So.2d 511 (Fla. 5th DCA 1981) held that since the interests of the beneficiaries were personal property no witnesses were required to an assignment of beneficial interest under the land trust.

2. With respect to personal liability, a Florida case Taylor v. Richmond's New Approach Association, Inc., 351 So.2d 1094 (Fla. 2d DCA, 1977), held that where the trustees were also the beneficiaries of the land trust and were involved in the development of a real estate project, the court looked to Florida Statutes Section 737.03 relating to personal liability of trustees to third parties and noted that the deed said nothing about the limitations of liability on the trustees. Therefore, every deed should contain language indicating that the liability of the trustee is limited to property which is contained in the trust. This limitation of liability should be placed on other documents executed by the trustee.

V. ADMINISTRATION OF LAND TRUSTS.

A. Conveyance of Fee Title from or to Land Trusts.

1. General Legal Relationships. With respect to conveyances in land trust situations, it is important to understand the relationship between Grantor, Beneficiary and Grantee. Unlike the conveyance of a fee interest from an individual or corporate grantor, a transaction with a land trustee as grantor contains certain elements which must be considered in a sale involving a land trust. The party who controls the management of property, and who would be considered the seller in a sale of real property not involving a land trust, is in fact the holder of personal property and is not a grantor of title to the land trust real property. That seller in the ordinary sense, but not necessarily in the legal sense, is the beneficiary of the land trust. The trustee merely holds and transfers title to the real property. One of the rights of the beneficiary is the right to direct the trustee to convey; the beneficiary cannot convey the title directly. The trustee holding the title will follow the directions of the beneficiary, except when any legal rights are asserted by the trustee or by third parties against the beneficiary.

The trustee and the beneficiary are bound by the terms of the recorded deed in trust which conveyed the realty to the trustee and by the unrecorded trust agreement between the trustee and the beneficiary. A grantee of title to real property from a trustee must consider the rights and obligations of both the trustee and the beneficiary. In general, the beneficiary has the right to (i) possession of the real estate; (ii) receipt of the rents, issues and profits of the real estate; and (iii) the right to direct conveyance of the real estate.

The trustee has the duty to convey upon direction of the beneficiary; and in certain cases, the right to convey without the direction of the beneficiary. The beneficiary, however, will be the party negotiating the terms of the sale, not the trustee. The grantee or buyer, therefore, will negotiate the conveyance of real estate with the party who might direct the conveyance but will not be the grantor of the deed. Therefore, undertakings and representations by the beneficiary are not those of the title holder and cannot be enforced against the title holder. The trustee-title holder, will not make substantial undertakings or representations to the prospective grantee, and yet, an agreement executed by a trustee may not bind the beneficiary. Finally, the fact that the trustee has executed a deed should not imply that the trustee holds title. The trustee is not under any duty to determine whether a deed in trust to the trustee conveyed any interest in the real estate so described.

a. Warranties. The grantee in a warranty deed receives certain covenants and warranties from the grantor, which are enforceable by the grantee. A land trustee will generally execute a trustee's deed containing no warranties. The grantee of a land trustee's deed will not obtain any warranties of title.

b. The nature of the Trustee's Deed. A form of a Trustee's Deed is included as Exhibit C. The grantee of a Trustee's Deed receives only the rights of a land trust grantor in and to the property without warranty.

c. The proceeds of sale. The proceeds of sale should be paid to the grantor. The beneficiary should obtain a pay proceeds letter from the trustee, which directs that the proceeds should not be paid to the trustee but should be paid to the beneficiary or as the beneficiary directs. In the event that this is not possible or desirable, the proceeds should be payable to the trustee.

d. Liens against the beneficial interest. Because of the undisclosed nature of a beneficiary's interest, liens, encumbrances, and collateral interests in the beneficiary's personal property interest may exist.

- (1) If the lien is not recorded against the title to the real estate, it does not attach to the interest of the grantee of the land trustee.
- (2) While such liens may not affect the title received by the grantee they can affect the ability of the beneficiary to direct a conveyance to the proposed grantee.
- (3) If a lien holder refuses to consent to the conveyance, the beneficiary may not be able to direct the trustee to convey, and thus a default may arise.

e. Actions by the Trustee. In general, a trustee will not make any covenant, representation, warranty or agreement except to convey when directed by the parties necessary to direct conveyance.

- (1) The beneficiary may undertake certain personal obligations (i.e. representations and warranties, agreements to repropate, agreement to surrender possession) but the beneficiary is not the party in title.
- (2) For a purchaser, it is desirable to bind not only the trustee but also the beneficiary.
- (3) With enactment of laws relating to environmental risks, trustees are becoming less willing to execute agreements for sale without specific exclusion accompanying the customary exculpatory language.

f. Signature of Beneficiary. In view of the many personal obligations of the ordinary contract, it may be advisable to seek the beneficiary's execution of the agreement or a joinder by which a beneficiary joins in and adopts the undertakings and representations of the trustee seller. Provisions should be made that the contract will not be recorded.

2. General forms in conveyance of title by trustee.

a. Land Trust Contracts. Where a beneficiary is to execute a contract for sale, the beneficiary should represent and undertake that: (i) the beneficiary is the sole beneficiary of the land trust; (ii) the beneficiary has full power to direct the trustee to enter into and execute the agreement and will do so to consummate the contemplated transaction; and (iii) there are no liens or claims to prohibit the trustee's execution of the closing documents upon delivery of the appropriate direction.

b. Beneficiary executes contract. The contract should recite that legal title is held in a land trust and that the trustee's deed will be delivered at closing. The

trustee should be identified as the seller, and the beneficiary is executing the contract. The beneficiary could be made an additional seller.

A form of clause for the execution of a sale contract by a beneficiary is as follows:

This contract is executed by John Doe as beneficiary under a land trust titled Richard Rowe as trustee under a Land Trust Agreement dated January 1, 1990, and known as Trust No. 101 and John Doe as beneficiary represents to C. Wadsworth Stuffings, the purchaser, that John Doe is the sole beneficiary, and possesses the sole power to direct the trustee and John Doe expressly undertakes all covenants and agreements contained in this contract not reserved for the trustee, and agrees to perform the same as if made by him. C. Wadsworth Stuffings acknowledges that John Doe is not the agent for Richard Rowe as trustee and further agrees to look solely to John Doe for the performance of those covenants and agreements not reserved to the trustee.

c. Letter of Direction. The letter of direction is the document by which the beneficiaries direct the land trustee to act.

d. A grantee of a land trustee may wish the beneficiaries to execute an undertaking which includes modified warranties of title. The sample form is as follows:

John Doe as beneficiary of a certain Trust Agreement dated January 1, 1990, and known as Trust No. 101 wherein Richard Rowe is the trustee, in consideration of \$10.00 and the covenants of a certain real estate contract dated February 1, 1991 for the premises known as 1525 Main Street, Dunedin, Florida, the receipt and sufficiency of which are hereby acknowledged, does hereby undertake, represent and warranty to C. Wadsworth Stuffings, the purchaser in the real estate sale contract, that:

- (1) The premises aforementioned and legally described as follows (legal description) are held by Richard Rowe as trustee and that Richard Rowe holds the same as an indefeasible fee simple estate and has the power to convey same.
- (2) The aforementioned described premises are free from encumbrances except as follows: taxes for the year 1990 and subsequent years, covenants, conditions and easements and restrictions of record, governmental regulations and land use regulations.
- (3) The grantee is entitled to peaceable possession of same except for the leases set forth in the rent roll attached as Schedule 1, and made a part of this undertaking.

- (4) The undertaking shall be binding upon the heirs, devisees, legatees, and assigns of John Doe and shall inure to the benefit of the heirs, devisees, legacies and assigns of C. Wadsworth Stuffings.
- (5) This undertaking is made and delivered to C. Wadsworth Stuffings in order to induce him to consummate the purchase set forth above."

It is important that these provisions be negotiated with the real estate contract since the beneficiary is not likely to agree to them after the contract has been executed. It is also important to know who the beneficiaries are. The Affidavit of Beneficiaries is attached as Exhibit H and may be of more help in this regard.

B. Transfer of Title by Assignment of Beneficial Interest.

1. General. It is important to understand the relationship of the assignor, assignee, and the trustee. Because the beneficial interest in a land trust is personal property, the assignment of that beneficial interest is governed by rules affecting personal property, not real property.

a. The transfer of this personal property is the transfer of the right to control the real property.

b. The trustee who holds title to the real property interest is the same entity before and after the assignment. The legal title to the realty remains unchanged.

c. The trustee after the assignment takes its directions from a new party, the assignee.

2. Assignee. The assignee is bound by the same terms of the trust, as was the assignor. The assignee, by accepting the assignment, agrees to all of the provisions of the trust agreement. The assignee is entitled to all of the rights of the assignor to the trust, but is subject to all of the obligations and burdens that accompany the ownership of the beneficial interest. The rights of third parties with respect to the title remain unchanged and still burden the land. The assignment is subject to all of those rights but may be subject to contractual rights granted to parties in possession by the previous beneficiary.

3. Title Insurance. A bona fide purchaser of real estate without notice and for value is given certain rights against third parties. Title insurance underwriting acknowledges this and excepts from coverage any matters known to the purchaser. An assignee of the beneficial interest does not have these rights, and furthermore, has all of the knowledge of the trustee and the assignor imputed to it. A standard type title insurance policy affords limited protection to the assignee for this kind of problem.

4. Trustees acknowledgment or receipt. The trustee's acknowledgment is nothing more than a receipt of the assignment. It is not a statement as to the validity of or the priority of the assignment and certainly makes no representation of the status of the legal title to the land, or even that the trustee holds title to the land.

5. Lodging the assignment, refusal of the trustee to acknowledge. If the trustee's acknowledgment is only a receipt, the refusal of the trustee to lodge the assignment and to acknowledge the assignment does not make the assignment void. Between assignor and assignee the assignment is valid, but the trustee may then refuse to follow any directions of the assignee. The assignee in such a case has purchased a lawsuit.

6. Warranties of title by the assignor. The assignor may negotiate in the contract for purchase of the beneficial interest to receive certain warranties similar to the warranties of title, which are included in a warranty deed.

7. Lien on title to real property. A transfer of the beneficial interest in a land trust does not affect the status of legal title to the underlying land. All liens and encumbrances remain the same. The assignee, in general, will not be personally liable for the satisfaction of those liens, although the real property may be sold to satisfy those liens. If the lien is a mortgage, the assignor may require that the assignee assume the debt and that the assignor be released from the debt. Additionally, the assignee may wish to assume the lien personally to prevent the calling of a mortgage which contains a due on sale clause. If the mortgage is assumed, it is advisable to receive, at the least, an estoppel letter from the lender which states that the mortgage is not in default and states the balance due, amount and date of payments. Additionally, an assumption agreement should be executed, in the same form as that for a transaction involving the transfer of real property.

8. Due on sale clauses. Most mortgages contain due on sale clauses which are triggered by an assignment of a beneficial interest. The use of an assignment of beneficial interest to avoid a due on sale clause can result in the triggering of a due on sale clause.

9. Drafting tips and assignments of beneficial interest.

a. Contractual language. To protect the assignee of the beneficial interest, appropriate provisions must be included in the contract between the assignee and assignor. These clauses include:

- (1) The right of the assignee to receive the beneficial interest. Such a clause might be included in a rider as follows:

The purchaser may elect to receive an assignment of beneficial interest in the Land Trust holding title to the premises which are the subject matter of this contract. The purchaser may exercise this right by giving notice of the same to the seller not less than thirty (30) days prior to the date of closing specified herein. If this right is exercised, then the provisions requiring delivery of a deed to the real property shall be modified to read that the seller shall provide an assignment of beneficial interest.

- (2) A provision should be added to provide that the seller would furnish an undertaking with warranties of title and other assurances.

- (3) A provision for searches and information should be added. Note, some of these searches will be done by the title insurer. At a minimum, the searches must include: Federal tax liens; judgment, pending litigation, and bankruptcy; UCC; certified copies of entire trust file; and certification of current beneficiaries. All of these searches should be in addition to the usual title search. The seller will not willingly provide the assurances and the information needed to protect the buyer taking an assignment unless the obligations are set forth in the contract. One alternative is to have the seller establish a new trust and have the beneficial interest in that trust transferred provided that such an arrangement will not frustrate any of the purposes of the purchaser in requiring an assignment by beneficial interest.

b. Assignment of Beneficial Interest. The actual form of assignment is usually provided by the trustee. Check for the signature of all beneficiaries and parties holding power to direct. Make sure that the assignment includes that the power to direct is transferred to the new beneficiaries. If homestead property is involved, include a waiver of homestead signed by the assignor and his or her spouse. Remember, the trustee may refuse to accept the assignment.

c. Warranties of title on the Assignment of Beneficial Interest. The warranties of title on a deed do not apply to the assignment of beneficial interest. The form of warranty should be substantially the same as the undertaking mentioned earlier with the following changes:

- (1) References to the real estate contract would have to be modified to fit the actual contract in its format.

- (2) A paragraph would be inserted as follows:

"The undersigned are all beneficiaries of the aforesaid trust, and warrant that they, and no others, have the power of direction, and that they are under no disability, and further warrant that there are no liens or encumbrances against any of their beneficial interests, and that they have full power and complete authority to assign the same."

d. Searches on title and beneficial interests. The assignment transaction itself does not involve real estate; however, since the rest of the trust is real property, it is very important to assure that the state of title is as agreed upon by the assignor and assignee of the beneficial interest. Title insurance, with the appropriate endorsement, should be a part of the transaction to assure that the assignee gets the agreed upon title.

C. Leases.

Generally, any lease of real property held in a land trust can be signed by the trustee as the lessor or as in Illinois, beneficiaries can execute the lease. The beneficiary enters into the lease in his or her own name reciting the appropriate capacity and not as an agent of the trust. A case approving this concept is Southeast Village Associates vs. Health Management Associates 92 Ill. App. 2d. 810, 416 NE 2d 325 (1980). The beneficiary under this concept is named as the lessor. Since the beneficiary is not the agent of the trust, and is not the trustee, the beneficiary should not attempt to sign for the trustee. The beneficiary may sue to recover rent and possession in his or her own name. Note that if the lease contains an option to purchase, then the trustee should sign, or the option should be executed by the beneficiary as the beneficiary of the trust with full power to direct the trustee.

VII. CASES REGARDING LAND TRUSTS

A. Trustee Liability for Environmental Matters.

A constant concern of those who serve as land trustee is the specter of being held liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*

1. A decision of a U.S. District Court (Illinois), held that a land trustee is not an "owner" under CERCLA. That case is United States v. Peterson Sand & Gravel, Inc., 806 F.Supp. 1346 (N.D. Ill. 1992), which involved an operator of a hazardous waste site who had been held liable for an \$800,000.00 remedial investigation, and who filed a third party complaint for contribution from several defendants. The complaint included Northern Trust Bank, the trustee of an Illinois land trust, which had held legal title to the site during the period of contamination. The bank sought summary judgment claiming that it was not an owner under CERCLA. The bank argued that a land trust is little more than a form of title registration; therefore, there was no policy reason to hold the bank liable as an "owner".

In its decision, the court noted that an Illinois land trust is "an odd legal creature". Under Illinois law, the land trustee holds both the legal and equitable title, and the beneficiary has only a personal property interest. The land trustee, however, may take no action with respect to the property without written direction from the beneficiary of the land trust. Illinois courts have, therefore, made a distinction between the legal concepts of title and ownership. Title refers to a legal relationship to the land, while ownership is comparable to control of the land, and denotes an interest in the land other than holding title. Because of the control of the trust property enjoyed by the land trust beneficiary, Illinois courts have placed the burden of ownership on the beneficiary of the land trust in other areas, such as responsibility for the payment of property taxes.

The court concluded that CERCLA policy would not be furthered by holding land trustees liable. Congress enacted the statute to impose liability upon those who have benefited from, and those who were responsible for, the environmental damage. Although Congress may have attempted to make "owners" strictly liable under the theory that "owners" are ultimately responsible for the condition of their property, simple paper title is unrelated to responsibility. Holding land trustees liable under CERCLA would have little deterrent value since they have no control of the property. Because the trustee had no further involvement with the

property beyond holding the title as land trustee, the court granted its motion for summary judgment and ruled that Illinois land trustees are not "owners" under CERCLA.

2. In another federal decision in the Northern District of Illinois United States v. N.L. Industries, 1992 WL 359986 (S.D. Ill. April 23, 1992), the court held: "The definition of owner, although broad, requires some indication of control... Furthermore, because the trustee of an Illinois land trust has no ownership or control interest which would implicate the policies behind CERCLA, the court concludes the trustee cannot be liable under CERCLA."

In Peterson Sand and Gravel, the court states at page 1359 of its opinion: "Taking into account the implications of being a trustee under Illinois law, the concepts of ownership under federal and Illinois law, and the legislative purposes of CERCLA, the court concludes that being an Illinois land trustee is not 'owning' land under 42 U.S.C. 9607(a)(2)."

While this case is an encouraging one for land trustees, it must be pointed out that there are some conflicts with other courts. For example, in Phoenix v. Garbage Service Company, 1991 WL 294636 (D. Ariz.) the U.S. District Court in Arizona held that a testamentary trustee was a CERCLA "owner" regardless of the lack of control given under the trust agreement. The Phoenix case is contrary to the decision of the U.S. District Court in Illinois. In a footnote however, the court in the Phoenix case stated it would hold the land trustee to be an "owner", but because of the trustee's lack of control, would not impose personal liability upon it, thereby achieving the same practical result as the Illinois courts.

B. Modification to Requirements regarding Land Trustees.

Florida Statutes Section 660.41 was recently modified to delete Subsection 4 which reads as follows: "All corporations, except banks or associations and trust companies incorporated under the laws of this state and having trust powers and except national banking organizations or federal associations located in this state and having trust powers, are prohibited from exercising any powers or duties and from acting in any of the capacities, within this state, as follows: ... (4) Trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others." This deletion would seem to indicate that corporations could now act as trustees for land trusts.

C. Land Trust as an Instrument in the Nature of a Mortgage.

Kirkland vs. Miller, 702 So.2d 620 (Fla. App. 4 Dist. 1997) involved a situation in which the purpose of the conveyance of real property into the land trust was to secure payment of money pursuant to an assignment of beneficial interest. The secured party foreclosed on the beneficial interest under Article 9 of the UCC rather than foreclosing the property as a real estate foreclosure. The trial court held that since the interest of Miller constituted personal property and that the rights of the secured party, Kirkland, were governed by Article 9 and Florida Statutes Section 679.01 was not applicable. Testimony at the trial indicated that the purpose of the transaction was to avoid a real estate foreclosure in the event of a default. The court held:

"Although Florida will recognize a valid Illinois land trust, Magnuson vs Jones, 491 So.2d 1315 (Fla. 5th DCA 1986), the transaction at issue here was not a valid Illinois land trust; it was a mortgage securing indebtedness. It is uncontradicted the Sellers and Kirkland intended that the conveyance would secure the payment of money, as provided in Section 697.01, Florida Statutes (1985). In the event of

default, Kirkland's interest in the property automatically reverts to Sportsmans (the secured party). Under these circumstances, the transaction "shall be deemed" a mortgage subject to the rules of Foreclosure."

If the conveyance into a land trust has, as its sole purpose, the avoidance of a real estate foreclosure, Florida Statutes Section 697.01 will apply.

D. In re Saber 233 B.R. 547 (Bkrcty. S.D. Fla 1999)

Involved a series of transfers of beneficial interest and appointment of a trustee who was also a 100% beneficial owner. Court held that the Doctrine of merger applied in Florida and that subsequent attempted transfers of trust interest were mere nullities.

E. State by State Analysis of Land Trusts. Attached to these materials as Exhibit D is a state by state analysis of statutes and cases which effect Land Trusts. The analysis is not complete and is out of date but does provide a point from which a review of a given state's laws regarding land trusts can begin.

F. A Model Land Trust Act. Attached to these materials as Exhibit E is a draft of a Land Trust Act that might be used in connection with standardizing land trust laws throughout the United States.