Supplement to Bulletin 2013-18
More Subtle and Sometimes Confusing Details
about the Revised Land Trust Act
Laws of Florida 2013-240

In an attempt to distinguish between a Land Trust and other types of trusts (governed under chapter 736), the new law defines what constitutes a Land Trust. Under prior law, a trust was a land trust if the deed into it included the Trustee Powers. Nothing else was required, but when people put Trustee Powers into a deed into an estate planning trust, they arguably turned it into a land trust.

In order to qualify as a Land Trust under the new law, a recorded instrument (usually a deed into the trust) must set forth the Trustee Powers, AND under the unrecorded trust agreement, the trustee has no duties other than:

> "1. The duty to convey, sell, lease, mortgage, or deal with the trust property, or to exercise such other powers concerning the trust property as may be provided in the recorded instrument, in each case as directed by the beneficiaries or by the holder of the power of direction;
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> 2. The duty to sell or dispose of the trust property at the termination of the trust;
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> 3. The duty to perform ministerial and administrative functions delegated to the trustee in the trust agreement or by the beneficiaries or the holder of the power of direction; or
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> 4. The duties required of a trustee under chapter 721, if the trust is a timeshare estate trust complying with s. 721.08(2)(c)4. or a vacation club trust complying with s. 721.53(1)(e),
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> However, the duties of the trustee of a land trust created before the effective date of this act may exceed the limited duties listed in this paragraph to the extent authorized in subsection (12)." §689.071(1)(c).

Based on that language, there is something of a safe harbor for "old" land trusts which gave their trustees too much independent authority. But changing the terms of the trust in a fashion which increases the trustee authority can trigger a change in the governing law, taking a trust out of the land trust act and putting it into the general trust law.

This change highlights the legal fiction which has always been at the heart of Land Trust laws.

Under the trust agreement, the trustee of a land trust (in the capacity of trustee) rarely has the authority to do anything regarding the trust property except on the direction of (some or all) the beneficiaries. Most Land Trusts are truly a "passive" trust – but is saved from the harsh results of §689.09 and the requirement to have all beneficiaries sign off on each transaction, the attachment of liens against the beneficiaries, etc. – only through a series of statutorily created fictions – that the trustee has both legal and equitable title, and actually has all of the Trustee Powers to act – when under the trust agreement, the trustee really may not have any of these powers.

This highlights the "hazards" of a closing agent seeing the actual trust agreement. If you know the trustee has additional duties -- that they can only act on the direction of the beneficiaries -- you must confirm that all those requirements were actually satisfied. This is part of the job for the attorney representing the trustee, but not something that the parties usually want to share with other parties involved in the closing. Since privacy is a frequent reason for selecting the land trust form of ownership, the parties almost never want to see beneficiary consents documented in the official record. So the statutory presumptions are VERY IMPORTANT.

There are a number of these statutory presumptions built into the new law:

A. The inclusion of the Trustee Powers in the deed into the trust really grants those powers, no matter what the trust agreement may provide. The deed is "declared to have vested, in such trustee full power and authority as granted and provided in the [deed] to deal in and with such property…." §689.073(1)

B. The trustee of a Land Trust (but not a ch. 736 trust) has both legal and equitable title. Note that you may not be able to tell the governing body of law from the recorded instruments.

C. The statute of uses, §689.09, is expressly made inapplicable to a land trust, or to vest the trust property in the beneficiaries, notwithstanding any lack of duties of the trustee. §689.071(4).

D. The doctrine of merger is made inapplicable by §689.071(5). That's the concept that if the same person is the trustee and a beneficiary, the legal and equitable title "merge" to give them fee ownership, free of any trust. This has significance when evaluating whether a lien attaches to property held in trust.

E. A lien against a beneficiary doesn't attach to the legal or equitable title held by the trustee. §689.071(8)(d). A lien against the trustee individually does not attach to the interest as trustee.

The Other Details:

A. The new Land Trust Act expressly allows the drafter of the trust to suballocate special ownerships of portions of the trust property. For example in the trust agreement, a particular beneficiary may be given ownership or use rights in, or a beneficial interest in a particular parcel of trust property, or have a power of direction concerning a particular parcel. §689.071(8)(b)1.

B. The new Land Trust Act clarifies that a beneficial trust interest may be held by multiple beneficiaries as tenants in common, joint tenants with right of survivorship or tenants by the entireties. §689.071(8)(b)2.

C. This clarifies what many have thought the law to be – that the interest of a beneficiary under a land trust is real property, unless the trust agreement specifically provides otherwise. §689.071(6). This sets up an intellectual conundrum with §689.071(3) which provides that the deed "Is declared to have vested, in such trustee both legal and equitable title and full rights of ownership…." If legal and equitable title and full rights of ownership are vested in the trustee, what sticks of the bundle are left for the beneficiary? Fortunately, this distinction probably has no practical significance aside from how one pledges the beneficial interest, and if probably most relevant in the timeshare arena.

D. Perfection of lien interests is spelled out. If the trust agreement specifies that the beneficial interests are personal property, a lien is perfected under the Uniform Commercial Code, ch. 679. If not specified to be personal property, such that the interest is treated as real property, the mortgage or other security instrument is to be recorded in the county specified in the trust agreement or deed into the trust. If no county is specified, then in the county where the trust property is located. There is a "savings clause" for UCC interests filed before the effective date of the act at §689.071(13)

   Pledging an interest in a beneficial interest in a trust is fraught with peril. Please your underwriter before insuring any beneficial interest in any type of trust.

E. The trustee's legal and equitable title to the trust property is separate and distinct from the beneficial interest of a beneficiary in the land trust and in the trust property. Accordingly,

   i. A lien, judgment, mortgage, security interest, or other encumbrance attaching to the trustee's legal and equitable title to the trust property of a land trust does not attach to the beneficial interest of any beneficiary; and

   ii. Any lien, judgment, mortgage, security interest, or other encumbrance against a beneficiary or beneficial interest does not attach to the legal or equitable title of the trustee

UNLESS the lien or other encumbrance by its terms or by operation of other law attaches to both the interest of the trustee and the interest of the beneficiary(ies). §689.071(8)(d) and the doctrine of merger is expressly not applicable to land trusts. See below.

F. Since one of the purposes of this act is to clarify the governing law as to estate planning trusts in which a deed include Trustee Powers, new section 689.071(12) includes a detailed matrix for determining the which law governs a trust (granted Trustee Powers) created before the effective date of the new act.