Florida Land Title Association

FLTA

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Land Trust Fix

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Brigham v. Brigham, 11 So.3d 374 (Fla. App., 2009) suggested that the inclusion of trust powers language under §689.071 ("with full power and authority to protect, to conserve, to sell, to lease, to encumber or otherwise to manage and dispose of the real property") could cause a traditional estate planning trust to be governed by the Land Trust Act, and free the trustee of fiduciary duties and other provisions of the Florida Trust Code, ch. 736, Fla. Stat. Since many title agents were taught that inclusion of these powers in any deed to a trustee helped protect their customer, we were inadvertently part of the problem.

After several years of work, the Real Property, Probate and Trust Law Section suggested a legislative fix, allowing any type of trust to benefit from the privacy and title certainty provisions of the land trust act, without casting doubts about the appropriate body of law governing the operation and management of the trust.

Key Points for Non-Attorneys

While the details are important, the key points of the statute for non-attorney title professionals are:

1. You may continue to rely on a deed granting the trustee "the power and authority to protect, to conserve, to sell, to lease, to encumber or otherwise to manage and dispose of the real property" described in the deed. (the "Trustee Powers"). If those Trustee Powers are expressly stated in the deed by which the trust took title, and unless something to the contrary appears in the official records, the trustee can be treated as actually having those powers.

2. If the Trustee Powers appear in a deed, a title agent has no duty to inquire into what authority the trustee may actually have (or not have) under the trust instrument, or into rights of beneficiaries, whether beneficiaries have consented to the transaction or any other preconditions created in the trust. §689.073(2). Nor is there a duty to inquire into any lien or security interest which may have attached to a beneficial interest in the land trust. §689.071(8)(c)

3. Unless you know differently! If your title search finds something of record indicating that the trustee powers are limited, that beneficiary approval is required or you are provided a copy of the trust agreement or excerpts, you then have to review the documents and determine what they require for a valid conveyance. But you are

under no duty to inquire and can safely rely on the powers – UNLESS YOU KNOW DIFFERENTLY.

4. As before, a lien, judgment, mortgage, security interest or other encumbrance against a beneficiary of a land trust does not attach to the interest of the trustee, (you will rarely know who the beneficiaries are anyway) and the property can be conveyed free of those liens. There is a very limited exception where the lien, by its terms or operation of law, attaches to both the interest of the trustee and the interest of the beneficiary. §689.071(8)(d). Unless voluntarily granted (think of a joint mortgage from the trustee and beneficiary), this will rarely occur since the doctrine of merger is expressly not applicable to land trusts.

4. Because you will no longer be able to tell the governing body of law from the Trustee Powers in the deed, some underwriters will probably require additional "status" certificates as part of the conveyance out of a trust – just as most currently do for an estate planning trust. Ask your underwriter about their requirements in light of the change in the law.

5. Conveyances out of an IRA, pension plan, KEOGH, or other qualified benefit plan will continue to be evaluated under the similar (but slightly different) provisions of §689.072, even if the deed into the IRA included the trustee "powers."

6. Homestead may be held within a Land Trust or a ch. 736 Trust. Under Florida's constitution, if any beneficiary (including the trustee) occupies the trust property as homestead, any conveyance or mortgage of the homestead must be joined by the homestead beneficiary and the spouse of that beneficiary. This issue can become especially tricky if a minor child is a named beneficiary of the trust along with the parents. It is doubtful that the statutory granting of trust powers and elimination of any duty of inquiry would supersede Florida's constitutional homestead protections. For more on this subtle interaction, you can refer to the FLTA webinar entitled "Homestead III." The recording is available HERE. Suffice it to say that homestead held in a trust presents a number of issues, so ask your underwriter.

7. We'll all have to retrain ourselves not to refer to the trustee "powers" as .071 powers – they will now be spelled out in §689.073.

There are a lot of complexities and subtleties to this bill, which fortunately do not greatly affect our day-to-day transactions insuring conveyances in and out of trusts. If you are really interested, you can find additional information regarding this bill **HERE**.

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